IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ari v. Insurance Corporation of British Columbia,* 2017 BCSC 2212

Date: 20171201
Docket: S123976
Registry: Vancouver

Between:

Ufuk Ari

Plaintiff

And

Insurance Corporation of British Columbia

Defendant

Before: The Honourable Madam Justice Russell

Restriction on Publication: **An order has been made in this proceeding pursuant to the Court's inherent jurisdiction that prohibits the publication of any information that could identify any of the potential class members, except those who have commenced proceedings in this Court; and the licence plate numbers, driver's licence numbers, vehicle descriptions, vehicle identification numbers, and addresses of any potential class members. This publication ban applies indefinitely unless otherwise ordered. These reasons for judgment comply with this publication ban.**

Reasons for Judgment

Counsel for the Plaintiff:	G.J. Collette
Counsel for the Defendant:	R. Hira, Q.C. A. Bultz
Place and Dates of Hearing:	Vancouver, B.C. July 5-6, 2017
Place and Date of Judgment:	Vancouver, B.C. December 1, 2017

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Introduction

[1] This is an application pursuant to s. 2(2) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*CPA*") to have this action certified as a class proceeding and to have Ufuk Ari ("Mr. Ari") appointed as the representative plaintiff. The action is in respect of alleged breaches of the *Privacy Act*, R.S.B.C. 1996, c. 373 by a former employee of the Insurance Corporation of British Columbia ("ICBC").

[2] The former employee was Candy Elaine Rheaume ("Ms. Rheaume"). She was employed with ICBC as a claims adjuster beginning in 2006, but had worked in other roles at ICBC since 1996. Ms. Rheaume accessed the personal information of 78 of ICBC's customers for no apparent business purpose, including Mr. Ari's personal information. Thirteen of those customers were then the victims of arson and shooting attacks at their residences. Ms. Rheaume has now been found criminally responsible, along with two others, for her involvement in the related offences.

[3] The plaintiff's central allegation is that the defendant ICBC is vicariously liable for the wrongful acts of Ms. Rheaume. Ms. Rheaume is not a named defendant in this action.

[4] The plaintiff seeks to have this action certified as a class action. He seeks to certify as a class all individuals resident in BC whose premises were identified willfully and without claim of right by Ms. Rheaume between January 1, 2010 and December 31, 2011 contrary to s. 1 of the *Privacy Act*. According to the plaintiff, this class would include not only the 78 individuals whose personal information was directly obtained without a business purpose, but also any family members of these 78 individuals or other residents of the premises that were identified in Ms. Rheaume's illegal search.

[5] The defendant's position is that certification should not be granted in this case because there is no cause of action and the proposed class is overbroad. The defendant submits that aside from the *prima facie* claim of the 78 individuals whose personal information was accessed, the 2nd Further Amended Notice of Civil Claim

(the "Current Claim") does not disclose a cause of action, and that from those 78, the 13 who experienced actual property damage have already been fully compensated. The defendant submits that the plaintiff's proposed class definition inappropriately seeks to include individuals who do not have a *Privacy Act* claim.

[6] For the reasons that follow I determine that the plaintiff has satisfied the requirements of s. 4(1) of the *CPA*, and this action should be certified as a class proceeding.

Background

ICBC

[7] The defendant, ICBC, is a Crown corporation incorporated pursuant to the *Insurance Corporation Act*, R.S.B.C. 1996, c. 228.

[8] Pursuant to s. 7 of the *Insurance Corporation Act*, ICBC is mandated to engage and carry on the business of operating and administering plans of insurance, including universal compulsory vehicle insurance, as well as carry out powers, duties and functions related to various motor vehicle enactments. ICBC's activities are comprehensively regulated by the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231.

[9] In order to fulfill its statutory mandate, ICBC must possess, maintain and use records, including insureds' personal information. ICBC's statutory authority to keep records is also found in s. 8.1 of the *Insurance Corporation Act*.

Ms. Rheaume's Unauthorized Access of Personal Information

[10] On or about August 8, 2011, ICBC identified Ms. Rheaume, one of its employees, as having accessed, without a business purpose, personal information of 78 individuals who had been at or near the Justice Institute of British Columbia in New Westminster. One of these individuals was the plaintiff, Mr. Ari. The information accessed included registered vehicle owners' names, addresses, driver's licence numbers, vehicle descriptions, vehicle identification numbers, licence plate numbers and claims histories.

[11] As a claims adjuster, Ms. Rheaume's duties required complex database searches. Accordingly, the scope of her permitted access to ICBC databases was within the job description and duties she was trained and authorized to fulfill.

[12] The illegally obtained personal information was used to target 13 of the 78 individuals with vandalism, arson and shootings (the "Attacks") between April 2011 and January 2012. The victims targeted in these offences were people who had parked their vehicles at the Justice Institute parking lot. The remaining 65 individuals whose personal information was accessed did not suffer any physical or property damage.

[13] In August 2011, the RCMP contacted ICBC's Special Investigations Unit in respect of its criminal investigation relating to victims of the Attacks, seeking ICBC's assistance in identifying whether there were any common links among the victims. As noted above at para. 10, ICBC ultimately determined that Ms. Rheaume had accessed the personal information of 78 individuals for no apparent business purpose. The RCMP requested that ICBC not notify Ms. Rheaume in order to maintain the integrity of the criminal investigation.

[14] ICBC has, and had at the time of Ms. Rheaume's breach, procedures, policies and mechanisms in place to preserve insureds' privacy. In addition, when she started as an employee at ICBC in July 1996, and as a condition of her employment, Ms. Rheaume reviewed ICBC's Information Security Policies and Code of Ethics, which outlines employees' responsibility to protect the privacy of customers' personal information. She also reviewed the Information Security Policy in July 2003, was trained on the relevant ICIBC Code of Ethics in September 2006 and October 2010 and on the Information Privacy Commitment in September 2008, and completed an Information and Privacy Online tutorial in October 2010.

[15] ICBC terminated Ms. Rheaume's employment on September 1, 2011 for cause due to her unauthorized access to the 78 individuals' personal information. Once the RCMP informed ICBC that it could notify those individuals who were affected by the breaches, ICBC did so, commencing on December 12, 2011. Two

sets of notifications were provided: the first group of victims were the 13 victims of the Attacks; the second group consisted of the remaining 65 individuals who did not experience harm beyond having had their personal information illegally accessed by Ms. Rheaume.

[16] On May 8, 2017, Ms. Rheaume pleaded guilty to one count of unauthorized and fraudulent use of a computer system, contrary to s. 342.1 of the *Criminal Code*, R.S.C. 1985, c. C-46: *R. v. Rheaume* (8 May 2017), New Westminster 80287-1 (B.C. Prov. Ct.). Ms. Rheaume received a suspended sentence, including nine-months' probation.

[17] Two individuals have been found criminally responsible for their involvement in the Attacks.

Alleged Breach of the *Privacy Act*

[18] The plaintiff, Mr. Ari, alleges that Ms. Rheaume breached s. 1 of the *Privacy Act* when she illegally accessed personal information of the 78 individuals. Section 1(1) of the *Privacy Act* provides that "[i]t is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another."

