LAURA BALLANTINE
Plaintiff/Applicant

and

EQUIFAX CANADA CO. et al.
Defendants

Court File No. CV-17-582566

January 24, 2018

See endorsement in motion record in Court File No CV-17-582551CP.

J.
Justice Glustein

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

Proceeding under the *Class Proceedings Act, 1992*

**MOTION RECORD OF THE PLAINTIFF**

**(CARRIAGE)**

**RETURNABLE DECEMBER 19th, 2017**

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**BETHANY AGNEW-AMERICANO**
**Plaintiff**

-and-

**EQUIFAX CANADA CO. et al.**
**Defendants**

**Court File No. CV-17-00582551-00C**

January 24, 2018

J-M. Leclerc for the plaintiff in Ct File No. CV-17-582551 CP

V. Vuia and A. Tibbs for the plaintiff in Ct File No CV-17-582566 CP

Motion for carriage by Agnew-Americano granted (Court File No. CV-17-582551 CP), motion for carriage by Ballantine dismissed (Court File No CV-17-582566 CP). See reasons for decision attached.

No order as to costs.

J.T.

Justice Glustein

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***ONTARIO***
**SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT TORONTO

# MOTION RECORD


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**CITATION:** Agnew-Americano v. Equifax Canada, 2018 ONSC 275
**COURT FILE NO.:** CV-17-582551CP & CV-17-582566CP
**DATE:** 20180124

**SUPERIOR COURT OF JUSTICE - ONTARIO**

**BETWEEN:** BETHANY AGNEW-AMERICANO, Plaintiff

AND:

EQUIFAX CANADA CO. AND EQUIFAX, INC., Defendants (Court File No. CV-17-582551CP)

**AND BETWEEN:** LAURA BALLANTINE, Plaintiff

AND:

EQUIFAX CANADA CO. AND EQUIFAX, INC., Defendants (Court File No. CV-17-582566CP)

**BEFORE:** Justice Glustein

**HEARD:** December 19, 2017

**COUNSEL:** *Jean-Marc Leclerc*, for the plaintiff in Court File No. CV-17-582551CP

*Venessa Vuia and Anthony Tibbs*, for the plaintiff in Court File No. CV-17-582566CP

## REASONS FOR DECISION

### Nature of motions and overview

[1] The court is asked to determine which of the plaintiffs shall have carriage of the class action brought against the defendants Equifax Canada Co. ("Equifax Canada") and Equifax, Inc. ("Equifax US") (collectively the "Equifax Defendants").

[2] In Court File No. CV-17-582551CP (the "Agnew-Americano Action"), the plaintiff Bethany Agnew-Americano ("Agnew-Americano") (and the proposed representative plaintiff to

be added by pseudonym, Jane Doe)[1] are represented by the law firm of Sotos LLP ("Sotos"). Agnew-Americano brings a motion seeking:

(i) a stay of the action brought by the plaintiff Laura Ballantine ("Ballantine") in Court File No. CV-17-582566CP (the "Ballantine Action"),

(ii) a declaration that no other actions may be commenced in Ontario without leave of the court in respect of the subject matter of the action, and

(iii) an order without the consent of the Equifax Defendants to add Jane Doe as a representative plaintiff and making other amendments to the statement of claim as in the form attached to the affidavit of Mohsen Seddigh ("Seddigh") sworn November 2, 2017 (the "Seddigh Affidavit").

[3] In the Ballantine Action, Ballantine (and the proposed representative plaintiff to be substituted Adele Perisiol ("Perisiol"))[2] are represented by the Merchant Law Group ("Merchant").[3] Ballantine brings a motion seeking:

(i) carriage of the proposed class action against the Equifax Defendants,

(ii) a stay of the Agnew-Americano Action, and

(iii) a declaration that no other actions may be commenced in Ontario without leave of the court in respect of the subject matter of the action.

