CITATION: Speevak v. Canadian Imperial Bank of Commerce, 2010 ONSC 1128
COURT FILE NO.: 05-CV-283484CP
DATE: 20100218

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: **Theodore Joel Speevak**, Plaintiff

Canadian Imperial Bank of Commerce, Defendant

BEFORE: G. R. Strathy J.

COUNSEL: *Michael E. Girard and Shanti Barclay*, for the Plaintiff

Simon Bieber, for the Defendant

DATE HEARD: February 5, 2010

R E A S O N S F O R D E C I S I O N: C E R T I F I C A T I O N A N D S E T T L E M E N T A P P R O V A L

[1] This is a motion for certification of this action as a class proceeding under s. 5 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (*"C.P.A.")* and for approval of a settlement between the parties. The defendant consents to the motion.

[2] The plaintiff brings this action on behalf of all persons who were clients of the Canadian Imperial Bank of Commerce ("CIBC") whose personal banking information was transmitted by facsimile between 2001 and 2004 to two third parties, one located in the United States and the other in Quebec.

[3] At the date of the hearing, for the reasons set out below, I issued an order certifying this action as a class proceeding, approving the settlement, and substituting Mr. John Muir as the representative plaintiff.

Background

[4] Between 2001 and 2004 various branches of CIBC inadvertently sent numerous faxes, containing personal information about CIBC's customers, to a company in the United States called Allstar Sports Line Limited ("Allstar"). The faxes, which were intended for another department in CIBC, contained customers' names, social insurance numbers, account numbers, amounts, addresses and telephone numbers and customer signatures. The problem was due to

the similarity between Allstar's fax number and the fax number of the CIBC department for which they were intended. When it was informed of the problem, CIBC asked Allstar to shred any faxes it received. Unfortunately, the problem was not resolved. It became so severe that Allstar commenced litigation in the United States against CIBC. This resulted in the posting of confidential information of one of the class members on the court web site. This in turn came to the attention of Canadian media and the federal Privacy Commissioner. CIBC eventually contacted or attempted to contact the customers whose personal information had been disclosed.

[5] Another incident occurred in 2004, when a business owner in Dorval, Quebec (referred to as "Dorval"), informed CIBC that he been receiving faxes containing personal information of the bank's customers. The problem continued for a number of months during which time the owner received a total of 20 to 25 faxes. He contacted CIBC after receiving each fax and sent it copies of what he received. He destroyed most of the faxes and ultimately turned over to CIBC all the undestroyed faxes in his possession. CIBC was never able to discover the reason these faxes were misdirected.

[6] The Privacy Commissioner found that CIBC failed to safeguard its clients' personal information from disclosure as required by the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA"*).

[7] There is no evidence before me that the disclosure of the confidential information resulted in identity theft or any direct financial loss to any member of the class. Due to the destruction of most of the faxes by the recipients, and the inability of CIBC to indentify the customers whose records were involved, it has only been possible to confirm the identities of thirty-eight individuals, all located in Canada and all of whom have been contacted by class counsel.

[8] This action was commenced in 2005. The plaintiff, Mr. Speevak, was a customer of CIBC whose personal information was faxed to one of the third parties. The statement of claim asserts that CIBC breached to the duty it owed its customers to keep their personal information confidential, that it was negligent in failing to do so and that it breached their privacy rights.

[9] Settlement discussions took place after the commencement of the litigation and a mediation took place before Mr. George Adams (formerly Mr. Justice Adams of this Court). A framework for settlement was agreed upon, but negotiations continued for some months. Ultimately, a settlement agreement was entered into on January 30, 2009, subject to the approval of the Court. I will discuss the terms of the settlement shortly.

[10] On May 20, 2009, Lax J. (who had responsibility for the case management of this action) granted an order approving a notice of proposed settlement and fixing a hearing date of June 29, 2009 for certification and settlement approval. That notice was mailed to all members of the class who have been identified by CIBC. No one appeared on June 29, 2009 to oppose the motion; however Lax J. requested further information concerning various terms of the proposed settlement. The settlement approval motion was therefore adjourned.

[11] That information has now been provided and I am in a position to consider both certification and settlement approval. I should add that there has been no opposition to the motion on either of the two appearances before me.

Certification

[12] The requirements for certification are set out in s. 5 of the *C.P.A.*:

> (a) the pleadings or the notice of action disclose a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has a plan which sets out a workable method for the advancement of the proceeding on behalf of the class, including notification of class members; and
>
> (iii) does not, on the common issues, have an interest in conflict with the interests of other class members.

[13] The issue on a certification hearing is simply whether the action can be appropriately prosecuted as a class action: *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401, [2004] O.J. No. 4924 (C.A.), at para. 38, leave to appeal to S.C.C. refused [2005] S.C.C.A. No. 50. Other than the requirement that the pleadings disclose a cause of action, the class representative is required to show some basis in fact for each of the certification requirements set out in s. 5 of the *Act*: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, at para. 25.