[19] As stated above, 65 of the 78 individuals did not suffer physical or property damages. But the plaintiff claims they suffered other pecuniary damages, including expenses for alternate accommodation; expenses for security or additional security; moving expenses; and loss of past and future income. Mr. Ari and his brother, Bayram Ari, with whom he lived at the relevant time, moved to another residence after discovering that Ms. Rheaume had accessed Mr. Ari's personal information. They moved because they no longer felt safe in their home due to Ms. Rheaume's access to Mr. Ari's personal information.

[20] There is no evidence to suggest that any of the individuals suffered identity theft as a result of Ms. Rheaume's illegal access to their personal information.

[21] The plaintiff alleges that ICBC is vicariously liable for Ms. Rheaume's illegal access to personal information of the 78 individuals.

The Proposed Class

[22] Nine other victims of Ms. Rheaume's illegal access to their personal information have contacted plaintiff's counsel in this action related to their interest in participating in the class action.

[23] Two of those victims are Annette Oliver and Sheral Marten, who have commenced their own individual actions but would prefer to participate in a class action should this action be certified. Both Ms. Oliver and Ms. Marten were victims of property damage due to Ms. Rheaume's illegal access to the personal information of the 78 individuals. Both Ms. Oliver's and Ms. Marten's actions are in abeyance by agreement of the parties pending the outcome of this certification application. If this matter is certified as a class action, then Ms. Oliver and Ms. Marten will discontinue their actions.

[24] Ms. Rheaume obtained Ms. Oliver's personal information through a direct search of her BC licence plate.

[25] Ms. Rheaume obtained the personal information of Ms. Marten's former spouse through a search of his BC licence plate. She obtained the identification of the premises where Ms. Marten lived with her former spouse. When the property damage occurred to Ms. Marten's premises, her former spouse no longer resided in the premises.

[26] The proposed class is particularized in the plaintiff's submissions as follows:

> All persons resident in British Columbia whose premises were identified wilfully and without claim of right by ICBC employee, Candy Elaine Rheaume (the "Employee"), between January 1, 2010 and December 31, 2011 (the "Class Members") contrary to s.1 of the *Privacy Act*, R.S.B.C. 1996, c.373 (the "Members").

[27] Paragraph 9 of the Current Claim makes clear that the plaintiff seeks to additionally include in the class the family members and others resident at the premises of the 78 individuals whose personal information was illegally accessed by Ms. Rheaume.

[28] The plaintiff seeks to be appointed as representative plaintiff for the proposed class.

Certification Requirements under the *Class Proceedings Act*

[29] Section 4 of the *CPA* sets out the requirements for certification of an action as a class proceeding:

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

(d) whether other means of resolving the claims are less practical or less efficient;

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

[30] Section 7 of the *CPA* identifies matters that will not bar certification:

> **7** The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

Analysis

Standard of Proof

[31] The proposed representative plaintiff, Mr. Ari, bears the burden of proof of establishing the criteria set out in the *CPA*: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 22; *AIC Limited v. Fischer*, 2013 SCC 69 at para. 48.

[32] The threshold to be met for certification is not onerous: the plaintiff must show that there is "some basis in fact" on admissible evidence for each of the certification requirements set out in s. 4(1)(b) to (e): *Hollick* at para. 25.

[33] Mr. Justice Masuhara, at para. 56 of his decision in *Seidel v. Telus Communications Inc.,* 2016 BCSC 114, described this standard as a "minimum evidentiary basis."

[34] Section 4(1)(a) is subject to a lower threshold: s. 4(1)(a) will be satisfied unless, assuming all the pleaded facts are true, it is plain and obvious that the claim cannot succeed: *Tonn v. Sears Canada Inc.*, 2016 BCSC 1081 at para. 26, citing *Seidel*; *Hollick* at para. 25.

[35] This Court performs an important gatekeeper function in certification applications. The Supreme Court of Canada stated at para. 103 of *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 that it was "worth reaffirming the importance of certification as a meaningful screening device." It is imperative not to sacrifice the ultimate goal of a just determination between the parties on the altar of expediency: *Thorburn v. British Columbia*, 2012 BCSC 1585 at para. 117, aff'd 2013 BCCA 480. My role is to ensure that there is sufficient evidence that the certification criteria are met and that the proceeding is suitable for class treatment: *Sun-Rype v. Archer Daniels Midland Co.*, 2013 SCC 58 at para. 68.

[36] The mandatory wording in s. 4 and s. 7 of the *CPA* requires that I certify the class action if the criteria are met: *Campbell v. Flexwatt Corp.* (1996), 25 B.C.L.R. (3d) 329 at para. 40 (S.C.), rev'd on other grounds (1997), 44 B.C.L.R. (3d) 343 (C.A.).

(a) Whether the Pleadings Disclose a Cause of Action

[37] As stated above at para. 34, the court will only refuse to certify an action on this ground where the claim as pleaded plainly cannot succeed: *Seidel* at para. 56; *Pro-Sys* at para. 63.

[38] The pleadings allege the following:

> In or about 2010 and 2011, at least 65 individuals including the Plaintiff had their personal information, wilfully and without claim of right, accessed b the Employee without a legitimate or authorized purpose, many of whom have had their premises, vehicles and other personal possessions made the targets of shootings, arson and other property damage. The Employee used the unlawfully obtained personal information herself, or disclosed the personal information to unauthorized third parties, who used that personal information to identify, locate and target those individuals and/or their families and other residents of their premises ….
>
> …
>
> The Employee, wilfully and without claim of right, breached the Plaintiff's and the Class Members' right to privacy contrary to, the *Privacy Act*, R.S.B.C. 1996, c. 73. At all materials times hereto, the Defendant was the employer of the Employee who, as a function of her employment duties, had access to its data bases containing the personal information of its customers , and is

> therefore vicariously liable for the breaches of privacy committed by the Employee, while employed by the Defendant. [Emphasis in original.]

[39] As stated above at para. 27, the plaintiff defines “Class members” as including not only the 78 individuals whose information was directly accessed by Ms. Rheaume, but also their family members and others resident at their premises.

[40] The plaintiff submits that the defendant has already applied to strike the plaintiff’s pleading that ICBC is vicariously liable for its employee’s breach, and that this Court has determined that the pleadings disclosed a reasonable claim for vicariously liability: *Ari v. Insurance Corporation of British Columbia*, 2013 BCSC 1308 at paras. 57-61, aff’d 2015 BCCA 468. The plaintiff submits that this Court has therefore already determined that the pleadings disclose a reasonable cause of action and this issue is *res judicata*.

[41] The defendant admits that based on the Court of Appeal’s ruling in *Ari v. Insurance Corporation of British Columbia*, cited above, the vicarious liability claim against ICBC pursuant to the *Privacy Act* for the 78 individuals whose personal information was accessed for no apparent business purpose by Ms. Rheaume is *res judicata* for the purposes of this certification application.

[42] However, the defendant maintains that two narrower issues are not *res judicata*. First, the defendant submits that there is no cause of action under the *Privacy Act* held by any individual whose personal information was not directly accessed by Ms. Rheaume. Since the plaintiff proposes a class definition that extends beyond those 78 individuals to include the family members and others resident at the premises purportedly connected to those 78 individuals, the defendant submits that it is plain and obvious that family and others resident do not have *Privacy Act* claims.

