Federal Court Cour fédérale

Date: 20180518

Docket: T-132-13

Citation: 2018 FC 522

Ottawa, Ontario, May 18, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

GAELEN PATRICK CONDON
REBECCA WALKER
ANGELA PIGGOTT

Plaintiffs

and

HER MAJESTY THE QUEEN

Defendant

ORDER AND REASONS

[1] This is a motion brought on consent under Rule 334.29 of the *Federal Courts Rules*, SOR/98-106, for orders approving the Settlement Agreement, appointing the administrator and arbitrators, fixing the cost of administration, fixing the amount of an honorarium for the representative plaintiffs and fixing class counsel's fees.

[2] For the reasons that follow, I approve the Settlement Agreement, the representative plaintiffs' honoraria and class counsel's fees.

I. Backgrond

[3] On January 11, 2013, Human Resources and Skills Development Canada [HRSDC] issued a press release stating that an external portable hard drive containing the personal information of approximately 583,000 National Loan Services borrowers from 2000 to 2006 had been lost. The lost drive contained the names, social insurance numbers, contact information, and loan balances [Personal Information] of the affected borrowers.

[4] In order to assist individuals with determining whether they were personally affected by the data loss, HRSDC established a call center hotline where concerned individuals could obtain information about the data loss, and could confirm whether their Personal Information was believed to be on the lost drive.

[5] HRSDC also wrote to the affected individuals directly, using the last known contact information on file, to advise them that the data loss had occurred, and that the defendant had purchased customized credit protection service packages from Equifax. Additional credit protection packages were later purchased from TransUnion and both packages were offered to all affected individuals for six-year terms, beginning on the date that they provided consent. The class members were given until March 31, 2018 to apply for these credit protection packages.

[6] In January 2013, two counsel groups commenced putative class actions against the defendant over the data loss:

i. Bob Buckingham Law;

ii. Branch McMaster LLP, together with the firms now known as Strosberg Sasso Sutts LLP and Charney Lawyers PC.

[7] The four firms involved chose to work together to prosecute this class action and in April 2013, they issued a Consolidated Statement of Claim asserting causes of action in breach of contract, breach of warranty, breach of confidence, intrusion upon seclusion and negligence.

[8] This action was certified as a class action by this Court on all advanced causes of action but for the claims of negligence and breach of confidence (*Condon v Canada*, 2014 FC 250). The Federal Court of Appeal granted the plaintiffs' appeal from that decision, referring the matter back to this Court to include the claims for negligence and breach of confidence (*Condon v Canada*, 2015 FCA 159). The certification order, dated June 20, 2016, defines the Class as follows:

> All persons whose personal information was contained in an external hard drive in the control of Human Resources and Skills Development Canada (now known as Employment and Social Development Canada) or the National Student Loan Services Center which was lost or disclosed to others on or about November 5, 2012, but not including senior management of Human Resources and Skills Development Canada, the Canada Student Loans Program, or Ministers and Deputy Ministers of the Ministry of Human Resources and Skills Development.

[9] On December 5, 2017, the parties entered into a Settlement Agreement pursuant to which the defendant will pay $17.5 million [Fixed Settlement Fund] as compensation for class

members' lost time and inconvenience in responding to the data loss. The Fixed Settlement Fund will be distributed to class members who complete a claim form, in payments fixed at $60 each [the Payments], net of all legal fees, taxes, disbursements, and the costs of administration.

[10] In addition, the defendant will fund the cost of an arbitration system so that class members can recover their Actual Losses (as defined below), over and above the compensation for loss of time and inconvenience [the Actual Loss Fund]. The Actual Loss Fund is uncapped and unlimited.

[11] To claim against the Fixed Settlement Fund, class members will not be required to demonstrate how much time they actually spent responding to the data loss. Instead, they will only be required to submit a brief claim form identifying themselves as class members, in which case they will be eligible for a $60 Payment.

[12] With respect to the Actual Loss Fund, "Actual Losses" are proven losses suffered by class members, excluding exemplary and punitive damages, as determined by an arbitrator, caused by the data loss, for which the class member has not been otherwise compensated.

[13] Class counsel are seeking a contingency fee of 30 percent on the $17.5 million Fixed Settlement Fund. They are not seeking fees on any awards made from the Actual Loss Fund.

[14] Class counsel have entered into contingency fee agreements [the Fee Agreements] with each of the three representative plaintiffs, which provide for a contingency fee of 30 percent upon the commencement of discovery.

II. Issues

[15] The following issues arise on this motion:

A. *Is the Settlement Agreement fair, reasonable and in the best interests of the Class, and should the Court approve it?*

B. *Should the Fee Agreements be approved, and are the fees and disbursements proposed by class counsel reasonable?*

C. *Should the Court approve the proposed honoraria of $5,000 to each of the representative plaintiffs?*

III. Analysis

A. *Is the Settlement Agreement fair, reasonable and in the best interests of the Class, and should the Court approve it?*

(1) The law relating to the approval of a settlement

[16] Pursuant to Rule 334.29 of the *Federal Courts Rules*, a class action may only be settled with the approval of a judge.

