IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tucci v. Peoples Trust Company,* 2023 BCSC 2004

Date: 20231116
Docket: S138544
Registry: Vancouver

2023 BCSC 2004 (CanLII)

Between:

Gianluca Tucci and Andrew Taylor

Plaintiffs

And

Peoples Trust Company

Defendant

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

Reasons for Judgment

Counsel for Plaintiffs:	T. Charney J. Palef S. Akhter
Counsel for Defendant:	R. Hira, K.C. J.K. Bienvenu
Place and Date of Hearing:	Vancouver, B.C. August 14–18, 2023
Place and Date of Judgment:	Vancouver, B.C. November 16, 2023

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Introduction

[1] This action is brought pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] and involves a claim arising from a data breach by cybercriminals of the defendant's system that contained the personal information of customers and prospective customers (the "Breach"). The Breach occurred in about September 2013. The size of the class, I am told, is approximately 12,000 people. The defendant became aware of the Breach on or around October 11, 2013. Shortly thereafter, it initiated a forensic investigation and notified police authorities, affected patrons, and the Office of the Privacy Commissioner of Canada ("OPC"). Complaints were also registered with the OPC. This action was filed in November 2013.

[2] I certified this action in August 2017. That decision is indexed as 2017 BCSC 1525 (the "Certification Decision").

[3] The defendant appealed and the plaintiffs crossed-appealed, and each were successful in part. That decision is indexed as 2020 BCCA 246 (the "BCCA Decision").

[4] There are three applications before me: two by the defendant and one by the plaintiffs.

[5] The defendant's first application seeks to have this action dismissed for want of prosecution, as it has been outstanding since 2013. The defendant argues that the plaintiffs have taken insufficient steps to advance the litigation following my Certification Decision and the BCCA Decision, and as a result, justice requires dismissal of the action.

[6] The defendant's second application seeks to have the plaintiffs' negligence claim struck or decertified. The defendant argues it is plain and obvious that this claim will fail, as the plaintiffs have not pleaded a type of loss that is capable of grounding a claim in negligence. Further, the defendant states that once the negligence claim is struck or decertified, all that will remain of the action are claims for nominal damages in contract. The defendant argues that a class proceeding is

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not the preferable procedure for resolving claims for nominal damages in contract alone. This is because, according to the defendant, class proceedings for nominal damages in this case would not improve access to justice, the plaintiffs' unconscionability argument would require individual assessment, and there would be limited behaviour modification benefit, given that standard cybersecurity measures have already improved dramatically over the past ten years. As a result, the defendant submits the Court should decertify the proceedings altogether.

[7] The plaintiffs' application seeks to amend the certification order to include non-residents as part of the opt-out class; to approve the notice of certification and method of dissemination; to approve the opt-out period; and to approve a revised litigation plan.

[8] For the reasons that follow, the applications of the defendants are denied.

Background

[9] Case management duties were assigned to me in January 29, 2015 and all matters in this action have been before me since.

[10] A schedule by consent led to a five-day certification hearing that took place between June and November 2016. I issued my Certification Decision allowing certification on August 29, 2017. The reasons canvassed several newer issues in the privacy breach area, such as forum selection and choice of law; whether the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 was a complete code; breach of contract and limitation of liability clauses in contract; damages; negligence; breach of confidence; intrusion upon seclusion; and unjust enrichment.

[11] The defendant filed a notice of appeal in September 2017. The Court of Appeal of British Columbia (the "BCCA") heard the appeal in October 2018. The BCCA issued its decision on August 31, 2020, which allowed the certification but with a narrower scope. The appeal order was filed on November 3, 2020.

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[12] Both sides acknowledge the effect that the COVID-19 pandemic had on the general public, the courts, and law firms starting around March 2020. It was an uncertain and difficult time. There is no doubt that the processing of cases encountered delays both within law firms and in the courts. This Court lifted its pandemic measures in March 2022.

[13] The plaintiffs concede that they took no material steps after the order of the BCCA was filed on November 3, 2020 until August 2022, when plaintiffs' counsel sent a letter to the defendant referencing a few outstanding matters. The defendant submits that the delay from the point of the filing of the appeal order was 665 days (one year, nine months, and 27 days). The defendant responded to the letter in September 2022, confirming there were outstanding issues in the litigation. The defendant reminded the plaintiffs of the requirement to file a notice of intention to proceed, as no step had been taken in over a year. The plaintiffs delivered the notice to the defendant on December 7, 2022.

[14] In February 2023, the defendant received a draft notice of application to address the opt-out point and approving notice, as well as a purported revised litigation plan with notice that the plaintiffs wished to schedule a case management conference. The plaintiffs filed that application on May 23, 2023.

[15] I will address first the defendant's application for dismissal for want of prosecution. The defendant submits that there has been an apathetic prosecution of the within-class action by the plaintiffs and that this conduct is antithetical to the requirements that the representative plaintiffs fairly and adequately represent the interests of the class, pursuant to s. 4(1)(e)(i) of the *CPA*.

[16] However, before doing so, I will deal with the preliminary issue of an affidavit based on information and belief. The defendant objects to the admissibility of the affidavit introduced as part of the plaintiffs' application response.

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Admissibility of Affidavit based on Information and Belief

[17] The defendant objects to the introduction of an affidavit from a lawyer, Ms. Banks. Her affidavit seeks to provide evidence on the reasons for the delay. Ms. Banks is a lawyer with Branch MacMaster LLP, one of the three law firms in the consortium having conduct of this case. The affidavit is based on information and belief. The defendant submits that the affidavit is inadmissible because the application in relation to which it was made—that is, the defendant's application for dismissal for want of prosecution—seeks a final order.