[43] The defendant further submits that the damages caused by the Attacks are not properly *Privacy Act* claims.

[44] The defendant submits that there has yet to be any judicial determination on these two issues, and therefore they are not *res judicata*.

[45] I agree with the defendant that the issues of whether there is a cause of action with respect to the family members and others resident at the premises, and with respect to whether the damages caused by the Attacks are properly *Privacy Act* claims are not *res judicata*. These questions have not yet been decided. Accordingly, I will consider whether the pleadings disclose a cause of action in respect of these two issues below.

(i) Do the family members and others resident at the premises have a cause of action under the Privacy Act?

[46] Section 1 of the *Privacy Act* provides as follows:

> 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[47] The plaintiff submits that s. 1 of the *Privacy Act* is very broad in that it is the "violation" of another's privacy that is the tort, not the method by which the violation is committed. The plaintiff submits that every person who lived at the premises that were identified through the illegal acts of Ms. Rheaume had their privacy violated pursuant to the *Privacy Act*. But for the unlawful acts, their premises would not have been identified and would not have been attacked or at risk of attack. For ease of reference, I will refer to the group of family members and others resident at the premises of the 78 individuals as the "Other Residents."

[48] The defendant submits that there is no authority for this indirect application of the *Privacy Act*, and that the only valid cause of action pursuant to s. 4(1)(a) of the *CPA* is that the 78 individuals have a *prima facie* claim based on the fact their personal information was accessed.

[49] Neither counsel for the plaintiff nor for the defendant provided me with any case that would help elucidate the issue of whether Ms. Rheaume's wrongful search engaged the Other Residents' right to privacy.

[50] Whether a person's privacy has been violated is dependent on the particular facts of each case. Adopting an explanation or definition of the term "privacy" is not determinative of the plaintiff's rights because s. 1(2) of the *Privacy Act* suggests that neither the plaintiff's right to privacy nor the defendant's obligation not to violate that right is fixed: *Davis v. McArthur* (1969), 10 D.L.R. (3d) 254 (S.C.), rev'd on other grounds (1970), 17 D.L.R. (3d) 760 (C.A.); *Milner v. Manufacturers Life Insurance Co*., 2005 BCSC 1661 at para. 74; *Heckert v. 5470 Investments Ltd*., 2008 BCSC 1298 at para. 75. The only guidance the *Privacy Act* gives to determine when someone is entitled to privacy is provided by s. 1(2): the privacy interest must be reasonable, and must take into account the lawful interests of others: *Getejanc v. Brentwood College Assn*., 2001 BCSC 822 at para. 17.

[51] Judicial consideration of the meaning of the term "privacy" in the context of the *Privacy Act*, while not determinative, is a helpful guideline: *Milner* at para. 79. At p. 254 of *Davis v. McArthur*, Mr. Justice Seaton defined the term "privacy," with reference to American jurisprudence, as follows:

> ..."the right to be let alone" and as the "right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity."
>
> It is a part of the general right of the immunity of the person. "It is like the right not to be maliciously prosecuted, the right not to be defamed." It is the right to an "inviolate personality". [Emphasis added.]

[52] The Court of Appeal agreed in an overall sense with the meaning above: *Heckert* at para. 72. At p. 763 of *Davis v. McArthur* (C.A.), Mr. Justice Tysoe

ultimately adopted the definition set out in Black's Law Dictionary, 4th ed. as "largely consonant" with s. 1 of the *Privacy Act*:

> The right to be let alone, the right of a person to be free from unwarranted publicity. [Citations omitted.] The right of an individual (or corporation) to withhold himself and his property from public scrutiny, if he so chooses. It is said to exist only so far as its assertion is consistent with law or public policy, and in a proper case equity will interfere, if there is no remedy at law, to prevent an injury threatened by the invasion of, or infringement upon, this right from motives of [curiosity], gain or malice. [Citations omitted.] [Emphasis added.]

[53] These definitions suggest that the statutory right to privacy is linked to the rightsholder's personhood or personality, and that the privacy protection of the rightsholder's property is derived from the protection of his or her personhood.

[54] It is true that an individual's expectation of privacy is highest in his or her own home: *Milner* at para. 76. But the claim of the Other Residents is not like *Milner*, where the plaintiff was subjected to surveillance while in her home: para. 70. Nor is it like *Getejanc*, where the defendant entered the plaintiff's home without invitation and while the plaintiff was not present: para. 1.

[55] Rather, in this case Ms. Rheaume wrongfully accessed the residential addresses of the Other Residents. Contrary to the plaintiff's argument, Ms. Rheaume did not *identify* any of the Other Residents. There was no personal identifier linking the Other Residents to their wrongfully accessed residential addresses. The information accessed by Ms. Rheaume did not touch on the personhood of the Other Residents. Therefore, while the 78 individuals—whose names, addresses, driver's license numbers, vehicle descriptions, vehicle identification numbers, licence plate numbers and claims histories were accessed—have a cause of action for breach of privacy under the *Privacy Act*, the Other Residents, who were not personally identified in that fashion, do not.

[56] Further, s. 1(1) of the *Privacy Act* requires that, for an act to be a violation of privacy, it must have been committed "wilfully and without a claim of right."

[57] Ms. Rheaume certainly did not have a claim of right.

[58] In *Hollinsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121 (C.A.) at para. 29, Lambert J.A. defined “wilfully” as follows:

> 29 … In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person….[Emphasis added.]

[59] In *Hollinsworth*, the plaintiff’s hair graft surgery was filmed. The plaintiff signed a release consenting to the use of the video for medical purposes only. BCTV later aired the video as part of a feature on baldness, which showed an unmistakable likeness of the plaintiff. The plaintiff alleged a breach of privacy under the *Privacy Act*, among other causes of action. The Court of Appeal held that the defendant did not violate the plaintiff’s privacy “wilfully” because it had no way of knowing that the plaintiff did not consent to its use of the video: paras. 24-26, 29-31.

[60] Similarly, Ms. Rheaume’s disclosure of the Other Residents’ residential addresses was not wilful because she had no way of knowing that the Other Residents resided at their respective addresses.

[61] She knew only that the 78 individuals resided at the addresses she obtained from her wrongful search of those individuals directly. She ought to have known that there was a possibility that others resided at the addresses of the 78 individuals. However, the question is whether or not Ms. Rheaume intended to do an act that she knew or ought to have known would violate the privacy of the Other Residents in particular: *Getejanc* at para. 23. She had no way of knowing that the Other Residents in particular resided at those addresses, because she never identified the Other Residents.

[62] I acknowledge that the law must be allowed to evolve, and I must err on the side of permitting a novel but arguable claim to proceed*: Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21. However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and

arguable extension of established law: *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at para. 130, aff'd 2013 ONCA 657.

[63] Is it clear and obvious that the cause of action in respect of the Other Residents cannot succeed, given that their privacy rights are not engaged and have not been violated. The claim in respect of the Other Residents therefore does not disclose a cause of action under s. 4(1)(a) of the *CPA*.

(ii) Do the damages caused by third parties' acts of arson, vandalism and shooting disclose a cause of action under the Privacy Act?