[4] Neither party seeks costs of the motion.[4]

[5] Both actions arise out of the unauthorized intrusion by "hackers" into the Equifax Defendants' computer systems from mid-May 2017 through July 2017.

[6] Both plaintiffs filed proposed amended statements of claim in their motion records. I rely on these proposed claims (which I refer to respectively as the "Agnew-Americano Claim" and "Ballantine Claim")[5] to consider the issues raised in this carriage motion.

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[1] I refer to Agnew-Americano as the representative plaintiff throughout these reasons although both Agnew-Americano and Jane Doe are proposed to be the representative plaintiffs in the amended statement of claim.

[2] I refer to Ballantine as the representative plaintiff throughout these reasons although it is proposed that Perisiol be substituted for Ballantine as the representative plaintiff in the amended statement of claim.

[3] I refer to the law firm as "Merchant" in these reasons. To the extent the parties refer to Anthony Merchant, Q.C., a lawyer at the Merchant firm, I refer to him as "Anthony Merchant".

[4] Agnew-Americano sought costs of the motion in her notice of motion but did not advance that relief at the hearing.

[7] In the recent case of *Mancinelli v. Barrick Gold Corporation*, 2016 ONCA 571 ("*Mancinelli*"), the Court of Appeal set out a non-exhaustive list of 14 factors for the court to consider on a carriage motion. In *Kowalyshyn v. Valeant Pharmaceuticals International Inc.*, 2016 ONSC 3819 ("*Kowalyshyn*"), Perell J. referred to similar factors and also considered some additional factors.

[8] Many of those factors are not at issue on this motion as the parties agree that they are neutral. The parties raise no different factors outside the *Mancinelli* and *Kowalyshyn* analysis.

[9] On this motion, the contested factors can be summarized as follows:

(i) The nature and scope of the causes of action and the theories advanced: Agnew-Americano submits that her claim raises more viable causes of action which may be successful at certification or trial.

Ballantine submits that "less is more", and that the additional causes of action relied upon in the Agnew-Americano Claim are either not viable or unnecessary;

(ii) The resources and experience of counsel: Agnew-Americano submits that (a) the Sotos lawyers proposed to have carriage of the Agnew-Americano Action have significantly more experience than the Merchant lawyers proposed to have carriage of the Ballantine Action, both in privacy law class actions and as plaintiffs' class action counsel; and (b) findings of past misconduct by lawyers at the Merchant firm should be considered by the court. Ballantine submits that this factor is neutral;

(iii) The state of the action including preparation and class engagement: Agnew-Americano submits that Sotos has conducted more work on the file to date, has been more engaged with prospective class members, and is more prepared to move the litigation forward. Ballantine submits that this factor is neutral;

(iv) Fee arrangements: Agnew-Americano submits that (a) Merchant did not obtain a written retainer prior to commencing the Ballantine Action and (b) Merchant's retainer agreement with Ballantine does not comply with the requirements under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*") and, as such, this factor supports carriage to Agnew-Americano. Ballantine submits that this factor is neutral;

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[5] (even though both Agnew-Americano and Jane Doe would be plaintiffs in the proposed amended claim in the Agnew-Americano Action and Perisiol would be the plaintiff in the proposed amended claim in the Ballantine Action)

(v) Class definition: Agnew-Americano submits that the proposed class definition in the Agnew-Americano Claim is superior since it encompasses potential class members who have a contractual claim.

Ballantine submits that the proposed class definition in the Ballantine Claim is superior since the proposed Agnew-Americano class definition includes an unnecessary subclass for breach of contract;

(vi) Interrelationship of class actions in more than one jurisdiction: Ballantine submits that because Merchant is counsel on three additional class proceedings in Quebec, Saskatchewan and British Columbia[6] seeking the same relief, with both the Saskatchewan and British Columbia actions seeking certification of a national class, this factor favours carriage by Ballantine.