[18] In response, the plaintiffs acknowledge the requirement that an affidavit in support of a final order, such as in an application for summary judgment or an application for dismissal for want of prosecution, must be by direct evidence and not on information and belief; however, they argue that this requirement applies to the evidence of the proponent of such an order, and not necessarily to the evidence of the respondent.

[19] Though it would be preferable to have an affiant with direct knowledge and risky to proceed otherwise, the evidentiary requirement noted above only applies to the applicant seeking a final order. The respondent need only raise doubts in meeting the case, and a responsive affidavit may be based on information and belief. The Court has discretion here. *Progressive Construction Ltd. v. Newton* (1980), 117 D.L.R. (3d) 591, 1980 CanLII 493 (B.C.S.C.) [*Progressive*] involved an application for summary judgment (under what is now Rule 9-6). In that case, Justice Esson (as he then was) said at para. 17:

> It was also held in cases decided under O. 14 that information and belief affidavits were not admissible in answer to a motion for summary judgment: *W. H. Malkin Ltd. v. Jackson* (1963), 44 W.W.R. 63 (B.C.). It may no longer be necessary to prohibit a respondent to a R. 18 application from relying upon information and belief. It is obviously right that an applicant who invokes this extraordinary procedure should not be allowed to rely upon anything but direct evidence. But to apply the same rule to respondents may be unfair. The respondent, at that stage, need only raise a doubt as to whether it is manifestly clear that his case is bad. There are two bases on which he might now be permitted to rely on affidavits deposing to statements by others as to material facts. One is that, by a combination of RR. 40(42) and 51(9), there is a discretion to permit statements on information and belief. The other

> possible basis is that an affidavit testifying to what somebody else has said may be direct evidence of a fact which, on the application, is material for the respondent to prove, i.e., that he has knowledge of a potential witness. Often it is impractical, by reason of constraints of time or distance, to obtain affidavits from potential witnesses, and sometimes it is impossible — there being no power equivalent to the subpoena which can require a person to swear an affidavit.

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[20] Justice Hyslop followed *Progressive* in *Anhalt v. Flowers*, 2013 BCSC 1378, as did Justice Tucker in *Marzec v. Nemi*, 2022 BCSC 178.

[21] I am therefore of the view that Ms. Banks' affidavit is admissible. However, plaintiffs' counsel's having a newly called lawyer who has had little to no involvement in this case is not a recommended approach.

[22] I also note that the Court has the ability to direct that an affidavit based on direct evidence be filed. I do not think such an affidavit is required here based on my determination of the application to dismiss for want of prosecution, to which I now turn.

Application to Dismiss for Want of Prosecution

Applicable Principles

[23] There is no dispute regarding the considerations that are to be taken into account. They are set out in *0690860 Manitoba Ltd. v. Country West Construction Ltd.*, 2009 BCCA 535 at para. 27 [*0690860 Manitoba*]:

> (1) the length of the delay and whether it was inordinate;
>
> (2) any reasons for the delay either offered in evidence or inferred from the evidence, including whether the delay was intentional and tactical or whether it was the product of dilatoriness, negligence, impecuniosity, illness or some other relevant cause, the ultimate consideration being whether the delay is excusable in the circumstances;
>
> (3) whether the delay has caused serious prejudice to the defendant in presenting a defence and, if there is such prejudice, whether it creates a substantial risk that a fair trial is not possible at the earliest date by which the action could be readied for trial after its reactivation by the plaintiff; and
>
> (4) whether, on balance, justice requires dismissal of the action.

[24] The fourth question is said to encompass the other three and to be the most important and decisive question: *0690860 Manitoba* at para. 28.

[25] In assessing the length of the delay and whether the delay is "inordinate", courts must consider the delay holistically, including any steps that a party has taken to advance a claim: *Wiegert v. Rogers*, 2019 BCCA 334 at para. 32 [*Wiegert*]; *New Rightway Contracting Ltd. v. 0790792 B.C. Ltd.*, 2023 BCSC 216 at para. 25. Steps in the process are only those that advance the action towards trial: *Easton v. Cooper*, 2010 BCSC 1079 at para. 10, as quoted in *Ellis v. Wiebe*, 2011 BCSC 683 at para. 12 [*Ellis*]. Many decisions have held that a notice of intention to proceed is not to be regarded a step that advances an action towards trial in this context: see e.g., *Gardner v. Blair*, 2015 BCSC 2271 at para. 10; *Mydonick v. ICBC*, 2017 BCSC 1897 at para. 29. However, while a notice of intention to proceed alone may not be determinative of when a delay ended, in my view, it is something that courts may properly consider when assessing holistically the length and circumstances of a delay. It is a formal step that a party must take to continue pursuing an action pursuant to Rule 22-4(4) and it provides evidence of a party's intention with respect to the litigation.

[26] Courts must assess delay in light of the unique circumstances of each case: *Wiegert* at para. 32; *Knight v. Imperial Tobacco Canada Limited*, 2017 BCSC 1487 at para. 21 [*Knight*]. In *Knight*, Justice Smith accepted that class proceedings are typically more complex, which weighs against dismissal for want of prosecution: at paras. 20, 27. Justice Smith further noted that s. 39 of the *CPA* suspends limitation periods while a class proceeding is pending, which he found directs courts "to be mindful about protecting the rights of absent class members" in assessing whether to dismiss class proceedings: at para. 51. While I accept these propositions, I also note that s. 4(1)(e) of the *CPA* requires there to be a representative plaintiff who "would fairly and adequately represent the interests of the class", which I see as directing courts to ensure that a representative plaintiff pursues the action diligently—not apathetically—on behalf of the class.