[64] Under tort law, a defendant will not be liable for damages resulting from its wrong if the damages were caused by a third party's intervening act constituting a *novus actus interveniens*. The test is whether or not the accident can be said to be the natural and probable result of the breach of duty: *Hadley v. Baxendale* (1854), 156 E.R. 145 (Eng. Ex. Div.). More specifically, the question to be determined is whether the intervening act would have been foreseeable to a reasonable person in Ms. Rheaume's position. If so, then the intervening act is not a *novus actus interveniens*, and Ms. Rheaume would be liable for the damages caused by the criminal acts of the third parties. But if the intervening act was not foreseeable to a reasonable person in Ms. Rheaume's position, then the intervening act of the third party would break the line of causation and relieve Ms. Rheaume of liability: *Jones v. Shafer*, [1948] S.C.R. 166 at 170-171.

[65] The defendant submits that the targeting of the 13 victims of the Attacks occurred independently of Ms. Rheaume and without her knowledge or involvement, and therefore it is plain and obvious that Ms. Rheume's conduct was not "wilful" with respect to those incidents. The defendant submits that the Attacks were unforeseeable consequences caused by a third party, and that Ms. Rheaume cannot be held liable for the resulting damage. The defendant submits that since this element of the tort is not established, there is no cause of action in respect of the 13 victims of property damage.

[66] Conversely, the plaintiff submits that but for Ms. Rheaume's unlawful acts, the premises of the 13 victims would not have been identified and would not have been attacked or at risk of attack. The plaintiff submits that it was foreseeable that damages could be caused to all of the residents of the targeted premises as a result of the privacy breaches. The plaintiff submits that Ms. Rheaume knew she was giving the personal information of the 78 individuals to someone who ran a "marihuana grow operation" so that he could see if vehicles in the area were "associated with police." The plaintiff submits that Ms. Rheaume therefore knew she was being paid to provide information to a criminal organization for a nefarious purpose. The plaintiff submits that a reasonable person in Ms. Rheaume's position would have known or ought to have known that the party she was giving the information to was going to use the information himself or in association with others associated with his criminal enterprise. The plaintiff submits that it is immaterial that Ms. Rheaume may not have known the specific nefarious purpose for which the information was being used or who in particular was actually going to cause the damage.

[67] The defendant has referred me to three cases in support of its position. In *Aquarium Restaurant Ltd. v. Newfoundland Propane Ltd.*, 13 A.C.W.S. (2d) 473 (Nfld. S.C.), a propane pipe was installed improperly on a hot water heater on the outside of a restaurant. An unknown passerby walked by the heater in the alley, applied force to the pipe and broke it. The resultant break caused a fire that damaged the restaurant. The restaurant sued the pipe installation company for the damage from the fire. The court ruled that the doctrine of *novus actus interveniens* applied because it was not foreseeable to a reasonable person in the defendant's position that a third party would come along and wilfully apply force to the pipe. The considerable amount of force that was required to move the pipe was a factor in the court's determination that the defendant could not have foreseen that a third party would break the pipe: paras. 81-84.

[68] The second case the defendant refers to is *Petriew v. Tricom Electronic Ltd.*, 61 Sask. R. 304 (Q.B.). There, chattels were brought to the defendant's warehouse

to be repaired. While the chattels were sitting in the warehouse, a third party broke into the warehouse and started a fire. The warehouse did not have an active fire alarm and the chattels were destroyed. The owner of the chattels sued the warehouse, but was unsuccessful. The doctrine of *novus actus interveniens* applied because it was not the acts of the defendant warehouse that had caused the losses, but the act of the unauthorized third party who broke in and set fire to the warehouse: para. 13. The warehouse was not responsible for the damage to the chattels.

[69] The third case the defendant refers to is *Garratt v. Orillia Power Distribution Corp.*, 2008 ONCA 422, leave to appeal ref'd [2008] S.C.C.A. No. 344. In that case, a spider rope was secured to an overpass by a construction crew. The crew vacated the overpass for lunch and properly secured the rope. While the crew was on lunch, an unknown vandal came and dislodged the spider rope. It fell onto traffic below and hit the hood of the plaintiff's car. The plaintiff sustained injuries and sued the defendant. The Ontario Court of Appeal reversed the trial judge on the issue of foreseeability, holding at paras. 61-66 that it was not foreseeable that a third party vandal would randomly detach the rope so it would fall into traffic.

[70] In each of the cases cited above, the third party vandal was a stranger with no connection whatsoever to the defendant. This is distinguishable from the case at bar, since Ms. Rheaume had some tenuous connection, albeit indirectly through her friend, Aldorino Moretti ("Mr. Moretti"), to the third parties who committed the Attacks. According to para. 8 of the Agreed Statement of Facts in *R. v. Rheaume*, Ms. Rheaume disclosed to an undercover operator during an undercover investigation into the Attacks that she had queried licence plates for

> … her friend [Mr.] Moretti. She explained that Moretti ran marijuana grow operations, and asked her to query nearby licence plates to see if vehicles in the area were associated with police. She disclosed that she generally received $25/plate, but admitted to receiving greater payment in some instances.

[71] According to paragraph 9 of the Agreed Statement of Facts, the investigators concluded that neither Ms. Rheaume nor Mr. Moretti had knowledge that the licence plate information was used to carry out targeted attacks. But whether or not Ms. Rheaume knew that the Attacks would take place is not at issue. What is at issue is whether the Attacks were foreseeable.

[72] I accept the plaintiff's argument that Ms. Rheaume knew that she was supplying the personal information of the 78 individuals to someone involved with a criminal enterprise (the marijuana grow operation), and that it would have been foreseeable to a reasonable person in her position that the information she supplied could have been put to a nefarious purpose.

[73] The issue then is whether the Attacks fall within the ambit of the risk of such a "nefarious purpose."

[74] In *Haynes v. Harwood*, [1935] 1 K.B. 146 at 156, Greer L.J. stated,

> If what is relied upon as *novus actus interveniens* is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence ...
>
> It is not necessary to show that this particular accident and this particular damage were probable; it is sufficient if the accident is of a class that might well be anticipated as one of the reasonable and probable results of the wrongful act.

[75] As stated above, the privacy right protected by the *Privacy Act* has been defined as "the right to be let alone, the right of a person to be free from unwarranted publicity… The right of an individual … to withhold himself and his property from public scrutiny, if he so chooses:" *Davis v. McArthur* (C.A.) at 763. Surely the right to be let alone includes keeping oneself free from criminal attacks on his or her person or property.

[76] The privacy right that Ms. Rheaume allegedly breached is meant to protect against occurrences such as the Attacks, which are the very essence of an intrusion into an individual's privacy. Further, as mentioned above, it is not necessary to establish that Ms. Rheaume ought to have foreseen the Attacks in their particularity,

or that she ought to have foreseen the particular damage that in fact occurred. It is sufficient that Ms. Rheaume ought to have foreseen that the Attacks were of a class that might be anticipated as a reasonable and probable result of her wrongful act. Here, Ms. Rheaume knew she was providing the information to an individual involved in a criminal enterprise. It may well have been reasonably foreseeable that the impugned information would be put to a criminal purpose. The Attacks fall within that class.