Agnew-Americano submits that this factor supports carriage by her. She submits that (a) Ballantine has not been clear as to her intentions with respect to her action; and (b) Merchant is counsel on multiple proceedings in multiple jurisdictions which counsel does not intend to pursue which is an abuse of process as it is not necessary to protect limitation periods; and

(vii) The anonymity of the representative plaintiff: Ballantine submitted in her factum that the proposed anonymity of the additional representative plaintiff in the Agnew-Americano Action was a factor in favour of carriage for Ballantine. Agnew-Americano submitted in her factum that this factor was neutral.[7]

[10] The critical issue on a carriage motion is which of the competing actions is more likely to advance the interests of the class. For the reasons I discuss below, I find that the Agnew-Americano Action is more likely to do so. I order that carriage of the proposed class action be granted to Agnew-Americano and I stay the Ballantine Action.

[11] I find the first and second factors summarized above (the nature and scope of the causes of action and the theories advanced, and the experience of counsel) are the most important on the facts of this case.

[12] The nature and scope of the Agnew-Americano Claim raise more viable causes of action which may succeed on certification or at trial. The claims in the Agnew-Americano Action for intrusion upon seclusion and breach of provincial privacy legislation are not "fanciful or

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[6] (although, as I discuss below, Ballantine did not initially disclose the existence of the Saskatchewan or British Columbia litigation and it was Seddigh who raised this issue in his affidavit on behalf of Agnew-Americano)

[7] Ballantine did not pursue this submission at the hearing, as her counsel acknowledged that the factor was neutral since Agnew-Americano was remaining as a representative plaintiff who could represent the interests of all class members. Nevertheless, I briefly address this argument in my reasons.

frivolous" and do not raise any "glaring deficiencies" (*Mancinelli*, at para. 42). I do not accept Ballantine's position that "The claims in the *Agnew-Americano* Action for 'intrusion upon seclusion' and breach of provincial privacy statutes are fundamentally flawed".

[13] I also find that the breach of contract and breach of consumer protection legislation claims in the Agnew-Americano Action expand the basis of the claim for class members.

[14] Consequently, the broader approach of Agnew-Americano to the claim is preferable and in the best interests of the class members.

[15] There is a significant discrepancy between the experience of counsel proposed to act on the respective class actions. The proposed team for the Agnew-Americano Action consists of experienced privacy law class action lawyers at Sotos with the ability to understand key issues and move the action forward. The affidavit evidence filed on behalf of Ballantine[8] provides no particulars as to the relevant experience of the proposed lawyers, and instead focuses on generalities about the Merchant law firm and counsel.

[16] With respect to the other factors, they are less important but still favour Agnew-Americano.

[17] Sotos has taken appropriate steps to protect the interests of the class members from the outset of the litigation, and has worked diligently to advise prospective class members of relevant issues. Merchant's evidence as to steps it has taken to move the litigation forward is general at best, and does not demonstrate the level of commitment of Sotos.

[18] Merchant's decision to begin proceedings without a written retainer is concerning, as is the failure of its fee agreement to comply with requirements under the *CPA*.

[19] The proposed class definition in the Agnew-Americano Claim is preferable. While the class definition on the negligence claims is similar in both actions, the Agnew-Americano Claim extends the class to those with a contractual relationship.

[20] The contractual class is not unnecessary (as submitted by Ballantine), but instead expands the range of damages available to the class members through contractual damages and remedies under consumer protection legislation. Further, even if subclasses are later required, the *CPA* provides for a process to create such subclasses.

[21] The issue of multiple class actions in other jurisdictions also favours carriage to Agnew-Americano. There is uncertainty as to whether the Ballantine Action will proceed, and no such concern for the Agnew-Americano Action. Consequently, it is preferable to grant carriage to Agnew-Americano.

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[8] (by Christopher Simoes ("Simoes"), a lawyer at Merchant)

[22] Agnew-Americano submitted that (i) the practice of filing class actions in multiple jurisdictions is an abuse of process; and (ii) it is not necessary to file multiple class actions to preserve limitation periods. However, I do not decide these legal issues as they are not necessary to my reasons.