[14] The consent of the defendant to certification does not reduce the responsibility of the court to be satisfied that the requirements of section 5(1) of the *C.P.A.* have been met and that the case is indeed appropriate for certification: *Vezina v. Loblaw Companies Ltd.*, [2005] O.J. No. 1974, 17 C.P.C. (6th) 307 (S.C.J.). Where certification is for the purposes of settlement, the requirements of section 5 can be less rigorously applied because the manageability of the proceeding is not an issue: *National Trust Co. v. Smallhorn*, [2007] O.J. No. 3825, 52 C.P.C. (6th) 123 (S.C.J.) at para. 8; *Bellaire v. Daya*, [2007] O.J. No. 4819, 49 C.P.C. (6th) 110 (S.C.J.) at para. 16; *Bona Foods Ltd. v. Ajinomoto U.S.A., Inc.*, [2004] O.J. No. 908, 2 C.P.C. (6th) 15

(S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092, 170 A.C.W.S. (3d) 464 at para. 30 (S.C.J.).

[15] I will now apply the test in s. 5 of the *C.P.A.* to the circumstances of this case.

(a) *Cause of Action*

[16] The test for establishing a cause of action is the same as the test under rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194: assuming the facts stated in the statement of claim can be proved, is it, "plain, obvious and beyond a reasonable doubt that the Plaintiff cannot succeed"? See: *Peter v Medtronic Inc.* (2007), 50 C.P.C. (6th) 133, [2007] O.J. No. 4828 (S.C.J.) at paras. 29-30, aff'd. (2008), 55 C.P.C. (6th) 242, [2008] O.J. No. 1916 (Div. Ct.); *Hollick v. Toronto (City)*, above, per McLachlin C.J. at para. 25; *Cloud v. Canada (Attorney General)*, above, per Goudge J.A. at para. 41.

[17] No evidence is admissible and the material facts pleaded must be accepted as true, unless patently ridiculous or incapable of proof: *Peter v Medtronic Inc.*, above, at para. 30; *Tiboni v. Merck Frosst Canada Ltd*. (2008), 295 D.L.R. (4th) 32, [2008] O.J. No. 2996 (S.C.J.) at para. 56.

[18] The statement of claim asserts causes of action for breach of contract, breach of a duty of care and breach of *PIPEDA.* It is not plain and obvious that any of these causes of action would fail.

(b) *Identifiable Class*

[19] The proposed class is defined as follows:

> All persons who were or are clients of CIBC and whose Personal Information was transmitted by facsimile transmission to Allstar and/or Dorval between 2001 and 2004.

[20] The proposed class definition is set out in objective terms, so that membership in the class is readily ascertainable. Inclusion in the class does not depend on the merits of the claim or the outcome of the litigation: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63 at para. 38. The class definition meets the test set out in *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, 27 C.P.C. (4th) 172, (Gen. Div.), per Winkler J. (as he then was) at para. 10:

(a) it identifies persons who have a potential claim for relief against the defendants;

(b) it defines the parameters of the lawsuit so as to identify those persons who are bound by the result; and

(c) it describes the persons entitled to notice of certification.

(c) *Common Issues*

[21] The plaintiff proposes as common issues:

(a) whether CIBC breached its contracts with Class Members by inadvertently sending the faxes to Allstar and/or Dorval;

(b) the faxes to Allstar and/or Dorval;

(c) whether CIBC was in breach of *PIPEDA* by inadvertently whether CIBC was negligent when it inadvertently sent sending the faxes to Allstar and/or Dorval; and

(d) whether CIBC should pay damages to the Class Members.

[22] The fundamental issue is whether the determination of the common issues will avoid duplicative fact-finding or legal analysis. In order to avoid this duplication, the court must ensure that the common issues are necessary to the resolution of each class member's claim.

[23] The common issues are appropriate – there is a basis in fact for these common issues and they are necessary to the resolution of the claim of each class member.

(d) *Preferable Procedure*

[24] 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. The claims of the class members are likely to be fairly modest and might not be pursued in the absence of a class proceeding. In this case, a class proceeding will promote judicial economy. The claim resolution procedure, which I will describe below, will provide an efficient and cost-effective way to resolve the claims, funded by CIBC. No court resources will be involved. A class proceeding in this case will also encourage CIBC and other large financial institutions to exercise care in the protection of the personal information of their customers. In view of the settlement, and the procedure for the resolution of individual claims, I am not concerned about the manageability of this proceeding.