[77] This is not a determination on the merits; whether the intervening Attacks were reasonably foreseeable to someone in Ms. Rheaume's position is to be determined at the trial of the issues. However, I determine that it is not plain and obvious that the plaintiff's claim in respect of the property damage caused by the Attacks cannot succeed: *Hollick* at para. 25. The claim in respect of the property damage therefore discloses a cause of action for the purpose of s. 4(1)(a) of the *CPA*.

[78] I conclude that the causes of action disclosed in the pleadings include the claims of the 78 individuals who hold a *prima facie* claim for breach of privacy under the *Privacy Act*, as well as the claims for property damage caused by the third party Attacks.

(b) Whether there is an identifiable class of 2 or more persons

[79] For an action to be certified as a class proceeding, there must be an "identifiable class of 2 or more persons:" s. 4(1)(b) of the *CPA*. To satisfy the identifiable class requirement, the plaintiff must establish "some basis in fact" that two or more persons will be able to determine that they are in fact members of the class: *Sun-Rype* at para. 52; *Hollick* at para. 25.

[80] The plaintiff's proposed class definition includes not only the 78 individuals whose personal information was wrongfully accessed, but also the Other Residents. Given my determination that the Other Residents do not have a cause of action, the class cannot include the Other Residents.

[81] The class therefore includes the 78 individuals who have been identified by ICBC as having had their personal information accessed for non-business purposes by Ms. Rheaume (the "Class Members"). The plaintiff has demonstrated that there is some basis in fact that two or more persons will be able to determine that they are in fact members of the class: John Edwards—a section manager of the ICBC Special Investigation Unit and special constable pursuant to the *Police Act*, R.S.B.C. 1996, c. 367, at ICBC—confirms that ICBC has determined that Ms. Rheaume accessed the personal information of 78 individuals for no apparent business purpose. This is an objective criterion by which all members of the class can be identified, and it bears a rational relationship to the common issues asserted by all class members: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38. The plaintiff has been identified by ICBC as being one of those individuals.

[82] However, the defendant submits that the proposed class consists of two groups of individuals: (1) those 13 individuals whose premises received property damage ("Group 1"); and (2) those 65 individuals whose premises were not subjected to property damage ("Group 2").

[83] The defendant takes issue with the fact that no subclass has been proposed pursuant to s. 6(1) of the *CPA*.

[84] Section 6(1) of the *CPA* provides as follows:

> **Subclass certification**
>
> **6** (1) Despite section 4 (1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who
>
> (a) would fairly and adequately represent the interests of the subclass,
>
> (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding, and
>
> (c) does not have, on the common issues for the subclass, an interest that is in conflict with the interests of other subclass members.

[85] I accept that the proposed class consists of two groups, and therefore it is appropriate for those individuals in Group 1 to constitute a subclass within the class (the "Subclass Members"). This is appropriate where, as here, there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members: *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.J.) at para. 45. The court has discretion to certify a class proceeding where there are some members of the class with common issues that are not shared by all members of the class: James Sullivan, *A Guide to the British Columbia Class Proceedings Act*, Vancouver: Butterworths Canada, 1997 at 37.

[86] The issues that are common to the Subclass Members but not common to the class as a whole are in respect of the property damage that resulted from the Attacks inflicted on the Subclass Members: (a) whether the Attacks were unforeseeable intervening acts such that Ms. Rheaume is not liable for the property damage that resulted from the Attacks; and (b) if the Attacks were foreseeable, whether the Subclass Members are entitled to damages.

[87] It is not necessary for a separate representative plaintiff to be in place before each of the class and subclass is established. When a class proceeding is certified, the representative plaintiff for the subclass may be the same person as the representative plaintiff for the class, provided that he or she has no conflict of interest and can fairly and adequately represent the interests of the subclass: *Pearson v. Boliden Ltd*., 2001 BCSC 1054 at paras. 73-75, rev'd on other grounds 2002 BCCA 624. I find that Mr. Ari has no conflict of interest with the subclass and can fairly and adequately represent the interests of the subclass. Therefore, the formation of the subclass is not a bar to certification. The plaintiff can at a future time apply to amend to substitute another representative plaintiff for the subclass.

[88] The defendant also raises two issues with respect to the Subclass Members. First, the defendant argues that the *Privacy Act* does not apply to the unforeseeable criminal acts of third parties. I reject this argument on the basis of my determination

above that the claim for property damage caused by the Attacks discloses a cause of action. Second, the defendant argues that the Subclass Members have already been fully compensated for their property damage. This is an issue that is individual to each Subclass Member and can be determined after the trial of the issues.

(c) Whether the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members

[89] Section 4(1)(c) of the *CPA* requires that "the claims of the class members raise common issues…." The central element of a class proceeding is the element of commonality between the claims of the proposed representative plaintiff and the class members. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. The common issues must significantly advance the claims of each class member to be certifiable under the *CPA*: *Pro-Sys* at paras. 106, 108 & 139.

[90] It is not essential that the class members be identically situated vis-à-vis the opposing party. But success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent: *Pro-Sys* at para. 108. It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues. The analysis of commonality is purposive: *Pro-Sys* at para. 108.

[91] As mentioned above, there must be evidence to establish "some basis in fact" that each of the proposed common issues is common to all class members: *Hollick* at para. 25; *Pro-Sys* at para. 110; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 143, aff'd 2015 BCCA 252.

[92] The plaintiff submits that there are several issues common to all the potential class members including:

(i) Whether the Employee breached the Members' privacy pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373:

a. When she identified Members' residences by obtaining their personal information wilfully and without a claim of right from the ICBC data bases?

b. When she identified Members' residences by obtaining the personal information of a family member or other resident of the premises [wilfully] and without a claim of right from the ICBC data bases?

(ii) Whether the Members are entitled to general damages based on the Employee's breach of the *Privacy Act*?

(iii) Whether the Members are entitled to pecuniary damages for losses suffered and expenses incurred due to the Employee's breach of the *Privacy Act*?

(iv) Whether ICBC is vicariously liable for the general damages and pecuniary damages caused by the Employee's breaches of the *Privacy Act*?

(v) Whether ICBC's conduct in the circumstances of the Employee's breaches of the *Privacy Act* justifies an award of punitive damages against ICBC, and if so, what amount of punitive damages is appropriate?

Issue (i)(b)

[93] Given my determination that the Other Residents do not have a cause of action, I decline to certify Issue (i)(b).

Issues (i)(a), (ii), (iii), and (iv)

[94] There is evidence that Ms. Rheaume wrongfully accessed the personal information of the Class Members during the time she was employed by ICBC. This evidence is sufficient to establish some basis in fact that Issues (i)(a), (ii), (iii), and (iv) are common to all Class Members.

Issue (v)

[95] The defendant disputes the commonality of Issue (v) – whether ICBC's conduct in the circumstances of Ms. Rheaume's breaches of the *Privacy Act* justifies an award of punitive damages against ICBC, and if so, what amount of punitive damages is appropriate?