[23] Finally, I agree with both counsel that the proposed anonymity of Jane Doe as an additional representative plaintiff does not affect carriage of the class action. Agnew-Americano can represent all class members even if her interest is not identical to others. Further, the issue of the anonymity of Jane Doe can be determined at a later date (if that issue is even raised). Even if Jane Doe did not wish to continue as a representative plaintiff, another person who received the Equifax letter could be added at that time.

**Facts**

[24] I review the background facts as well as the facts related to each of the factors I set out above.

**i) Background facts**

[25] Based on the pleadings, the Equifax Defendants operate a business with two aspects that are relevant to this litigation.

[26] First, the Equifax Defendants gather personal information on consumers for the purposes of providing credit reports to customers seeking such information.

[27] Second, the Equifax Defendants sell services to individual customers who wish to protect themselves from concerns such as credit fraud, identity theft, and other risks involving the unauthorized disclosure of personal information.

[28] On September 7, 2017, Equifax US announced that an unauthorized intrusion due to a "cybersecurity incident" by "criminals" who "exploited a U.S. website application vulnerability" had occurred in its computer systems from mid-May 2017 through July 2017.

[29] In the press release, Equifax US stated that (i) the information accessed "primarily includes names, Social Security numbers, birth dates, addresses and, in some instances, driver's license numbers"; and (ii) "[i]n addition, credit card numbers for approximately 209,000 U.S. customers, and certain dispute documents with personal identifying information for approximately 182,000 U.S. customers, were accessed". Equifax US stated that it "will send direct mail notices to consumers whose credit card numbers or dispute documents with personal identifying information were impacted".

[30] Equifax US stated in its press release that the intrusion impacted approximately 143 million U.S. consumers and that the breach also included "unauthorized access to limited personal information for certain UK and Canadian residents". Equifax US did not set out the number of affected Canadians or refer to a plan to notify them of the breach.

[31] On September 15, 2017, Equifax US issued a further press release, in which it explained the method by which hackers accessed Equifax's computer systems. Equifax US stated that:

(i) the attack occurred "through a vulnerability in Apache Struts (CVE-2017-5638), an open-source application framework that supports the Equifax online dispute portal web application";

(ii) the vulnerability was identified and disclosed by the United States Computer Emergency Readiness team in March 2017; and

(iii) the hacker intrusions occurred from May 13, 2017 through July 30, 2017.

[32] On September 19, 2017, Equifax Canada issued a press release, which stated that:

(i) it believed approximately 100,000 Canadian consumers were affected by the breach but that its investigation was ongoing; and

(ii) "the information that may have been breached includes name, address, Social Insurance Number and, in limited cases, credit card numbers".

[33] By October 16, 2017, Equifax Canada updated its website to state that the personal information of approximately 8,000 Canadian consumers was impacted. The website advised that:

> The potentially impacted information may include names, addresses, Social Insurance Numbers and, in limited cases, credit card numbers. Other potentially impacted information includes username and password, and secret question/secret answer, which we believe are several years old and were login credentials for use of our direct-to-consumer website.

[34] The website update also stated that (i) "some of the consumers with affected credit cards announced in the company's initial statement may be Canadian"; and (ii) "[o]ur investigation is now complete and Equifax is notifying impacted Canadians by mail and offering them free credit monitoring and identity theft protection."

[35] Equifax Canada's website was subsequently updated to revise the 8,000 figure to almost 20,000. Equifax Canada's website now states:

> The personal information of approximately 8,000 Canadian consumers was impacted. In addition, it was also determined that some of the consumers with affected credit cards announced in [*sic*] company's initial statement are also Canadian. We now know that this group includes 11,670 impacted Canadian consumers and we are in the process of notifying them by mail and offering them free credit monitoring and identity protection.

[36] Consequently, according to Equifax Canada, almost 20,000 Canadians are affected by the privacy breaches.