(e) *Representative Plaintiff*

[25] It is proposed to replace the representative plaintiff, Mr. Speevak, with another plaintiff, Mr. John Muir. Mr. Speevak was the person whose private information was actually published on the court website in the United States. Mr. Speevak has advised that, while he does not oppose the settlement in favour of the class, he is likely to opt out of the action and he therefore does not wish to provide an affidavit in support of the settlement. He consents to the substitution of another representative plaintiff.

[26] Mr. Muir is a member of the class and had made a complaint to the Privacy Commissioner as a result of the disclosure of his financial information by CIBC. He has been active in advancing a complaint for the breach of his privacy rights. I am satisfied that Mr. Muir would fairly and adequately represent the class and that he has no conflict with the class on the common issues. CIBC consents to the substitution of Mr. Muir for Mr. Speevak.

[27] In view of the settlement of this action, the role of the representative plaintiff is substantially diminished. I will therefore order the substitution of Mr. Muir as plaintiff in place of Mr. Speevak and approve Mr. Muir as representative of the class.

Settlement and Settlement Approval

[28] In overview, the settlement agreement provides that each class member will be provided with a claim form to be submitted to CIBC. In response, CIBC will make a settlement offer to the claimant. If this offer is not accepted, the class member is entitled to have his or her claim assessed by an independent arbitrator. The right to claim for identity theft at any time in the future is preserved. CIBC will pay the costs of class counsel and the arbitration process. CIBC will also pay $100,000 to a registered charity. The following describes the settlement in more detail.

[29] The agreement gives CIBC the right to terminate the settlement, and to contest certification, in the event that more than five class members exercise their right to opt out of the proceeding. Class members wishing to opt out are required to give written notice of their intention to opt out within ninety days of the Court's order approving the settlement.

[30] Each class member will be provided with a standard claim form on which they are to set out the details of any loss or damage they have suffered as a result of the disclosure of their personal information. The claim form must be filed within ninety days of settlement approval. Following receipt of the claim form, CIBC is required to make an offer of settlement to the class member. Each class member will then have the option of accepting CIBC's offer or having the quantification of their claim determined by an arbitrator, who is to be a retired judge. All costs of the arbitration, other than the costs of counsel for the class member, are to be borne by CIBC. If the arbitration award is more than the amount of CIBC's initial offer, the class member's legal fees are to be paid by CIBC. Otherwise, the class member will bear his or her own legal costs.

[31] The damages recoverable will not include punitive or aggravated damages. Class members are entitled to recover any other damages they can establish. In my view, the agreement to forego punitive and aggravated damages is a reasonable compromise in light of CIBC's admission of liability for other damages, including any damages caused by identity theft, and the other provisions of the settlement.

[32] Recognizing that class members are located in several jurisdictions across Canada, as well as throughout Ontario, the arbitration will be held at the city closest to the place of residence of each class member.

[33] The settlement agreement also addresses any damages directly caused to class members as a result of identity theft (other than punitive or aggravated damages) and any such claims will be subject to the arbitration process.

[34] Under the terms of the settlement, CIBC is to pay the sum of $42,500 plus G.S.T. to cover fees and disbursements of class counsel up to the date of the mediation, March 13, 2007, and partial indemnity costs of class counsel after that date. The class members will have no further liability for costs other than their own costs, if any, in the event that the amount awarded on arbitration is less than CIBC's offer.

[35] Funding of this action was obtained through the Class Proceedings Fund (the "Fund"). A term of obtaining that funding was that 10% of any damages recovered by any class member are to be paid to the Fund. Accordingly, the settlement agreement provides that 10% of any payment to each class member will be paid directly by CIBC to the Fund.

[36] The settlement agreement also provides that the sum of $100,000 be paid by the CIBC to the Public Interest Advocacy Centre ("PIAC"). Lax J. had requested additional information on this organization and a further affidavit has been sworn by a lawyer in the office of class counsel. The affidavit establishes that PIAC was federally incorporated in 1976 and it is a registered charity focused on access to justice. It has an impressive record of activities in relation to privacy issues including extensive publications, participation in the development of legislation and practices in relation to privacy issues, and making representations to government and industry organizations. PIAC has received a *cy pres* award in another class proceeding as part of a settlement in *HSBC Bank of Canada v. Robert Hocking*, Court File CV-245829CP. I am satisfied that the payment of $100,000 to PIAC will serve the dual goals of promoting access to justice and encouraging appropriate behaviour modification in relation to privacy matters. As such, the payment will be a meaningful benefit to class members and it is an appropriate component of the proposed settlement.

[37] Class Members who do not opt out of the settlement release CIBC of all claims arising out of the disclosure of their confidential information to Allstar and Dorval, except claims under the dispute resolution and arbitration process set out in the settlement agreement.