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Discussion

[27] The remedy sought by the defendant is described in the cases as "draconian": *0690860 Manitoba* at para. 20. I will review the circumstances in light of this and the considerations identified above.

1) Length of delay and whether it is inordinate.

[28] The defendant's position is that the delay started with the commencement of this action in November 2013. This period translates to about a ten-year delay. The defendant relies on *Wiegert* at para. 32, in which the BCCA stated that the commencement of the action is typically the point from which delay is measured. The defendant cited various cases where delays of a similar or shorter length resulted in dismissal, including: *Unrau v. McSween*, 2013 BCCA 343; *Ed Bulley Ventures Ltd. v. The Pantry Hospitality Corporation*, 2014 BCCA 52; *Northwest Organics, Limited Partnership v. Sam*, 2018 BCCA 70; *Dodd v. Stork Craft Manufacturing Inc.*, 2022 BCSC 512; and *Huard v. The Winning Combination Inc.*, 2022 SKCA 130. The last two of these cases involved class proceedings.

[29] As stated in the same passage relied upon by the defendant in *Wiegert*, there is no "universal rule" as to the date from which the delay is to be measured: at para. 32. I accept, however, that the appropriate starting point for the delay in this case would be the commencement of the action in November 2013.

[30] The BCCA defined "inordinate delay" as "delay that is immoderate, uncontrolled, excessive and out of proportion to the matters in question": *Wiegert* at para. 32. Courts must assess the period of delay contextually: *ibid*. In this case, the parties have pursued highly contested applications pretty much from the outset. There is no question that through to the finalizing of the order arising from the BCCA Decision that the parties were actively litigating their respective interests. Unlike many of the cases relied upon by the defendant, this case cannot be said to have been inert or dormant from the outset of the proceedings. The parties have invested considerable time and resources. Aside from the more recent period of inactivity on

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the part of the plaintiffs, which occurred over the pandemic, the parties have been actively engaged.

[31] Also, it cannot be ignored that this case is a class action, which has its own unique challenges. While the onus of advancing an action lies with the plaintiffs, the defendant's inaction in filing a response to civil claim in this action until June 2023 weighs somewhat against its position.

[32] A key milestone in class proceedings is the certification order, which in this case was filed on November 3, 2020 following the appeal. The delay from that point is about two-and-a-half years. While that delay lies with plaintiffs' counsel, the distance the plaintiffs had advanced this case to that point is considerable. That level of progress and investment by the plaintiffs in the litigation is not present in the cases cited by the defendant. As well, a substantial period of the delay includes the period during which my Certification Decision was under reserve (from November 2016 to August 2017) and the period between that decision and the BCCA Decision, which was issued in August 2020.

[33] I also note that the plaintiffs have recently taken further steps to bring the litigation back on course, including an application for approval of the notice of certification and the filing of a revised litigation plan. Further, the parties have now exchanged lists of documents, and discoveries are to be set down pursuant to my Case Management Conference order of May 3, 2023. I further note that apart from the applications before me is an application by the defendant for summary judgment.

[34] In light of all of these circumstances, I do not find the delay inordinate. However, I will nevertheless go on and consider the remaining considerations set out above.

2) Reasons for delay and whether delay was excusable

[35] The reasons for delay are brief and are found in the affidavit of Ms. Banks. There are shortcomings in this evidence as I discussed earlier, which should not be taken as a comment against Ms. Banks, as she no doubt did what her principals

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asked of her. I am prepared to recognize that a part of the inaction is attributable to the difficulties caused by the pandemic and change in counsel composition. Given the state of the case as discussed above, I am inclined to find that the delay was excusable. I also take into account, as mentioned, the period of time taken for the certification and appeal decisions.

3) Prejudice to the defendant and whether it creates a substantial risk that a fair trial is not possible

[36] In terms of prejudice, the defendant argues that the delay has created substantial risk of an unfair trial and prejudice to the defendant. The focus is on witnesses and the obvious fading of memories over time. The defendant points to the fact that potential key witnesses, including several who were familiar with the information technology systems used at the time of the Breach, are no longer employed by the defendant. As well, one of the defendant's senior executives has died.

[37] It is unfortunate that, over the time elapsed, there has been the loss of employees who would be potential witnesses and that, of the employees most familiar with specific changes to the defendant's computer systems that occurred over the past decade, one retired in 2017 and the other left in 2020. These events occurred during the period while my Certification Decision was under reserve and during the period after its release but prior to the finalization of the order following the BCCA Decision.

[38] However, this cannot be blamed on the plaintiffs. As well, the defendant initiated forensic investigation into the database attack, made reports to police authorities and the OPC, and notified affected patrons of the Breach. There would therefore appear to be a fair degree of documentation available to the defendant. Further, while it is most unfortunate that the senior executive has passed, there is no indication that the employees that no longer work for the defendant are not available as witnesses.

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[39] Further, the vigorous and entirely legitimate steps of the defendant to contest the plaintiffs in the litigation affords some evidence mitigating against the prejudice here. In this regard, I note the following: the original application to strike at the early stages of the litigation many years ago; this second such application now before me; the contested certification; the appeal of the Certification Decision; the decision not to file a response to civil claim until June 2023; and the pending application to seek summary judgment. It is apparent to me that the strategy of the defendant involves attrition. This strategy somewhat diminishes the strength of the defendant's arguments on prejudice.

4) On balance, does justice require dismissal of the action?

[40] The defendant, in this weighing exercise, points to damages being potentially only nominal in this case, based on the available evidence. It notes the evidence that since the Breach, it has not received of any complaints of privacy breaches or injuries suffered.