[17] The test for approving a class action settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the Class as a whole, taking into account

the claims and defences in the litigation and any objections to the settlement by class members. However, the test is not whether the settlement meets the demands of a particular class member.

[18] A settlement need not be perfect (*Châteauneuf v Canada*, 2006 FC 286 at para 7). It need only fall "within a zone or range of reasonableness" (*Ontario New Home Warranty Program v Chevron Chemical Company* (1999), 46 OR (3d) 130 (Ont Sup Ct J) at para 89).

[19] In determining whether to approve a settlement, the Court may take into account factors such as:

a. The likelihood of recovery or likelihood of success;

b. The amount and nature of discovery, evidence or investigation;

c. Terms and conditions of the proposed settlement;

d. The future expense and likely duration of litigation;

e. The recommendation of neutral parties, if any;

f. The number of objectors and nature of objections;

g. The presence of arm's length bargaining and the absence of collusion;

h. The information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations;

i. The degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and

j. The recommendation and experience of counsel.

(See *Ford v F Hoffmann-La Roche Ltd* (2005), 74 OR 3d 758 (Ont Sup Ct J) (QL) at para 117.)

[20] The factors listed above are merely guidelines. In a particular case, some criteria may be given more weight than others, some criteria may not be satisfied, and other criteria may be

irrelevant (*Parsons v Canadian Red Cross S*ociety, [1999] OJ No 3572 (Ont Sup Ct J) (QL) at para 73 [*Parsons 1999*]).

(2) Factors that are relevant to this settlement approval motion

(a) *The likelihood of recovery or success / Rationale for the settlement*

[21] It has been five years since the lost hard drive went missing. To date, class counsel have not been able to identify any evidence that the Personal Information on the lost drive has been compromised in any way. It remains unclear whether the drive was stolen, merely lost or destroyed, and there is no evidence that a third party has even accessed the Personal Information, much less that the Personal Information has been used for unlawful or improper purposes.

[22] If this matter were to proceed to trial, the onus would be on the plaintiffs to establish that a privacy breach has actually occurred. Based on the evidentiary record developed over the last five years of litigation, including a number of investigations and expert reports, there are significant hurdles to the plaintiffs' ability to meet their onus of establishing that the Personal Information on the lost drive has been compromised or improperly disclosed in any way.

[23] I agree with the plaintiffs that their case at trial would likely turn on establishing nominal damages for breach of contract based on wasted time and inconvenience. The Fixed Settlement Fund of $17.5 million is designed to compensate class members for an average of four hours of wasted time and inconvenience in responding to the data loss, at average industrial hourly wage rates, net of legal fees.

[24] In my Reasons for Judgment delivered on the certification motion (2014 FC 250), I commented on the unique challenges facing the plaintiffs in litigating this action to a successful conclusion, including the problems related to proving the damages of the class members:

> [68] In addition, a summary review of the evidence adduced by both parties leads the Court to the conclusion that the Plaintiffs have not suffered any compensable damages. The Plaintiffs have not been victims of fraud or identity theft, they have spent at most some four hours over the phone seeking status updates from the Minister, they have not availed themselves of any credit monitoring services offered by the credit reporting agencies nor have they availed themselves of the Credit Flag service offered by the Defendant.
>
> [69] Nor does the evidence adduced support a claim for increased risk of identity theft in the future. Since the Data Loss, Equifax has produced reports pertaining to the credit files of the 88,548 individuals who availed themselves of the Credit Flag service. These reports show that there had been no increase in the relevant indicia that would be consistent with an increase in criminal activities involving those individuals' Personal Information. The rate of criminal activities registered was not higher than the 3% of the population generally victim of identity theft. Moreover, the Plaintiffs submitted a CBC news article concerning a Class Member who had been a victim of identity theft yet the article noted no proven causal link between the Data Loss and that theft.

[25] There is considerable uncertainty in the law as to whether a trial judge would award aggregate nominal damages in the context of a class action. There is little to no jurisprudence on the issue. The British Columbia Supreme Court in *Tucci v Peoples Trust Co,* 2017 BCSC 1525 (QL), recently recognized that wasted time spent responding to a privacy breach could form the basis for awarding compensable aggregate nominal damages (see paras 247, 257).

[26] Even if I were to accept that aggregate damages for nominal damages are available, the award per class member is also very much an uncertain factor. What is nominal in an individual

action brought by one person may not be nominal when aggregated across a class of 583,000 individuals.

[27] I certified the plaintiffs' claim for nominal damages, but only on the basis that they were novel in the context of a class action. I further noted specifically that the defendant had advanced an "interesting and strong argument" that nominal damages should not be awarded in a class action (at para 51).

[28] With respect to the tort of intrusion upon seclusion, damages are presumed and therefore a nominal amount of damages can be awarded for the tort absent proof of actual harm (*Jones v Tsige*, 2012 ONCA 32 (QL) at para 60). Before there can be an award of damages, however, the onus remains on the plaintiffs to establish first that an intrusion actually occurred.