[96] Punitive damages are not to compensate the plaintiff. When they are awarded, punitive damages are to be assessed in an amount reasonably proportionate to a number of factors, including the degree of misconduct of the defendant, any other penalties suffered by the plaintiff for the misconduct in question, the harm caused to the plaintiff and the relative vulnerability of the plaintiff. Therefore, punitive damages should only be awarded where the compensatory damages award is insufficient to achieve the objectives of retribution, deterrence and denunciation, "in an amount that is no greater than necessary to rationally accomplish their purpose:" *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 94, 123; *Koubi v. Mazda Canada Inc.*, 2010 BCSC 650 at para. 152, rev'd on other grounds 2012 BCCA 310.

[97] The defendant first submits that the plaintiff is inconsistent in the way he frames the common issue of punitive damages. The Notice of Application frames the questions as follows:

> (v) Whether ICBC's conduct in the circumstances of the Employee's breaches of the *Privacy Act* justifies an award of punitive damages against ICBC, and if so, what amount of punitive damages is appropriate? [Emphasis added.]

[98] [4] On the other hand, the Current Claim frames the question as follows at Part 1, paragraph 12:

> The Plaintiff states that the conduct of the Employee, for which the Defendant is vicariously liable, was wilful, arrogant, callous, and high-handed and constituted a gross violation of the privacy rights of the Plaintiff and the Class Members. The [P]laintiff submits that this is therefore an appropriate case for punitive, aggravated and/or exemplary damages. [Emphasis added.]

[99] With respect to the way the issue is framed in the pleadings, the defendant argues that the plaintiff's claim that he is entitled to punitive damages arising from ICBC's vicarious liability for Ms. Rheaume's conduct is contrary to law. The defendant submits that punitive damages may not be awarded in the absence of reprehensible conduct specifically referable to the employer: *Blackwater v. Plint*,

2005 SCC 58 at paras. 90-92. I agree that punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to ICBC in this case.

[100] With respect to the way the issue is framed in the Notice of Application, the defendant submits that the plaintiff has failed to satisfy the "some basis in fact" requirement for the common issue of punitive damages, because the plaintiff has failed to adduce any evidence of misconduct, rising to the level that may warrant punitive damages, committed by ICBC.

[101] The defendant submits that ICBC is statutorily compelled to possess and maintain insureds' personal information in order to fulfill its public purpose. The defendant submits that ICBC was a victim of criminal acts on the facts of this case.

[102] I agree that there is no evidence of misconduct on the part of ICBC here. On the contrary, there is evidence that upon being made aware of potential wrongdoing, ICBC assisted the police with its investigation and performed its own internal investigation; and upon discovering Ms. Rheaume's wrongful conduct, ICBC terminated Ms. Rheaume's employment. In addition, ICBC undertook various measures to ensure enhanced security, and fully compensated the 13 victims of property damage (the Subclass Members) for all motor vehicle insurance claims, including deductible payments. On this basis, I accept the defendant's submission that the plaintiff has failed to establish that there is "some basis in fact" that ICBC's conduct justifies an award of punitive damages.

[103] Thus, I decline to certify Issue (v) because firstly, punitive damages cannot be awarded in the absence of reprehensible conduct specifically referable to ICBC; and secondly, the plaintiff has not established "some basis in fact" that ICBC's conduct justifies an award of punitive damages.

[104] Notwithstanding my decision, I will briefly consider the defendant's further argument that the issue of punitive damages is unsuitable for common resolution because it will have to await the disposition of the individual issues of other heads of damages. This is because an appropriate award of punitive damages can be

calculated only after compensatory damages have been determined, so as to determine whether compensatory damages adequately achieve the objectives of retribution, deterrence and denunciation: *Whiten* at para. 94.

[105] The defendant also submits that ICBC's conduct in this case cannot be examined without reference to the individual circumstances of each proposed Class Member. The defendant cites Donald J.A.'s observation in *Fakhri v. Wild Oats Markets Canada*, 2004 BCCA 549 that there are two stages for determining a punitive damages claim: first, an assessment of the defendant's behaviour to ascertain whether it is deserving of a punitive response; and second, an examination of the effect of the defendant's behaviour on the individual class members: para. 23; *Koubi* at para. 151.

[106] This is correct. However, in *Fakhri*, where the defendant sold food products tainted by the Hepatitis A virus from an infected employee, the Court of Appeal observed that the facts were likely to be similar in most claims among the class members. Thus, the court determined that the first stage of the analysis—assessment of the defendant's behaviour to ascertain whether it was deserving of a punitive response—was an appropriate common issue: *Koubi* at para. 153.

[107] *Rumley v. British Columbia*, 2001 SCC 69 dealt with the certification of an action against the provincial government in connection with sexual, physical and emotional abuse of students by staff at a residential school for deaf children. In that case, the Supreme Court of Canada also determined that it was appropriate to certify the punitive damages issue as a common issue, on the grounds that the plaintiff's negligence claim was advanced as a general proposition, rather than by reference to conduct specific to any one plaintiff: para. 34.

[108] In *Koubi,* Madam Justice Dardi distinguished the facts from those of *Fakhri*. Madam Justice Dardi observed,

> 154 This is a case in which, given its very particular nature, the defendants' conduct cannot be considered in isolation from the individual circumstances of particular claimants. The relative incidence of theft from

> auto is variable across different communities. While individuals in one community may face a high incidence of such crime, others do not. There is no basis in the evidence to suggest any uniformity in the extent to which individuals in various localities may have been affected. The assessment of the reasonableness of the defendants' conduct and whether it can be characterized as "harsh, vindictive, reprehensible, or malicious" cannot fairly be separated from this consideration.
>
> 155 There is an absence of commonality necessary for a common issue. The results of the inquiry as to whether, in any particular circumstances, the defendants acted in a highhanded or reprehensible manner cannot be extrapolated to the experiences of other members of the proposed class. Therefore, in the particular circumstances of this case, the question of whether punitive damages would serve a rational purpose cannot be determined until after individual issues of causation and compensatory damages.

[109] Madam Justice Dardi concluded that while there may be cases where at the common issues trial the court would be in a position to determine entitlement to punitive damages, *Koubi* is not one of those cases.

[110] In my estimation, the case at bar is one of those cases that Madam Justice Dardi referred to in *Koubi*. There is not the same variability among Class Members here that was present in *Koubi*. Rather, Ms. Rheaume performed the same wrongful act against each Class Member. The claim of breach of privacy is not advanced by reference to conduct specific to any one plaintiff, and the facts are likely to be similar in most claims among the Class Members. Therefore, this case may be one where certification of the punitive damages issue as a common issue would be appropriate, were it not for my determination that there is no “basis in fact” for any finding of misconduct on the part of ICBC, let alone conduct so reprehensible or highhanded as to warrant an award of punitive damages.

Issues common to the Subclass Members

[111] Given my determination that there is a cause of action with respect to the property damage caused by the Attacks, there are two issues common to the Subclass Members, in addition to the issues common to all Class Members:

(i) Whether the Attacks were unforeseeable intervening acts such that Ms. Rheaume is not liable for the property damage the Subclass Members suffered as a result of the Attacks; and

(ii) If the Attacks were foreseeable, whether the Subclass Members are entitled to damages.

Individual assessment of damages

[112] Section 7(a) of the *CPA* provides that I must not refuse to certify this proceeding as a class proceeding merely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. Accordingly, the fact that this proposed class proceeding will involve the assessment of damages as individual issues is not a bar to certification.