[41] With respect to prejudice, there is mention that the defendant conducted a forensic investigation closely following the Breach. There is no evidence that the defence witnesses are not available, including those that were involved with the information technology in question, though, as noted above, the then-CEO who was providing instructions to counsel has since passed.

[42] In this case, though there has been some delay for which the plaintiffs take responsibility, there is no question that the plaintiffs have invested considerable time and resources in the litigation. There have been several contested matters, including an appeal that covered a number of issues that were new. The circumstances here do not warrant a dismissal. As class action litigation goes, the plaintiffs have reached the hard-fought key milestone of certification. For the majority of cases, that is the most significant point for the plaintiff. The next step of advancing to the trial of common issues is not common. In the vast majority of cases, some form of resolution before trial is reached.

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[43] On balance, recognizing that this case has been vigorously contested at all stages to this point; the action has been certified after an appeal; the issues in this case raise important privacy concerns; the parties have exchanged pleadings and largely completed their disclosure; examinations for discovery have been set down; as well as the prejudice argued by the defendant which I have assessed above, I find that the dismissal of this action would be disproportionate. I am not persuaded that the parties cannot have a fair trial in spite of the delay. Accordingly, the application is dismissed.

[44] I now turn to the defendant's application to strike or decertify the pleadings of the plaintiffs.

Application to Strike or Decertify

[45] The defendant applies to strike the plaintiffs' claim in negligence pursuant to Rule 9-5(1)(a) on the basis that it is plain and obvious that the claim will fail or has no reasonable prospect of success. In the alternative, the defendant seeks to decertify the plaintiffs' claim in negligence pursuant to s. 10(1) of the *CPA* on the basis that it no longer meets the requirements for certification set out under s. 4(1).

[46] Further, if successful, the defendant argues that the remaining claim in contract should not be permitted to proceed as a class action. It argues that since the claim in contract involves only nominal damages, there is no valid purpose for continuing when viewed in light of the objectives of class proceedings set out in s. 4(4)(a) of the *CPA*.

[47] The defendant argues that there would be little interest of class members in such damages, and as a result, the class proceedings would do little to advance access to justice. As well, the determination of a limitation clause as being unconscionable—an affirmative defence raised by the plaintiffs—would require individual assessment, which militates against judicial economy given the size of the class. The defendant argues also that the Court should give the behaviour modification objective only minimal weight, as there is little hope of recovery of actual losses, and in any event, the defendant has modified and updated its security

systems since the Breach to keep step with changing technological standards of protection. As a result, it says the action should be decertified in its entirety.

Defendant's Position

[48] The defendant relies upon s. 12 of the *CPA*, which states:

> The court may at any time make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate.

[49] The defendant submits that the words "any order" in s. 12 grants the Court the discretion to order that an application to strike be brought at any time.

[50] The defendant also relies upon s. 10 of the *CPA*, which specifically provides for decertification as follows:

> Without limiting section 8 (3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6 (1) are not satisfied with respect to a class proceeding.

[51] One of the conditions for certification is that "the pleadings disclose a cause of action": *CPA*, s. 4(1)(a). The standard for satisfying this particular condition is the same as the standard for striking a claim under Rule 9-5(1)(a)—that is, whether it is plain and obvious, assuming the facts pleaded to be true, that the plaintiff's claim cannot succeed: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 27.

[52] The defendant argues that narrowing the issues to be determined at trial is in the interests of judicial economy and efficiency and that this should be done through the Court's important gatekeeping function.

[53] Specific to the negligence claim, the defendant argues that what is required is some harm, loss, or injury—sometimes referred to as "compensable damages"—that resulted from the defendant's wrongful act, and that proof of negligent conduct without such consequences will not ground a claim in negligence. The mere creation of risk, or "negligence in the air", is not wrongful conduct: *Mustapha v. Culligan of*

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Canada Ltd., 2008 SCC 27 at para. 3 [*Mustapha*]; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 33 [*Atlantic Lottery*]; *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 795 at paras. 45–49 [*Sandoz*]; *Setoguchi v. Uber B.V.*, 2023 ABCA 45 at para. 53, leave to appeal to SCC ref'd, 40681 (13 July 2023) [*Uber*].

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[54] The defendant submits that the compensable damages sought in respect of negligence are:

a) The risk of future identity theft; and

b) Out-of-pocket monitoring expenses.

[55] Though my certification of the negligence claim, affirmed on appeal, permitted the negligence action to proceed, it is the defendant's position that these theories of damages cannot support a claim in negligence. The defendant argues that these types of losses are no longer permitted under the common law. It is also noted that since the Breach, there is an absence of evidence that any of the class members have suffered fraud or identity theft.

[56] The defendant submits that since my Certification Decision and the BCCA Decision, the law has fundamentally changed to the point that earlier decisions are no longer good law.

Plaintiffs' Position

[57] In response, the plaintiffs submit that:

a) The defendant is seeking to have this Court revisit the Certification Decision and BCCA Decision and reverse them. As such, the application is an impermissible collateral attack on these two decisions.

b) That to the extent the defendant is arguing that the claim is based on pure economic loss, it should have pursued that argument at the time of the certification application.

[58] With respect to the absence of compensable damages, the doctrine of pure economic loss does not apply to past or future claims for pecuniary damages for the cause of action in negligence when the plaintiff pleads an injury to their person or property damage: see *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 17 [*Maple Leaf Foods*]. Further, there are exceptions to the doctrine where an injury has not yet materialized, including damages to ameliorate a real and substantial risk of harm and negligent performance of a service. It is also noted that the categories for an exception are not closed. In this regard, the plaintiffs submit that the Supreme Court of Canada has not considered the application of the pure economic loss doctrine to damages arsing from a cyberattack.