[29] In the summer of 2017, the plaintiffs retained the services of Cytelligence Inc. [Cytelligence], a cybersecurity and digital forensics company, to conduct an in-depth investigation to determine whether the Personal Information had been disclosed or sold on the deep/dark web. That investigation concluded that, "[b]ased on the age of the information, and given that Cytelligence could not uncover any such evidence, it is unlikely that the contents [of the lost hard drive] are in circulation on the dark web."

[30] Finally, class counsel's review of the defendant's extensive documentary production did not uncover any evidence that the Personal Information on the lost drive had been improperly accessed or generally disclosed anywhere.

[31] In sum, there is no evidence in the case at bar that would establish, on a balance of probabilities, that the Personal Information has been compromised. There is thus no evidence of an intrusion upon the class members' privacy.

[32] When this action commenced, it was questionable whether the action could be prosecuted successfully, given the state of the law on privacy breaches. Most of those factors are still relevant today.

[33] There have been approximately half a dozen privacy breach class actions settled to date in Canada where funds have been established to compensate class members for wasted time and inconvenience and/or actual losses. In most of these settlements, there was only one fund established to satisfy both sets of damages, and that fund was capped. Class members were also required to provide documented evidence to support their claims, even for wasted time and/or inconvenience (*Lozanski v The Home Depot Inc*, 2016 ONSC 5447 at paras 45, 51; *Drew v Walmart Canada Inc*, 2017 ONSC 3308 at para 10(b)).

[34] *Rowlands v Durham Region Health et al*, a class action about health information contained on a lost hard drive with no evidence of the information being compromised, was settled on the basis that each of the 83,524 class members had to come forward to prove their individual damages (*Rowlands v Durham Region Health, et al*, 2011 ONSC 719; *Rowlands v Durham Region Health, et al*, 2012 ONSC 3948). No money was available to the class members unless they proved their actual losses.

[35] In *Lozanski*, the Court approved a settlement of a class action in which a credit payment system was hacked by a third party. For the approximately 500,000 class members, a settlement fund of $250,000 was set up. Each class member with documented losses, including time spent remedying the issues relating to the data breach, could apply for reimbursement up to $5,000 on the following basis:

> [45] … The time remedying issues claim is: (a) for up to five hours at $15 per hour; or (b) for a Settlement Class Member with reasonable documentation of substantiated losses for out-of-pocket losses or unreimbursed charges who cannot separately document their time remedying those losses or charges may self-certify for up to two hours at $15 per hour.

[36] In *Drew*, the Court approved a similar settlement providing a fund of $400,000 for roughly 640,000 class members whose photo centre account information was hacked by a third party (above at para 10). Only class members who had documented actual losses were eligible to be reimbursed for two hours of their wasted time at $15/hour without proof. In all other circumstances, wasted time claims were required to be supported with documentary evidence. Including actual losses, the total an individual class member could claim was $5,000.

[37] By contrast, in the case at bar, the Actual Loss Fund is uncapped, meaning that class members who can prove that they have sustained an Actual Loss can be compensated in full, on top of compensation for their wasted time and inconvenience.

(b) *The amount and nature of discovery, evidence or investigation*

[38] I am satisfied that I was presented with sufficient evidence to allow me to make an objective, impartial and independent assessment of the fairness of the proposed Settlement

Agreement (*Dabbs v Sun Life Assurance Co of Canada*, [1998] OJ No 1598 (Ont Sup Ct J) (QL) at para 15).

[39] I am also satisfied that over the five years since this action commenced, the parties have done what could reasonably have been done to inform themselves of the facts relevant to liability and damages, including reviewing the multiple investigations into the loss of the hard drive.

[40] Two main investigations were conducted into the loss of the hard drive. HRSDC's Special Investigations Unit conducted an internal investigation, including interviews of numerous employees who worked in proximity to the last person in possession of the hard drive, and a forensic technical analysis. Their investigation could not determine the cause of the data loss, but did rule out the possibility that "someone would have taken the hard drive with the intent to make off with the information."

[41] As mentioned above, Cytelligence conducted another investigation. The report produced by Cytelligence concludes that:

> a. There is no evidence that the Personal Information contained on the lost drive was disclosed to others or was sold to a third party; and
>
> b. There is no evidence that the Personal Information contained on the hard drive was accessible or sold on the dark web, which contains websites that are not accessible via traditional web browsers (and therefore is where illegal transactions such as the sale of personal information tend to take place online).

[42] Class counsel have provided evidence that in addition to the many volumes of evidence adduced at the certification motion, they reviewed and analyzed approximately 68,377 documents produced by the defendant.

[43] Given the scope of the information available to class counsel, they were well situated to negotiate, and ultimately agree, subject to court approval, to the resolution of this action for the benefit of the class members.

(c) *The terms and conditions of the proposed settlement*

[44] The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms of the settlement. It is within the power of the Court to indicate areas of concern and to afford the parties an opportunity to answer those concerns with changes to the settlement. The Court's power to approve or reject settlements, however, does not permit it to modify the terms of a negotiated settlement (*Dabbs*, above at para 10).