[37] I review below the facts relevant to each of the carriage factors at issue in this case.

### ii) Factor 1: Facts relevant to the nature and scope of the causes of action and the theories advanced

[38] Both claims were issued on September 12, 2017. I review each claim below.

#### a) The Agnew-Americano Claim

[39] The Agnew-Americano Claim names Agnew-Americano as the proposed representative plaintiff. Agnew-Americano is a monthly subscriber to the "Complete Premier Plan" offered by Equifax Canada, providing daily credit monitoring and identity theft insurance.

[40] A further representative plaintiff was also a subscriber to the same plan. That plaintiff received a letter dated October 17, 2017 in which Equifax Canada advised that her social insurance number, name, address, date of birth, phone number, e-mail address, user name, password and secret question/secret answer were compromised in the data breach announced by Equifax US on September 7, 2017.

[41] The Agnew-Americano Claim requests that the second representative plaintiff (referred to as "Jane Doe") be permitted to use an alias to prevent her personal information from being further impacted as a result of publicly identifying herself as an affected person in the class proceeding.

[42] The Agnew-Americano Claim alleges five causes of action: (i) negligence, (ii) intrusion upon seclusion, (iii) breach of provincial privacy statutes, (iv) breach of contract, and (v) breach of consumer protection legislation. I review these claims below.

##### 1. The negligence claim

[43] On the negligence claim, Agnew-Americano pleads:

(i) The Equifax Defendants owed the Class Members a duty of care in the collection, retention, use, and disclosure of personal information and a duty to safeguard the confidentiality of their personal information;

(ii) The Equifax Defendants breached their duty of care since they, *inter alia*, (a) "failed to take adequate steps to ensure that a website application vulnerability would not result in the exposure of extremely sensitive personal information belonging to millions of North American consumers", (b) "failed to apply a website application patch made public in March 2017 in a timely way, waiting until at least August 2017 before applying it", and (c) "failed to give notice to Canadians affected by the breach until October 17, 2017, several months after the breach was detected, and over one month after it was publicly announced"; and

(iii) "As a result of the defendants' acts and omissions, Class Members suffered reasonably foreseeable damage and losses, for which the defendants are liable".

### 2. The intrusion upon seclusion claim

[44] With respect to the intrusion upon seclusion claim, Agnew-Americano pleads:

> The actions of the defendants constitute intentional or reckless intrusions upon seclusion that would be highly offensive to a reasonable person, for which the defendants are liable. The defendants failed to take appropriate steps to guard against unauthorized access to sensitive financial information involving the Class Members' private affairs or concerns. Their actions were highly offensive, causing distress and anguish to Class Members, for which the defendants are liable and should pay damages.

### 3. The breach of provincial privacy statutes claim

[45] With respect to the claim for breach of provincial privacy statutes, Agnew-Americano relies on such legislation in British Columbia, Manitoba, Newfoundland and Labrador, and Quebec. Agnew-Americano pleads that the Equifax Defendants are liable under these statutes since:

> As described above, the actions of the defendants constitute intentional or reckless intrusions upon seclusion that would be highly offensive to a reasonable person, for which the defendants are liable. The defendants failed to take appropriate steps to guard against unauthorized access to sensitive financial information involving the Class Members' private affairs or concerns.

### 4. The breach of contract claim

[46] In addition, the Agnew-Americano Claim alleges breach of contract on behalf of all persons who purchased Equifax credit monitoring and identity theft protection services for a monthly fee, on the basis that the Equifax Defendants breached their contractual agreement to maintain "strict security safeguards".

[47] The breach of contract claim is based on the following Privacy Policy statement provided by Equifax Canada when it entered into a contractual relationship with the class members:

> Equifax maintains strict security safeguards when storing or destroying your personal information in order to prevent unauthorized access, collection, use, disclosure, copying, modification, disposal or similar risks. These standards are in place for all information, regardless of how it is stored and we regularly review, test and enhance our systems to ensure they meet accepted industry standards. [...]