[59] In the alternative, the plaintiffs argue that their claim for out-of-pocket expenses is itself a compensable loss, and therefore is sufficient to ground their negligence claim on its own.

Discussion

Collateral attack and abuse of process

[60] The plaintiffs argue that this application constitutes a collateral attack on my Certification Decision. The defendant responds by arguing that, strictly interpreted, the rule against collateral attacks applies only to a party who seeks to avoid compliance with an order issued against it by pursuing "a separate lawsuit", which is not the case here.

[61] I find it unnecessary to determine whether the defendant's application constitutes a collateral attack in the strict sense. The BCCA clarified in *Hollander v. Mooney*, 2017 BCCA 238, leave to appeal to SCC ref'd, 37752 (5 April 2018) that the rule against collateral attacks falls within the broader doctrine of abuse of process. In that case, Justice MacKenzie helpfully summarized the law applicable to the doctrines of collateral attack and abuse of process:

> [71] This Court succinctly set out the rule against collateral attack in *Burnaby (City) v. Trans Mountain Pipeline ULC*, 2014 BCCA 465:
>
>> [30] The rule against collateral attack was articulated by the Supreme Court of Canada in *Wilson v. The Queen*, 1983 CanLII 35

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> (SCC), [1983] 2 S.C.R. 594 at 599, and has been affirmed by that Court more recently in *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at paras. 71-72, and *Canada (Attorney General) v. TeleZone*, 2010 SCC 62 at paras. 60-62. It stipulates that an order made by a court or tribunal is binding and conclusive until it is set aside on appeal or lawfully quashed, and cannot be attacked in proceedings other than those whose specific object is its reversal, variation, or nullification. If a proceeding calls into question the validity of an order made in another independent proceeding, the former proceeding must be struck as an abuse of process.

[72] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, Madam Justice Arbour for the majority observed that where the question relates to an implicit attack on the correctness of the factual basis for the decision rather than the decision's legal force, it is more appropriate to turn to abuse of process than to focus on the narrower rule against collateral attack. She said:

> 34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

[73] She described the abuse of process doctrine and its rationales this way:

> 35 Judges have an inherent and residual discretion to prevent an abuse of the court's process.…
>
> 37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles (2000)*, 2000 CanLII 8514 (ON CA), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:
>
>> The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

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> > One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis of Arbour J.]
>
> As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice.…
>
> 38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, [Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Markham, Ont.: Butterworths, 2000)], at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-48):
>
> > The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

See also *Gonzales v. Gonzales*, 2016 BCCA 376 at paras. 18–22.

[74] In sum, while a collateral attack is always an abuse of process, conduct that may fall short of the strict definition of collateral attack may nevertheless be an abuse of process.

[Emphasis in original.]

[62] I accept that in the absence of new developments in the applicable law following certification, the defendant's application would amount to no more than an attempt to relitigate the issues already decided in the Certification Decision and the BCCA Decision. If this is the case, this Court must dismiss the application as an abuse of process, as allowing it to proceed would "violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37.

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[63] Therefore, the question to be decided is whether changes in the law and the facts of this case following certification warrant exercising the Court's discretion to either strike the plaintiffs' claims under Rule 9-5 or amend the certification order or decertify the proceedings under s. 10(1) of the *CPA*.

[64] The standard for exercising discretion under either Rule 9-5 or s. 10(1) of the *CPA*—on the basis that the requirement for certification under s. 4(1)(a) is no longer met—is the same: whether it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 17; *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 27.

The risk of future identity theft

[65] A successful action in negligence requires the plaintiff to demonstrate four elements: (1) that the defendant owed him or her a duty of care; (2) that the defendant's behaviour breached the standard of care; (3) that the plaintiff sustained damage; and (4) that the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 3.

[66] The defendant argues that the risk of identity theft is not a type of loss that can satisfy the third element of a negligence claim (i.e., it is not "compensable damage"). The defendant also submits that since the Breach, there is no evidence that any of the class members have actually experienced identity theft.

[67] In support of its argument, the defendant claims that the following decisions issued after the certification hearing have clarified the applicable law: *Sandoz*; *Uber*; *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928 [*Campbell*]; and *K.W. v. Accor Management Canada Inc.*, 2023 BCSC 1149 [*K.W.*]. I will assess each of these decisions in turn. To the extent that other decisions issued prior to the certification hearing support the defendant's argument, it was open to the defendant to bring those decisions to this Court's attention then; I need not consider them now.

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[68] In *Sandoz*, Justice Wilkinson granted an order to strike the entirety of the plaintiffs' negligence claim in a proposed class action concerning allegations that the consumption of a prescription drug led to an increased risk of adverse health effects. *Sandoz* did not concern the risk of future identity theft, which courts have dealt with in a distinct manner, as I will describe below. Rather, Wilkinson J. applied existing legal principles concerning compensable damages in the context of potential future physical harm. While the plaintiffs may not ultimately succeed at trial in establishing that an increased risk of identity theft constitutes compensable damages, I am not prepared to find that *Sandoz* changed the law applicable to this case, such that the plaintiffs' negligence claim no longer has a reasonable prospect of success.