(d) Whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues

[113] The plaintiff bears the burden of establishing that there is some basis in fact that a class proceeding is the preferable procedure for resolving the common issues raised in the action: *Fischer* at para. 1.

[114] According to the Supreme Court of Canada's decision in *Hollick*, the preferable procedure analysis consists of two questions:

(1) Would the class proceeding be a fair, efficient and manageable method of advancing the claim?

(2) Would a class proceeding be preferable to all reasonably available means of resolving the class members' claims?

[115] The analysis must be conducted through the lens of the three principal goals of class proceedings: access to justice, judicial economy, and behaviour modification: *Hollick* at paras. 28-31.

[116] The plaintiff submits that a class proceeding is preferable because the resolution of the common issues will significantly resolve the important aspects of every single Class Member's claim.

[117] The defendant submits that the plaintiff's claims for expenses will be necessarily individualistic and lengthy individual trials would ensue. The defendant's main argument is that the certification application should fail because the common issues will be overwhelmed by the individual issue of the quantification of damages. The defendant cites *Vaugeois v. Budget Rent-A-Car of B.C. Ltd*., 2017 BCCA 111 for this proposition.

[118] *Vaugeois* dealt with an appeal of a decision dismissing an application for certification of a class action against a car rental company for its alleged systematic practice of improperly charging or over-charging consumers for auto body and window repair costs. In the court below, the application judge had determined that individual questions of fact surrounding an individual's rental of a vehicle overwhelmed the common issues, and separate hearings for liability were necessary: para. 8.

[119] There is no such necessity in the case at bar. Liability will be established on the common issues. The individual issues of damages quantification are not likely to require lengthy individual inquiries into questions of fact.

[120] Class members' credibility was also central to the determination of liability in *Vaugeois*: para. 13. This is not so in the case at bar, where Class Members' credibility will have little significance to the determination of the quantum of damages.

[121] In addition, and as the defendant itself submits, the determination of whether the preferable procedure criterion is satisfied depends on the facts and circumstances of each case. Decisions in other cases are of limited utility, and do not create a presumption in favour of certification: *Miller v. Merck Frosst Canada Ltd*., 2013 BCSC 544 at para. 22, aff'd 2015 BCCA 353.

[122] I do not accept that the individual issues overwhelm the common issues in this case. The common issues will resolve all issues of liability. The individual issues will only concern the determination of quantum of damages. Some of the Class Members will only have claims for compensation for breach of the *Privacy Act*, and thus will not require any determination of individual issues. Those Class Members that do have claims for security and moving-related expenses are likely to have modest claims. These can be dealt through an individual claims determination process pursuant to s. 27(3) of the *CPA*. The most substantial claims are likely to be for property damage suffered by the Subclass Members. However, there are only 13 Subclass Members. If these claims necessitate individual trials, this will still not negate the preferability of a class proceeding to resolve the common issues.

[123] The defendant submits that the Class Members have other available methods to advance their claims. However, I agree with the plaintiff that administrative remedies under *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c.165 do not provide compensation to victims and are therefore not a reasonable alternative to a civil action.

[124] The defendant submits that Class Members could bring individual civil actions against the unnamed defendants—that is, the perpetrators of the crimes at issue in this case: Ms. Rheaume, and the two accused who have been criminally convicted for their involvement in the Attacks, among others. The plaintiff submits that a class proceeding is preferable to this alternative because the damages sought are such that it would be difficult for the Class Members to maintain individual actions in respect of this complex and novel litigation.

[125] The plaintiff claims expenses such as increased security, moving expenses, and the cost of other arrangements made while feeling threatened as a result of the privacy breaches. Even in the absence of such expenses, compensation can be awarded in the face of a *prima facie* breach of the *Privacy Act*. But such damages are generally nominal to modest, ranging from $1,000 for breach of privacy in a case where ICBC hired a private investigator who exceeded his authority when he called

the plaintiff's wife to ask personal questions about the plaintiff (*Insurance Corporation of British Columbia v. Somosh* (1983), 51 B.C.L.R. 344), to $15,000 for both breach of privacy and breach of confidentiality in a case where a cosmetic hair transplant patient's surgery was filmed for medical purposes, but was later aired on television for a feature on baldness without the plaintiff's knowledge or consent: *Hollingsworth*.

[126] The plaintiff did not provide me with case authorities to support the proposition that a class proceeding is preferable where modest damages are sought so I have taken it upon myself to locate such authorities. They follow below.

[127] In *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128 Strathy J. held that where the claims of the class members are likely to be fairly modest and might not be pursued in the absence of a class proceeding, a class proceeding will promote judicial economy: at para. 24. Further, a class action proceeding may be preferable because it would make smaller claims viable by spreading the cost of legal fees across a larger number of plaintiffs: *Sorotski v. CNH Global N.V.*, 2007 SKCA 104 at paras. 67-68, leave to appeal ref'd [2007] S.C.C.A. No. 590. I agree with the plaintiff that the class proceeding will enhance access to the courts for the Class Members.

[128] The defendant also submits that the actual loss or special damages claims of the Subclass Members have been fully resolved by ICBC. The plaintiff replies that even if they have been fully compensated for their property damage, which is not admitted, none of the Subclass Members have been compensated for their breach of privacy.

[129] Finally, the defendant submits that there is no behaviour modification benefit in this case because ICBC did everything it should have done in response to Ms. Rheaume's wrongful act. While I have found no misconduct on the part of ICBC in response to Ms. Rheaume's wrongful act, there is evidence that at least seven other former ICBC employees were terminated with cause for privacy breaches from 2008-2011. Certainly the basis of an argument exists for the plaintiff to say that

ICBC should look more closely at the trustworthiness of its employees and their access to confidential information.

[130] One other Class Member, Ms. Oliver, apparently has a claim held in abeyance, but would prefer to join the class if this action is certified. This being the only evidence on the matter, there does not appear to be a contentious issue of whether a significant number of Class Members have a valid interest in individually controlling the prosecution of separate actions.

[131] In conclusion, I am satisfied that a class proceeding is the preferable procedure in this case because it provides a fair, efficient and manageable method of determining the common issues and advances the proceeding in accordance with the goals of judicial economy, access to justice and behaviour modification.

(e) Whether there is a representative plaintiff who

(i) would fairly and adequately represent the interests of the class

[132] I accept that Mr. Ari is capable of fairly and adequately representing the interests of both the class and subclass. ICBC has confirmed that Mr. Ari had his personal information unlawfully accessed by Ms. Rheaume. He has retained counsel and pursued this litigation. He confirms that he is willing to devote the requisite time and effort to see the proceedings through to completion.

(ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding

[133] The defendant disputes that Mr. Ari's Proposed Plan for the Proceeding (the "Litigation Plan") is sufficiently workable.

[134] The *CPA* expressly requires that plaintiffs have a proper litigation plan for advancing the proceedings. It must set out a workable framework for the proceeding and demonstrate that the plaintiff and his counsel have adequately considered the complexities involved in the litigation and have "a plan to address those

complexities:" *Koubi* at para. 195; *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 223.