[45] The proposed settlement contemplates two separate funds for the benefit of the class members: the Fixed Settlement Fund and the unlimited Actual Loss Fund.

[46] The Fixed Settlement Fund in the amount of $17.5 million will be allocated as follows:

a. Payments to compensate the class members for their wasted time and inconveniences associated with the data loss, claimed by filling out a brief form, without having to provide evidence of the time spent;

b. Proposed honoraria to the representative plaintiffs;

c. Class counsel fees, disbursements and taxes thereon; and

d. Costs of administrating the settlement, including the costs of giving notice of the proposed settlement in accordance with my Order of December 20, 2017.

[47] After payment of the expenses set out in subparagraphs (c) and (d) above, the balance will be used to fund the proposed honoraria to the representative plaintiffs (more on this below) and the $60 Payments to compensate class members for their wasted time and inconvenience. If there is a shortfall, the class member Payments will be made *pro rata*. If there is a surplus in the Fixed Settlement Fund after all of the class members are paid, the surplus will be used to pay for Actual Losses. Thereafter, if there remains a surplus from the Fixed Settlement Fund, even after all Actual Losses are paid, the parties will seek the direction of the Court before further distribution.

[48] This Court should consider the expected take-up rate in determining whether a settlement is fair, reasonable, and in the best interests of the class members, particularly where there is a fixed settlement fund (*Smith v Vancouver City Savings Credit Union*, 2012 BCSC 990 (QL) at paras 21-26).

[49] Class counsel submit that it is reasonable to estimate that approximately 30 percent of the class members will apply for compensation from the Fixed Settlement Fund. The $17.5 million amount of the Fixed Settlement Fund was accordingly derived from class counsel’s estimate that approximately 30 percent of class members will participate in the claims process.

[50] In *Smith*, a case about the interest rate charged on overdraft fees, Justice Gray of the British Columbia Supreme Court found that a $2.5 million settlement fund was fair, reasonable, and in the best interest of the class, in part because it was likely that the class members who participated in the settlement would achieve full recovery:

> [24] In light of these administrative costs, and the low likelihood of "take-up" by claimants, it appears likely that under the proposed settlement, all those who present a claim will get full recovery, and that some funds will be paid to the VanCity Community Foundation.

[51] To support that finding, Justice Gray considered that the take-up rate in similar class actions was low (between 16-30 percent), and would likely be even lower because of the years that had passed since the events giving rise to the class members' claims. As such, Justice Gray concluded that the value of the fixed settlement fund would likely be sufficient to compensate all class members who file a claim (*Smith*, above at para 24).

[52] In the present case, I agree with class counsel that 30 percent is a reasonable estimation of the proportion of class members who will file a claim to the Fixed Settlement Fund. Class counsel considered several factors in estimating the expected take-up rate, including that:

a. There are an estimated 585,236 class members after subtracting the opt outs (there were a total of 564 opt outs);

b. Only 91,351 class members asked for and received credit protection services funded by the defendant (approximately 15.61 percent of the class), despite receiving a direct mailing from the defendant with this offer;

c. Only approximately 58,000 class members registered with the online system set up by class counsel for this class action (approximately 9.91 percent of the class);

d. It has been five years since the data loss was publicly disclosed;

e. Some of the Personal Information on the lost drive dates back to 2000 and is therefore almost two decades old; and

f. The maximum amount recoverable from the Fixed Settlement Fund is $60.

[53] While it is difficult to predict take-up rates, class counsel submit that take-up rates in Canadian class actions demonstrate that the take-up rate is below 50 percent in most Canadian class actions and often well below 50 percent, particularly where the size of the claim a class member can make is smaller.

[54] By contrast, the Actual Loss Fund is an unlimited and uncapped fund for each class member who applies for arbitration, without regard to the issue of take-up. Class members who claim that they incurred an Actual Loss must file an arbitration form and request an arbitration.

[55] Ivan Whitehall and Reva Devins are the proposed arbitrators and their costs will be paid entirely by the defendant.

[56] The protocol for the arbitrations has been provided to the Court. The proposed process is user-friendly, does not require the assistance of a lawyer, and requires the arbitrator to decide on a balance of probabilities whether the class member suffered an Actual Loss.

[57] The defendant will fund the cost of direct mailing to the Class to publicize the settlement, a cost estimated to be approximately $600,000. This amount is separate and apart and in addition to the Fixed Settlement Fund and the Actual Loss Fund.

(d) *Future expense and likely duration of litigation*

[58] Courts have recognized that a payment to class members now is a factor in support of a settlement. If there is no settlement now, counsel for the parties anticipate that at least a further three years will be needed for a trial and a potential appeal.

[59] After taking these probable three further years of litigation into consideration, including what is projected to be an eight-week trial with numerous expert witnesses to be called by each party, coupled with the factors outlined above, I am satisfied that the proposed settlement is fair and reasonable and in the best interests of the Class.