[38] As part of the settlement agreement, CIBC was required to give the plaintiff a list of all of those individuals it could identify whose personal information was sent by fax to either Allstar or Dorval. The settlement agreement provided that plaintiff's counsel was entitled to submit questions in writing to CIBC to determine whether it was possible to identify any other class members. Interrogatories and answers have been exchanged and class counsel has sworn that he is satisfied that it is not possible to identify any class members other than those specifically identified and attached as a confidential schedule to the settlement agreement.

[39] Class counsel has confirmed that in his opinion the settlement is fair and reasonable and in the best interests of the class.

[40] A settlement of a class proceeding is not binding unless it is approved by the court*: C.P.A.* s. 29(2). In order to approve a settlement, the court must find that it is fair, reasonable and in the

best interests of the class as a whole. The leading case is *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 40 O.R. (3d) 429, [1998] O. J. No. 2811 (Gen. Div.) at paras. 30-46, aff'd (1998), 41 O.R. (3d) 97, [1998] O.J. No. 3622 (C.A.), leave to appeal refused [1998] S.C.C.A. No. 372.

[41] Consideration must be given to all the circumstances, including the factual context of the proceedings, the legal issues, the claims made and defences raised, as well as any objections to the proposed settlement. The relevant factors, which will vary from case to case, were summarized by Perell, J. in *Corless v. KPMG LLP*, above, at para. 38:

> When considering the approval of negotiated settlements, the court may consider, among other things: likelihood of recovery or likelihood of success; amount and nature of discovery, evidence or investigation; settlement terms and conditions; recommendation and experience of counsel; future expense and likely duration of litigation and risk; recommendation of neutral parties, if any; number of objectors and nature of objections; the presence of good faith, arms length bargaining and the absence of collusion; the degree and nature of communications by counsel and the representative plaintiffs with class members during the litigation; and information conveying to the court the dynamics of and the positions taken by the parties during the negotiation: *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.) at 440-44, aff'd (1998), 41 O.R. (3d) 97 (C.A.), leave to appeal to S.C.C. refused Oct.22, 1998; *Parsons v. The Canadian Red Cross Society*, [1999] O.J. No. 3572 (S.C.J.) at paras. 71-72.; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.) at para. 8; *Kelman v. Goodyear Tire and Rubber Co*., [2005] O.J. No. 175 (S.C.J.) at paras. 12-13; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2005), 74 O.R. (3d) 758 (S.C.J.) at para. 117; *Sutherland v. Boots Pharmaceutical plc*, [2002] O.J. No. 1361 (S.C.J.) at para. 10.

[42] It has been frequently stated that the settlement of complex litigation is encouraged by courts and favoured by public policy: *Sparling v. Southam Inc*. (1988), 66 O.R. (2d) 225, [1988] O.J. No. 1745 (H.C.J.); *Ontario New Home Warranty Program v. Chevron Chemical Company* (1999), 46 O.R. (3d) 130, [1999] O.J. No. 2245 (S.C.J.) at para. 70; *Gariepy v. Shell Oil Co*., [2002] O.J. No. 4022, 26 C.P.C. (5th) 358 (S.C.J.) at para. 43. This principle certainly applies to class action litigation.

[43] When a proposed class settlement has been negotiated at arms-length by counsel for the class, there is a presumption that the settlement is fair. In this case, there is a history of negotiation and mediation under the auspices of a very experienced mediator. To rebut the presumption of fairness, I would have to find that the settlement does not fall within a range of reasonable outcomes: *Dabbs v. Sun Life*, at para. 30; *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383, 24 C.P.C. (5th) 396 (S.C.J.) at para. 13; *McKrow v. Manufacturers Life Insurance Co*., [1998] O.J. No. 4692, 28 C.P.C. (4th) 104 (Gen. Div.), at para. 15. In this case, each class

member will be entitled to prove and recover damages suffered as a result of the release of their confidential information. It appears that in most, if not all, cases the release of personal information occurred without causing direct financial loss to members of the class. Nevertheless, to the extent that class members are able to prove damages, including general damages or damages attributable to identity theft, those damages will be recoverable in the arbitration process. As I have said earlier, it is my view that the waiver of punitive and aggravated damages is a reasonable compromise in light of the benefits accruing to the class and the payment to the PIAC.

[44] The claims process will provide a simple and cost-effective way of resolving the claims of class members.

[45] I am satisfied that the settlement was the product of an arm's length and adversarial negotiation process. It is fair, reasonable and in the best interests of the class and it is approved.

Conclusion

[46] In conclusion, the order that I signed on February 5, 2010 certifies this action as a class proceeding under s. 5 of the *C.P.A.*, substitutes Mr. Muir for Mr. Speevak as the representative plaintiff and approves the terms of the settlement. The order will become final one hundred days after its date, unless CIBC notifies class counsel of its intention to terminate the settlement because five or more class members have opted out.

G. R. Strathy J.

DATE: February 18, 2010