[69] In *Uber*, the plaintiffs sought to rely on the acquisition of the personal information of the proposed class members by criminals as the *per se* compensable harm. The Court of Appeal of Alberta ("ABCA") found that the plaintiffs' claim was not certifiable on this basis. However, the ABCA expressly noted two cases—including the Certification Decision—in which courts have allowed class actions to proceed in the context of cyber attacks where there is alleged to be a "substantial risk" of future identity theft. As stated at paragraph 55:

> [55] We recognize that courts have at times allowed damage claims to proceed where there is alleged to be a substantial risk of future identity theft: *Tucci v Peoples Trust Company*, 2017 BCSC 1525 [*Tucci SC*] at paras 175, 181, 201, var'd on other grounds in 2020 BCCA 246 [*Tucci CA*]; see also *Campbell* at para 126. As noted in *Tucci SC* at para 201, "[g]iven 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". This risk of future fraud created by a data hack is sometimes analogized (as it was in *Tucci SC*) to medical monitoring costs associated with negligence that puts people at an ongoing heightened risk of developing a harmful condition that has not yet occurred. On this view, the negligence does not exist "in the air" because, unlike the negligent driver who fails to cause an injury (the example provided by Uber in this case), the increased risk of future harm continues to exist after the negligent act has passed: see, for example, Daniel J. Solove & Danielle Keats Citron, "Risk and Anxiety: A Theory of Data-Breach Harms" (2018) 96:4 Tex L Rev 737 [Solove & Citron] at 760-763.
>
> [Emphasis added.]

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[70] In *Campbell*, Justice Iyer stated that the increased risk of harm resulting from a data breach "might not be compensable absent pleading actual loss": at para. 54. However, Iyer J. went on to note at para. 126 that "[c]ourts have accepted that a demonstrated real risk of future harm may give rise to compensable loss even where there is no evidence that stolen data has been used: *Tucci BCSC* at paras. 200-201; *Obodo* at para. 137."

[71] In *K.W.*, Justice Jackson declined to certify proposed class proceedings arising from a data breach on the grounds that the plaintiffs' pleadings failed to disclose compensable loss. The plaintiffs in that case specifically pleaded that the data breach caused the proposed class members psychological or mental distress—a theory of loss also advanced by the plaintiffs in this case, which I rejected in my Certification Decision: *K.W.* at para. 28; Certification Decision at para. 198. Justice Jackson accordingly did not consider the issue of whether a risk of future identity theft gives rise to compensable loss: *K.W.* at paras. 54–63.

[72] None of these decisions specifically reject the proposition that a substantial risk of future identity theft may constitute compensable loss sufficient to sustain a claim in negligence. They do not alter my analysis in the Certification Decision at paras. 196–202 that it is not plain and obvious that the plaintiffs' negligence claim is bound to fail.

[73] I find the BCCA's decision in *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2023 BCCA 28 [*Kirk*] to be helpful in this case by way of analogy. In *Kirk*, the BCCA held that while the representative plaintiff in that case may ultimately fail in establishing that the law of nuisance extends to an interference with the right to use property, as opposed to an interference with the property itself, the law was not sufficiently settled on this point to allow a court to conclude that the claim was bound to fail: at para. 67. Courts routinely entertain novel legal issues in class proceedings; the threshold requirements of certification should not mean that the plaintiffs in class proceedings may not advance positions based on unsettled law.

[74] It was open to the Court of Appeal to find that my reasons contained a reviewable error with respect to this issue. It did not: BCCA Decision at para. 52. In the absence of a change in the applicable law, the defendant's argument amounts to no more than an attempt to relitigate this issue, and may properly be dismissed as an abuse of process.

[75] Therefore, I decline to exercise my discretion to strike the plaintiffs' pleadings under Rule 9-5(1) or alter the certification order under s. 10(1) of the *CPA* on this basis. While this finding is sufficient to dispose of the defendant's application to strike or decertify, I will nevertheless consider the defendant's remaining arguments.

Out-of-pocket expenses

[76] As stated above, the defendant argues that the plaintiffs' negligence claim must fail because the risk of future identity theft is not a compensable loss. The defendant suggests that this makes the negligence claim a mere collection of claims for out-of-pocket expenses—such as the costs of credit monitoring and the costs for time spent mitigating the exposure to identity theft—which are unrecoverable as pure economic loss. The defendant submits at para. 130 of its written submissions that "[t]he liability rule from *Winnipeg Condominium* precludes compensation for damages that have not yet occurred in the absence of an imminent and serious threat to an individual's person or property", citing *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 1995 CanLII 146 [*Winnipeg Condominium*].

[77] In *Maple Leaf Foods*, Justices Brown and Martin, writing for the majority, clarified that the "liability rule" from *Winnipeg Condominium* is consonant with the principle that there is no general right to be free from pure economic loss, such as the *prospect* of damage: at para. 19. Pure economic loss is economic loss that is not connected to a physical or mental injury to a person or to physical damage to property. It is distinct from consequential economic loss, such as the costs of care incurred by someone as a result of his or her physical or mental injury: *Maple Leaf Foods* at para. 17. Put differently, for a negligence action to succeed, the plaintiff's

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loss generally must be the result of an interference with a legally cognizable right: *Maple Leaf Foods* at para. 18.

[78] I briefly note that the defendant argues it does not rely upon the pure economic loss doctrine. However, by relying on the liability rule from *Winnipeg Condominium*, the defendant puts this doctrine in issue.

[79] The plaintiffs argue that the out-of-pocket expenses in this case are not pure economic loss. They say that these costs are connected to the theft of their personal information, which they argue constitutes either an injury to the person or property damage. In the alternative, the plaintiffs argue that the out-of-pocket expenses fall within the recognized exception to the rule against recovery of pure economic loss for the negligent performance of a service. I will assess each of these arguments in turn.

i) Are the plaintiffs' out-of-pocket expenses pure economic loss?

[80] The plaintiffs claim that there is no precedent in British Columbia deciding the issue of whether having sensitive personal information stolen by criminals constitutes an injury to the person or property damage (and therefore is not pure economic loss), nor has the Supreme Court of Canada considered this issue. I am not aware of any decisions that bear directly on this claim.