(e) *The number of objections and nature of the objections*

[60] As of the court-ordered deadline on February 12, 2018, at 5:00 p.m. EST, 294 objections to the settlement were received. These objections make up approximately 0.00050188 percent of the Class (1/20 of 1 percent).

[61] Four of the 294 objectors attended the proposed settlement hearing via videoconference from Fredericton, Toronto and Winnipeg and had the opportunity to voice their objections to the Court. A fifth objector sought to participate in the proposed settlement hearing via

videoconference from Halifax. However, this objector was not able to participate, as notice that the Halifax local office would be open for videoconferencing was only given shortly before the hearing. Nevertheless, this objector's written objection was duly considered, along with all of the other written objections.

[62] 72 objectors submitted what appears to be an identical form letter. These 72 objectors, as well as many others, assert that the class members' outstanding student loan debt should be forgiven or discounted as part of this settlement. The objector who attended the proposed settlement hearing via videoconference from Fredericton expressed an objection of this nature. However, this proposition is untenable at law, particularly so since the Supreme Court of Canada laid to rest the doctrine of a fundamental breach in Canadian contract law (*Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, 2010 SCC 4). The parties did not negotiate, and could not have negotiated, the Settlement Agreement on the basis that debt forgiveness could form part of the compensation for class members.

[63] A large number of the objections refer to financial losses allegedly incurred as a result of the data loss as having value greater than $60, including the objector who attended the proposed settlement hearing via videoconference from Toronto. These objections are premised on a misunderstanding of the structure of the Settlement Agreement, since such losses can be claimed against the Actual Loss Fund.

[64] A large number of the objections also reference paying out-of-pocket for credit monitoring, despite the government's blanket offer to pay for six years of credit monitoring

through TransUnion and Equifax. Both objectors who attended the proposed settlement hearing via videoconference from Winnipeg expressed this type of objection, seeking compensation for lifetime credit protection. In my view, lifetime protection is an unreasonable request.

[65] One of the objectors who attended the proposed settlement hearing from Winnipeg also expressed a desire to be given a new SIN number. However, the evidence shows that replacing an individual SIN number presents numerous challenges for both the individual and the government. Additionally, the government is actively monitoring class members' SIN numbers and will continue doing so until 2023.

[66] Finally, a large number of the objections reference the amount of class counsel's fee request. Another one of the objectors who attended the proposed settlement hearing via videoconference from Winnipeg also expressed this type of objection. However, it was publicized in the Notice of Certification that class counsel would be requesting up to one-third of any recovery in the action as legal fees and it was possible for class members to opt out on the basis of any objection to the proposed terms.

[67] As for the class member who requested to attend via videoconference from Halifax, she argues that her case is unique because she is transgender and has transitioned since the hard drive was lost. She states that she should be awarded $40,000 in damages.

[68] First, if she considered her claim to be distinct from that of the rest of the Class, she could have opted out of this class action, retained counsel and filed her own individual action against

the defendant. In addition, if she has suffered actual compensable damages, in excess of lost time and inconvenience, she can file her claim against the Actual Loss Fund.

[69] Having considered all of the objections received, I am of the view that the settlement ought to be approved. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the Class as a whole (*Parsons 1999*, above at para 79).

[70] In this case, as in *Manuge v Canada*, 2013 FC 341, it would not serve the interests of the vast majority of the Class who did not object to the settlement to send the parties back into further discussions to address the concerns of a "handful" of objectors (at para 25).

(f) *The presence of arm's length bargaining*

[71] The negotiations that transpired leading to a settlement among the parties were arm's length and adversarial in nature, spanning several months.

(g) *The degree and nature of communications with class members*

[72] Given the size of the Class, class counsel organized and maintained a website located at www.studentloansclassaction.com [the website], a Strosberg Sasso Sutts LLP toll-free phone line, and a Facebook page maintained by Buckingham Law.

[73] The website hosts class counsel's secure, interactive web-based registration system. The registration system went live shortly after the commencement of the action, at which time and

thereafter, class members were encouraged to register on the registration system. To date, approximately 58,000 class members have registered and provided their information to class counsel.

[74] The notice of proposed settlement was sent by email to all of the class members who registered with class counsel and provided valid e-mail addresses. Class counsel also posted the notice of the proposed settlement and Settlement Agreement on the website for class members to review and they organized an online marketing campaign.

[75] During these proceedings, class counsel updated the website fourteen times since January 22, 2013, and posted all key documents. In only the last year, the website has been viewed by over 50,000 unique users. As well, class counsel received in excess of 5,000 phone calls through their dedicated toll-free lines.

(h) *The recommendation of experienced counsel*

[76] Class counsel suggest that the proposed settlement is fair, reasonable and in the best interests of the class members. Class counsel are experienced class actions litigators and their tactics, analysis and processes have been disclosed to the Court. I am satisfied that their decision to settle this case reflects their best exercise of judgment. Class counsel's recommendations are significant and are given substantial weight in the approval process.