[135] In order to be workable, a litigation plan must provide a feasible method for approaching determination of the individual issues after the common issues are resolved—if they are resolved in the plaintiff's favour: *Miller* at paras. 214-215. Additionally, the litigation plan put forward by the plaintiff must be fair to the defendants and cannot create or abrogate substantive rights: *Miller* at para. 218; *Caputo* at para. 50.

[136] However, the plan does not have to be complete at the certification stage; a plan can be found to be workable even if it is sketchy at the certification hearing: *Harrington v. Dow Corning Corp*. (1996), 22 B.C.L.R. (3d) 97 at 114 (S.C.), aff'd 2000 BCCA 605.

[137] The plaintiff proposes in his Litigation Plan that if any or all of the common issues are resolved in favor of the class and judgment is pronounced for the plaintiff, a case management hearing will be held as soon as possible following the judgment. At the hearing, both parties will be at liberty to make submissions regarding the methodology for resolving the remaining issues. The plaintiff will ask the trial judge to establish an individual claims determination process pursuant to s. 27(3) of the *CPA*, and to appoint a referee to manage that process pursuant to s. 27(1)(b) of the *CPA*.

[138] The defendant submits that the individual issues of quantification of damages will require full discovery and trial on an individual basis. The defendant submits that it will be impossible to deal with the nature of the individual issues through a referee, and that determining what subjective damages a person has suffered is an inquiry within the expertise of a court. The defendant cites *Keatley Surveying Ltd. v. Teranet Inc*., 2012 ONSC 7120, rev'd on other grounds 2014 ONSC 1677 (Div. Ct.) in this regard.

[139] *Keatley* was a certification application in which the plaintiff alleged that the defendant's electronic land title business was an infringement of the proposed class members' copyright in their plans of survey under the *Copy Right Act*, R.S.C. 1985, c. C-42. The motions judge determined that there was no single common issue that would significantly advance the litigation for the class because proof of infringement was necessarily an individual issue. The motions judge determined that the case was overwhelmed by individual issues: para. 222. This was central to the motion judge's determination that the litigation plan was deficient. The judge concluded, "there is no manageable basis on which the individual issues in this case could be resolved. Proving the single cause of action will require an individual inquiry into each person's consent:" para. 248.

[140] The case at bar is distinguishable. Proving Ms. Rheaume's alleged breach of the *Privacy Act* and ICBC's alleged vicarious liability for that breach will not require any individual inquiry in respect of the Class Members. Thus, as determined above, resolution of the common issues will significantly advance the litigation. The only individual issues to be determined after the common issues are resolved, in the event the plaintiff is successful, will be issues of quantum of damages.

[141] Some of the Class Members will only bring claims for general damages for breach of the *Privacy Act*. These will not require any individual inquiry, as general damages are available without proof of damage under the *Privacy Act*. Other Class Members will bring claims for security and moving-related expenses. Many of these are likely to be modest claims, like that of the plaintiff. Modest claims for expenses will not require lengthy individual trials, and can be resolved by a referee through an individual claims determination process pursuant to s. 27(3) of the *CPA.* With respect to claims for expenses that are substantial, and for claims for property damage caused by the third party Attacks, I agree that these claims may require individual trials. However, given the maximum of 78 Class Members' claims for general damages, the maximum of 13 claims for property damage, and the likelihood that many expenses claims will be modest, the number of individual

assessments will not be unmanageable. This is not a case like *Caputo*, where there could have been as many as 15 million class members.

[142] I accept the defendant's submission that if certification is granted, a press release is not necessary. ICBC is capable of providing the names and contact information of the 78 individuals whose personal information was accessed to counsel for the plaintiff. This approach will be sufficient.

[143] The defendant also objects to the timelines of the exchange of expert reports set out in the litigation plan. The plaintiff seeks exchange of expert reports within 12 months of the prospective Certification Order at paragraph 11 of the Litigation Plan. However, the plaintiff does not provide any justification for why the Court should depart form the timeline set out in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 in this case. I agree with the defendant that the regular exchange timeline of 84 days in advance of trial is appropriate.

[144] In conclusion, it is likely, and common, that the Litigation Plan will require amendments as the case proceeds and the nature of the individual issues are demonstrated by class members: *Basyal v. Mac's Convenience Stores Inc*., 2017 BCSC 1649 at para. 186. Further, shortcomings can be addressed through case management: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at para. 256. I am satisfied that the Litigation Plan is sufficient and not a bar to my finding that the plaintiff has satisfied the requirements of s. 4(1)(e).

(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members

[145] I accept that Mr. Ari does not have, on the common issues, an interest that is in conflict with the interests of the other Class Members or with the Subclass Members. Any contentious issues amongst the Class Members, or between the Class Members and the Subclass Members, will relate to division of proceeds, if any are obtained, and not to the common issues which need to be litigated in this proceeding.

Conclusion

[146] I am satisfied with respect to the following:

[147] The plaintiff has satisfied the requirements of s. 4(1) of the *CPA*.

[148] A class proceeding will substantially advance this litigation, including the question of common issues, having regard to the principles of judicial economy, access to justice, and behaviour modification.

[149] Consequently, I make the following orders:

1. I certify this action as a class proceeding.

2. The plaintiff has demonstrated that the pleadings disclose a cause of action in respect of (a) ICBC's alleged vicarious liability for Ms. Rheaume's alleged breach of the *Privacy Act*; and (b) the property damages caused by the third party Attacks.

3. The class is defined as:

   > The 78 individuals who have been identified by ICBC as having had their personal information accessed for non-business purposes by Ms. Rheaume.

4. There will be a sub-class of the 13 individuals who have been identified by ICBC as having had their personal information accessed for non-business purposes by Ms. Rheaume, and whose premises received property damage caused by the third party Attacks.

5. Mr. Ari is appointed as Representative Plaintiff for both the Class and the Subclass.

6. The issues set out in Schedule "A" are certified as common issues.

7. The plaintiff's proposed form and method of notice to the Class Members to notify them of the certification of the class proceedings is approved.

    (i) ICBC must provide notice to the 78 individuals whose personal information was wrongfully accessed by Ms. Rheaume.

    (ii) Notice is to be provided within 60 days after the certification order.

8. Persons who are resident in British Columbia on the date of certification and who wish to opt out of this class proceeding may do so by delivering the court approved opt out form to class counsel on or before 90 days from the date that the Class Members are notified.

"Russell J."

_____

The Honourable Madam Justice Russell

Schedule "A"

Certified Common Issues of the Class

(i) Whether the Employee breached the Members' privacy pursuant to the *Privacy Act*, R.S.B.C. 1996, c. 373 when she accessed Class Members' personal information wilfully and without a claim of right from the ICBC data bases.
(ii) Whether the Members are entitled to general damages based on the Employee's breach of the *Privacy Act*.
(iii) Whether the Members are entitled to pecuniary damages for losses suffered and expenses incurred due to the Employee's breach of the *Privacy Act*.
(iv) Whether ICBC is vicariously liable for the general damages and pecuniary damages caused by the Employee's breaches of the *Privacy Act*.

Certified Common Issues of the Subclass

(i) Whether the Attacks were unforeseeable intervening acts such that Ms. Rheaume is not liable for the property damage the Subclass Members suffered as a result of the Attacks.
(ii) If the Attacks were foreseeable, whether the Subclass Members were entitled to damages.