[81] The law has, however, recognized the increasing need for legal protection of informational privacy in several different contexts. In *Jones v. Tsige*, 2012 ONCA 32, the Court of Appeal for Ontario recognized the tort of intrusion upon seclusion in that province, and in *Douez v. Facebook Inc.*, 2017 SCC 33 the Supreme Court of Canada noted at para. 59 that "[p]rivacy legislation has been accorded quasi-constitutional status". The question of whether the common law breach of privacy tort exists in British Columbia is not at issue here, but I note that our Court of Appeal has expressly stated that this area of law remains "unsettled": *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331 at para. 69, citing BCCA Decision at paras. 53–68.

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[82] The defendant cites the decision of *Del Giudice v. Thompson*, 2021 ONSC 5379 [*Del Giudice*]. Del Giudice concerned a data breach that resulted in public disclosure of the personal information contained in the credit card applications of six million Canadians. Justice Perell declined to certify the plaintiffs' negligence claim in part due to his finding that out-of-pocket expenses to monitor for identity theft—and even identity theft itself—constituted pure economic loss:

> [230] . . . In the immediate case, the overwhelming majority of the Class Members will have suffered only the threat of pure economic losses and only a few may have suffered actual pure economic losses from identify theft and fraud or from expending money to respond to the threat of a fraud occurring.

[83] The defendant also suggests that Wilkinson J.'s decision in *Sandoz* is instructive on this point. In that case, Wilkinson J. found that in the absence of compensable loss, the plaintiffs' past and future costs of medical monitoring to provide early detection of any adverse health effects caused by the consumption of a prescription drug were not recoverable, given that there was no "[i]mminent and serious threat" pleaded: at paras. 77–82. However, as noted above, the risk posed to the plaintiffs in *Sandoz* differs from the risk posed to the plaintiffs in this case. Wilkinson J. cited Health Canada's statement that "[t]here is no immediate health risk associated with the use of [the prescription drug at issue]": at para. 116. Conversely, the plaintiffs in this case have pleaded that some class members have already suffered harm as a result of the data breach, and others have a "real and substantial" chance of suffering harm. There is currently no evidence before the Court that would allow me to determine with sufficient certainty the immediacy or seriousness of the pleaded harms; however, it is clear that the Breach was committed by criminal actors.

[84] The plaintiffs, for their part, point to this Court's decision in *Campbell*. Justice Iyer concluded in that case that "expenses actually incurred to mitigate against the risk of future loss are compensable damages and satisfy the third element of a negligence claim": at para. 54. The Ontario Superior Court of Justice reached a similar, although less certain, conclusion in *Obodo v. Trans Union of Canada, Inc.*, 2021 ONSC 7297, aff'd 2022 ONCA 814, leave to appeal to SCC ref'd, 40555 (13

July 2023) [*Obodo*], in which it held that it is not settled law that out-of-pocket costs for credit monitoring and identity theft insurance following a data breach cannot constitute a compensable loss capable of sustaining a negligence claim: at para. 160.

[85] In light of these decisions, I am not satisfied that it is "plain and obvious" that the out-of-pocket expenses pleaded by the plaintiffs in this case are pure economic loss. I find persuasive the plaintiffs' argument that there is no precedent in British Columbia, much less a decision from the Supreme Court of Canada, on whether having sensitive personal information stolen by criminals constitutes an injury to the person or property damage. The plaintiffs here have pleaded that the defendant's negligence allowed the hackers to gain access to the personal information of class members, and by having so pleaded, this justified a common issue as in *Campbell*. Further, the plaintiffs have pleaded here damages in their third amended notice of civil claim as follows:

> 27. As a result of PTC's breach of contract, negligence, breach of confidence and reckless intrusion upon seclusion, as particularized in Part 3 below, the Class Members suffered damages including, but not limited to:
>
> 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 take the steps recommended by PTC and to reduce the likelihood of identity theft or improper use of credit information, and to address the credit flags placed on their credit files; and
>
> f. Time lost engaging in precautionary communications with third parties such as credit card companies, credit agencies, banks, and other parties to take the steps recommended by PTC and to inform them of the potential that the Class Members' Personal Information may be misappropriated and to resolve delays caused by flags placed on Class Members credit filed.
>
> 28. In addition, the Class Members have suffered or will likely suffer further damages from identity theft because the Personal Information as downloaded and reproduced by cybercriminals for criminal

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> purposes, including identity theft and phishing. It is likely or alternatively there is a real and substantial chance that these cybercriminals will use the Personal Information in the future for criminal purposes such as to create fictitious bank accounts, obtain loans, secure credit cards or to engage in other forms of identity theft, thereby causing the Class Members to suffer damages.

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[86] However, I will consider the plaintiffs' next argument that the out-of-pocket expenses would nevertheless fall within the exception to the rule against recovery of pure economic losses for the negligence performance of a service.

ii) Do the plaintiffs' out-of-pocket expenses fall within a recognized exception to the rule against recovery of pure economic loss?

[87] I again note that the defendant has stated that it is not characterizing the subject damages pleaded as pure economic loss. However, for the purposes of the argument, I will analyze this question.

[88] The law permits recovery for pure economic loss in certain established categories, including in cases of the negligent performance of a service: *Maple Leaf Foods* at para. 21; *Pacific Bioenergy Corporation v. AG Growth International Inc.*, 2023 BCSC 1619 at para. 29; *Del Giudice* at para. 228.