(i) *The recommendation of the representative plaintiffs*

[77] I was provided evidence that all of the representative plaintiffs were briefed regularly throughout the five years of this litigation. They were involved in making the major decisions, including instructing class counsel to sign the Settlement Agreement and unanimously recommending approval of this settlement to the Court.

(j) *Conclusion*

[78] There are ranges of acceptable settlements. This principle recognizes the reality of the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

[79] This action was ably prosecuted and the litigation risks and the risks relating to damage issues were adequately canvassed by class counsel. This Court concludes that the Settlement Agreement is fair, reasonable and in the best interests of the Class and ought to be approved, including the appointment of the administrator and arbitrators.

B. *Should the Fee Agreements be approved, and are the fees and disbursements proposed by class counsel reasonable?*

(1) The law relating to the approval of class counsel fees

[80] Rule 334.4 of the *Federal Courts Rules* provides that no payments may be made to a lawyer from the proceeds recovered in a class action unless those payments are approved by a judge. Class counsel accordingly seeks this Court's approval of the Fee Agreements and class counsel's legal fees, disbursements, and applicable taxes.

(a) *Counsel fees must be fair and reasonable*

[81] Class counsel's fees are to be fixed and approved on the basis of whether they are "fair and reasonable" in all of the circumstances (*Manuge*, above at para 28; *Parsons v Canadian Red Cross Society* (2000), 49 OR (3d) 281 (Ont Sup Ct J) at paras 13, 56 [*Parsons 2000*]).

[82] In *Manuge*, this Court held that, in determining what is fair and reasonable, the Court must look at a number of factors, including the results achieved by class counsel, the extent of the risk assumed by class counsel, the amount of professional time actually incurred by class counsel, the causal link between the legal effort and the result achieved, the quality of the representation, the complexity of the issues raised by the litigation, the character and importance of the litigation, the likelihood that individual claims would have been litigated in any event, the views expressed by class members, the existence of a fee agreement, and the fees approved in comparable cases (*Manuge*, above at para 28; *Merlo v Her Majesty the Queen*, 2017 FC 533 (QL) at paras 77-98).

[83] In particular, courts have focused on two main factors in assessing the fairness and reasonableness of a fee request: (1) the risk that class counsel undertook in conducting the litigation; and (2) the degree of success or result achieved (*Parsons 2000*, above at para 13; *Sayers v Shaw Cablesystems Limited*, 2011 ONSC 962 at para 35). Risk in this context is measured from the commencement of the action (*Gagne v Silcorp Ltd* (1998), 49 OR (3d) 417 (Ont CA) at para 16). These risks include all of the risks facing class counsel, such as the liability

risk, recovery risk, and the risk that the action will not be certified as a class action (*Gagne*, above at para 17; *Endean v Canadian Red Cross Society*, 2000 BCSC 971 (QL) at paras 28, 35).

(b) *Percentage-based counsel fees are preferable to alternatives, such as applying a multiplier to counsel's time*

[84] Over the years, courts have expressed a preference for utilizing percentage-based fees in class actions (*Mancinelli v Royal Bank of Canada*, 2017 ONSC 2324 at para 52). A percentage-based fee should be paid based on a percentage of the amounts recovered and should be awarded at a level that appropriately incentivizes and rewards class counsel.

[85] The percentage-based fee set out in a contingency fee retainer agreement is presumed to be fair and "should only be rebutted in clear cases based on principled reasons" (*Cannon v Funds for Canada Foundation*, 2013 ONSC 7686 at para 8). Examples of where a court may rebut the presumption that a percentage-based fee is fair include where:

a. There is a lack of full understanding or true acceptance on the part of the representative plaintiff;
b. The agreed-to contingency amount is excessive; or
c. The presumptively valid contingency fee would result in a fee award so large as to be unseemly.

(*Cannon*, above at para 9.)

[86] The main alternative to a percentage-based fee is applying a multiplier to class counsel's time. This multiplier approach has been criticized for, *inter alia*, encouraging inefficiency and

duplication and discouraging early settlement (*Cassano v Toronto-Dominion Bank* (2009), 98 OR (3d) 543 (Ont Sup Ct J) (QL) at para 60). Courts have indicated that "the application of a multiplier … is unacceptably subjective if not completely arbitrary" (*Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743 at para 22).

[87] Percentage-based fees, on the other hand, encourage a results-based approach to rewarding counsel. As noted by the British Columbia Supreme Court in *Endean*, percentage-based fees are common in class actions and properly reward class counsel for their effectiveness, rather than being based solely on the time incurred to achieve success (above at paras 74, 75).

[88] In *Baker (Estate) v Sony BMG Music (Canada) Inc*, 2011 ONSC 7105, Justice Strathy explained that compensating counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client" (at para 64). A percentage-based fee encourages the lawyer to maximize recovery for the client efficiently; it is fair to the client since there is no payment without success (*Baker*, above at para 64).

(c) *Percentage-based fees provide necessary incentives to class counsel for a class action regime to be viable*

[89] Effective class actions would not be possible without contingency fees that pay counsel on a percentage basis.

[90] Contingency fees help to promote access to justice in that they allow counsel, rather than the client, to finance the litigation. Contingency fees also promote judicial economy, encourage

efficiency in the litigation, discourage unnecessary work that might otherwise be done simply to increase the lawyer's fee based on time incurred, properly emphasize the quality of the representation and the results achieved, ensure that counsel are not penalized for efficiency, and reflect the considerable costs and risks undertaken by class counsel (*Osmun v Cadbury Adams Canada Inc*, 2010 ONSC 2752 at para 21).

[91] This Court, and courts across Canada, have recognized that the viability of class actions depends on entrepreneurial lawyers who are willing to take on these cases, and that class counsel's compensation consequently must reflect this reality (*Manuge*, above at para 49; *Helm v Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at para 26; *Griffin v Dell Canada Inc*, 2011 ONSC 3292 at para 53). Compensation must be sufficiently rewarding to "provide a real economic incentive to lawyers to take on a class proceeding and to do it well" (*Sayers*, above at para 37).

(d) *Class counsel's requested 30 percent fee is comparable to other percentage-based fees in settled class actions*

[92] In *Baker*, Justice Strathy stated that fees in the range of up to 30 percent are "very common" in class actions (above at para 63). In *Cannon*, Justice Belobaba approved a contingency fee of 33 percent (above at para 3).

(2) Factors supporting the fee request

[93] Class counsel argue and I agree that the following factors support the requested fee as being fair and reasonable.

(a) *Risks undertaken by class counsel*

[94] From the outset, class counsel agreed to pursue this action on a contingency fee basis pursuant to the Fee Agreements, accepting responsibility for all expenses and costs and seeking court approval for a fee if successful, in accordance with the Fee Agreements.

[95] In *Green v Canadian Imperial Bank of Commerce*, 2016 ONSC 3829, the Ontario Superior Court of Justice recognized the risks assumed by class counsel in pursuing class actions on a contingency fee basis and the need to incentivize counsel to take on these risks: "The risks are – quite simply … the risk of receiving no compensation for the time and disbursements invested in the case" (at para 14).

[96] The litigation risk assumed by class counsel is a function of the probability of success, the complexity of the proceedings, and the time and resources expended to pursue the litigation.

[97] When assessing these risks involved in pursuing class action litigation, the risks must be assessed as they existed when the litigation commenced and as the litigation continued. They should not be assessed with the benefit of hindsight (*Ford*, above at para 71).

[98] In this case, class counsel were cognizant of the procedural and litigation risks involved with these claims, being that liability was, and is, difficult to prove, and that individual damage assessments would likely be necessary at the end of a common issues trial, if successful. By any

measure, this is a complex case, both in terms of the subject matter, the number of class members, and damages.

(b) *Results achieved*

[99] As reviewed in detail above, class counsel achieved good results for the class members.

[100] In weighing the results achieved by class counsel's work, it is also appropriate for the Court to consider to what extent the three objectives of class actions – namely, access to justice, behaviour modification, and judicial efficiency – have been met by the proposed settlement (*Bancroft-Snell v Visa Canada Corporation*, 2015 ONSC 7275 at para 49).

[101] This class action provided access to justice for hundreds of thousands of class members where, absent the class action, the scope of the individual claims would not justify litigation despite what appeared to be, at the time that litigation was commenced, a fairly serious privacy breach.

[102] The class action regime in the *Federal Courts Rules* was designed to encourage class counsel to advance actions like this, where the individual claims are relatively modest because, on an aggregate basis, entrepreneurial class counsel can earn a fee that justifies the risks associated with advancing the class action and the time invested.

[103] This settlement will serve as a benchmark for future privacy breach class actions and encourage organizations throughout Canada to take privacy seriously, for fear of facing serious litigation consequences for a privacy breach.

[104] With respect to the defendant, this action has directly encouraged the Government of Canada to take a substantial number of steps to improve their privacy security, which benefits not only the class members but all Canadians, as the Government is the single largest depository of Canadians' personal information.

(c) *The counsel fee request is within the reasonable expectations of the representative plaintiffs and other class members*

[105] The representative plaintiffs entered into Fee Agreements that contemplated the payment of 30 percent of the recovery, plus applicable taxes and disbursements, at the commencement of discovery. Since discovery was well underway by the time that settlement negotiations commenced and ultimately resulted in the proposed settlement, class counsel are now requesting that their fees be fixed at 30 percent of the recovery, in accordance with the Fee Agreements.

[106] All of the representative plaintiffs support class counsel's request for fees and the Notice of Certification, which was published and distributed in mid-2016, explicitly stated that class counsel would seek a fee of up to one-third of the recovery.

[107] Therefore, class members could fairly weigh this issue when deciding whether to opt out or to participate in the lawsuit going forward.

(d) *Experience of class counsel*

[108] Evidence was provided that class counsel have practised in class actions for many years. They have a breadth of experience in prosecuting class actions, and have collectively negotiated settlements of over a hundred class actions.