[89] In *Maple Leaf Foods*, the Supreme Court of Canada affirmed that the negligent performance of a service may ground a cause of action in negligence. The majority noted that the existence of a proximate relationship between the parties is necessary to establish a *prima facie* duty of care under the *Anns/Cooper* framework: at para. 30. It then went on to clarify how courts should assess whether a proximate relationship exists in cases of the negligent performance of a service, and to explain the underlying rationale for doing so:

> [32] In cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance (*Livent*, at para. 30). Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the plaintiff has a right to rely on the defendant's undertaking to do so" (*ibid.*). "These corollary rights and obligations", the Court added, "create a relationship of proximity" (*ibid.*). In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and

> detrimental reliance by the plaintiff upon the defendant for that purpose (P. Benson, "Should *White v Jones* Represent Canadian Law: A Return to First Principles", in J. W. Neyers, E. Chamberlain and S. G. A. Pitel, eds., *Emerging Issues in Tort Law* (2007), 141, at p. 166).
>
> [33] Taking *Cooper* and *Livent* together, then, this Court has emphasized the requirement of proximity within the duty analysis, and has tied that requirement in cases of negligent misrepresentation or performance of a service to the defendant's undertaking of responsibility and its inducement of reasonable and detrimental reliance in the plaintiff. Framing the analysis in this manner also illuminates the legal interest being protected and, therefore, the right sought to be vindicated by such claims. When a defendant undertakes to represent a state of affairs or to otherwise do something, it assumes the task of doing so reasonably, thereby manifesting an intention to induce the plaintiff's reliance upon the defendant's exercise of reasonable care in carrying out the task. And where the inducement has that intended effect—that is, where the plaintiff reasonably relies, it alters its position, possibly foregoing alternative and more beneficial courses of action that were available at the time of the inducement. That is, the plaintiff may show that the defendant's inducement caused the plaintiff to relinquish its pre-reliance position and suffer economic detriment as a consequence.
>
> [Italic emphasis in original; underline emphasis added.]

[90] Cases of negligent performance of a service will therefore satisfy the proximity requirement if, and only if, the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose. The plaintiff's reliance must fall within the scope of the defendant's undertaking: *0790482 B.C. Ltd. v KBK No. 11 Ventures Ltd.*, 2022 BCSC 1002 at para. 38.

[91] The plaintiffs submit that if their pleaded out-of-pocket expenses are indeed pure economic loss, they nevertheless fall within this exception and are recoverable. The plaintiffs say that the present case is analogous to *Obodo*. That case concerned a data breach suffered by TransUnion affecting its consumers' personal information, which it had collected to provide them with credit reports, credit monitoring services, and identity theft insurance. In *Obodo*, Justice Glustein found that the plaintiff had "a reasonable prospect of demonstrating that the claim falls within a recognized duty of care under the category of negligent performance of a service": at para. 176. Justice Glustein based this conclusion on the representations that TransUnion made to its consumers in its privacy policy, undertaking to protect their confidential information: at paras. 174–175.

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[92] According to the plaintiffs in this case, the plaintiffs entered agreements with the defendant related to the use of the defendant's website and the defendant's collection, retention, use, and disclosure of their personal information. The terms of these agreements included the terms of the defendant's "Privacy Policy", which stated:

> 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").

[93] As well, the defendant's 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.

[94] In addition to these terms, there were several other representations made by the defendant regarding the security and privacy of the personal information it collected, which are set out in the plaintiffs' pleadings.

[95] It therefore appears that the defendants made significant privacy representations, undertaking to keep the plaintiffs' personal information secure from

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cybercriminals. The plaintiffs appeared to rely this on undertaking to use the defendant's website and obtain its financial services. Therefore, I believe the plaintiffs have a reasonable prospect of establishing that the defendant's privacy representations gave rise to a legally proximate relationship between the plaintiffs and the defendant.

[96] I already held in the Certification Decision that "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", and as a result, that it is not plain and obvious that the defendant did not owe the plaintiffs a duty of care respecting their personal information: at paras. 122–136. The defendant has not established that any changes in the law would require a different conclusion now.

[97] As Glustein J. concluded in *Obodo*, I find in this case that "even if the pleaded claims constituted pure economic loss, it is not beyond doubt that the exception of negligent performance of a service could not apply to allow the [out-of-pocket expenses] pleaded": at para. 183.

Nominal damages for breach of contract

[98] Given that I have concluded that the defendant's application to strike or decertify the plaintiffs' negligence claim should be dismissed, there is no need to consider whether the plaintiffs' claim for contractual damages, on its own, is suitable for resolution as a class proceeding.

[99] I now turn to the plaintiffs' application.

Application to Amend the Certification Order and Approve the Notice of Certification, the Opt-Out Period, and the Revised Litigation Plan

[100] The plaintiffs seek to amend the certification order to include non-residents as part of the opt-out class; to approve the notice of certification and method of dissemination; to approve the opt-out period; and to approve of a revised litigation plan.

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[101] This matter was addressed at the end of hearing regarding the defence applications. I was advised that the defendant consents to the order regarding opt-outs with a 90-day period, as applied for.

[102] With respect to the notice of certification, the outstanding issues were on the method of distribution and who will be responsible for the costs. I was advised that if the parties could not resolve these issues, they would bring the matter back before me.

[103] Similarly, with respect to the litigation plan, the parties are conferring and will return before me for resolution if there are issues.

[104] As a result, I will await notification as to the status of the discussions between the parties before issuing any orders with respect to this application.

Summary of Determinations

[105] The defendant's application to have the action dismissed for want of prosecution is denied.

[106] The defendant's application to strike or decertify has not been made out. Accordingly, the application is denied.

[107] The amendments to the certification order are approved on consent.

[108] The parties are to confer on resolving the terms of the notice of certification and litigation plan, with any outstanding issues to be brought back before me.

"The Honourable Mr. Justice Masuhara"

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