(e) *Time and expenses incurred by class counsel*

[109] Class counsel have done extensive work over the past five years to reach the Settlement Agreement, including litigating certification through two hearings, reviewing almost 70,000 documentary productions, and devising an innovative two-pronged approach to the settlement (the Fixed Settlement Fund and the unlimited Actual Loss Fund) in order to maximize compensation for the class members.

(f) *Work that must be done if the settlement is approved*

[110] If the Settlement Agreement is approved, class counsel must, *inter alia*: oversee the publication and distribution of the notice of settlement approval; continue to implement and oversee the administration of this class action for at least an additional eight months until the settlement distribution is complete; and liaise with the thousands of class members who may have questions about the judgment. Class counsel's job will not be complete until the settlement administration is complete.

(g) *Conclusion*

[111] In sum, the legal fees sought by class counsel are consistent with the Fee Agreements, and they are fair and reasonable when considered in light of the procedural and substantive risks assumed by class counsel. The legal fees are also fair and reasonable when considered in light of the evolution of the evidentiary record, five years after the data loss occurred.

(3) Class counsel incurred significant disbursements

[112] A list of class counsel's disbursements was presented to the Court at the motion hearing.

[113] There were significant disbursements paid and accrued, which have been completely funded by class counsel, including $250,292 plus taxes for the registration system, which permitted class counsel to communicate with, and provide notice to, approximately 58,000 class members. There will be no interest charges on the disbursements.

C. *Should the Court approve the proposed honoraria of $5,000 to each of the representative plaintiffs?*

[114] Class counsel request that the Court award a $5,000 honorarium to each representative plaintiff, to be paid from the Fixed Settlement Fund, for a total of $15,000, in recognition of their respective contributions to this action.

[115] This Court has the discretion to award honoraria to representative plaintiffs and has done so numerous times previously. An honorarium is "not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice" (*Johnston v The Sheila Morrison Schools*, 2013 ONSC 1528 at para 43).

[116] The affidavits filed by each representative plaintiff show that they expended a significant amount of time carrying out their duties as representative plaintiffs. They were not simply figureheads for this litigation – they carried out real work and functions such as:

a. Preparing the affidavits for certification;

b. Preparing for and attending cross-examinations on the affidavit in support of certification;

c. Assisting in the preparation of the list of documents in their possession for the documentary discovery phase and the lawsuit;

d. Strategizing with class counsel from time to time over the years;

e. Expressing their opinions to class counsel on the proposed Settlement Agreement and instructing class counsel to sign the Settlement Agreement; and

f. Assisting in the preparation and execution of the affidavits in support of this settlement approval motion.

[117] In addition, each of the representative plaintiffs had their name widely publicized in the media.

[118] The representative plaintiffs did not request these honoraria, nor were any honoraria promised to them by class counsel at any time. Indeed, the Fee Agreements each state:

> 16. The Client acknowledges that [the Client] is not entitled to receive any payment or fee out of the Recovery for acting as representative plaintiff in the Action unless ordered by the Court.
>
> (Condon Affidavit at para 32; Walker Affidavit at paras 13, 33; Piggott Affidavit at paras 13, 33.)

[119] Courts across the country, including this Court, have permitted stipends to representative plaintiffs in varying amounts (*Manuge*, above at para 53; *Hislop v Canada (Attorney General)*, 2004 CanLII 11203 (Ont Sup Ct J) at para 22).

[120] In this case, class counsel submitted, and I agree, that $5,000 is appropriate for each representative plaintiff.

ORDER in T-132-13

THIS COURT ORDERS that:

1. Plaintiffs' motion is granted;

2. The Settlement Agreement is approved;

3. The parties will provide the Court, within seven working days from this Order and Reasons, with a draft order confirming the Settlement Agreement approval, the appointment of the administrator and arbitrators, the fixation of the administration costs, the fixation of the honoraria for the representative plaintiffs and the fixation of class counsel's fees, the whole in accordance with the present reasons;

4. There are no costs on this motion.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-132-13
STYLE OF CAUSE:	GAELEN PATRICK CONDON ET AL v HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 22, 2018 (IN PERSON AND BY VIDEOCONFERENCE)
ORDER AND REASONS:	GAGNÉ J.
DATED:	MAY 18, 2018

APPEARANCES:

Chelsea D. Hermanson	FOR THE PLAINTIFFS
Ted Charney Tina Yang	
Harvey Strosberg Sharon Strosberg	
Bob Buckingham	
Catharine Moore Travis Henderson	FOR THE DEFENDANT

SOLICITORS OF RECORD:

Branch MacMaster LLP Vancouver, British Columbia	FOR THE PLAINTIFFS
Charney Lawyers Toronto, Ontario	FOR THE PLAINTIFFS
Strosberg Sasso Sutts LLP Windsor, Ontario	FOR THE PLAINTIFFS

Bob Buckingham Law St. John’s, Newfoundland	FOR THE PLAINTIFFS
Attorney General of Canada Ottawa, Ontario	FOR THE DEFENDANT