[48] Agnew-Americano pleads that:

(i) "[t]his Privacy Policy formed part of the contracts between the defendants and Class Members affected by the Equifax Contractual Claims";

(ii) "[i]t was a term of the contracts of Class Members affected by the Equifax Contractual Claims that Equifax would maintain strict security safeguards when storing and retaining personal information in order to prevent unauthorized access and similar risks"; and

(iii) "[i]t was a further term of the contracts that the Class Members would be provided with notice if their personal information was disclosed on the Internet, and that they would be provided with protection against identity theft".

[49] Consequently, Agnew-Americano pleads that the Equifax Defendants breached their contracts with class members with "Equifax Contractual Claims" and are liable to repay all fees paid by those class members.

### 5. The breach of provincial consumer protection legislation claim

[50] Agnew-Americano also alleges breach of consumer protection legislation in Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, Newfoundland and Labrador, Nova Scotia, and Prince Edward Island. She alleges that the Equifax Defendants "made false, misleading or deceptive representations that their services had strict security standards", by representing that (i) "they maintained strict security safeguards when storing personal information in order to prevent unauthorized access" and (ii) "they are trusted stewards of personal information".

[51] Agnew-Americano pleads that as a result of the allegedly false representations, the Equifax Defendants "engaged in unfair practices" so that "[c]onsumers affected by the Equifax Contractual Claims are entitled to rescind their contracts and/or an award of damages".

## b) The Ballantine Claim

[52] The Ballantine Action is now proposed to be brought by Perisiol who, like the proposed plaintiff Jane Doe in the Agnew-Americano Action, received a similar notice from Equifax Canada dated October 17, 2017. It is not proposed that Ballantine continue as a representative plaintiff.

[53] The Ballantine Claim is based solely on negligence. Ballantine relies on all of the facts summarized in the "Background facts" section above and pleads:

(i) "In an attempt to increase profits, Equifax negligently failed to maintain adequate technological safeguards to protect the Plaintiff's and Class Members' Private Information from unauthorized access by unauthorized third-parties";

(ii) "Equifax could have and should have substantially increased the amount of money it spent to protect against cyber-attacks but chose not to";

(iii) "Equifax failed to have implemented systems which would have alerted it to the unusual activity necessary to collect such large amounts of data"; and

(iv) "Equifax failed to act diligently and responsibly by delaying notification of the Data Breach for more than a month after its discovery".

[54] Consequently, Ballantine pleads:

> The Plaintiff and Class Members seek damages, redress, and other compensation from the Defendants for harm, inconveniences, economic losses, mental distress, or other losses resulting from the unauthorized access to their confidential personal and information records.

**iii) Factor 2: Facts relevant to the resources and experience of counsel**

[55] I review the evidence filed by each party on this issue below.

**a) Evidence filed by Agnew-Americano about the experience of the Sotos lawyers proposed to have carriage of the Agnew-Americano Action**

[56] Seddigh attached the biographies of the Sotos lawyers who would have carriage of the Agnew-Americano Action and provided detailed evidence as to their experience:

(i) David Sterns ("Sterns"), Louis Sokolov ("Sokolov") and Jean-Marc Leclerc ("Leclerc") will be lead counsel on the file;

(ii) Sterns is co-counsel in a privacy class action involving Lenovo Canada, a claim which alleges that the defendant breached the privacy interests of people who purchased certain Lenovo computers by preloading laptops with malicious adware that is alleged to intercept the user's secure connection and allows criminals to do the same. That matter was certified by decision of Justice Perell in *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 5853 ("*Bennett-Certification*");

(iii) Sterns is past president of the Ontario Bar Association and a past chair of the civil litigation section of the Ontario Bar Association;

(iv) Sterns recently presented a seminar to the Advocates' Society on privacy law issues;

(v) Sterns has been recognized both by Chambers Canada 2016 for his expertise as plaintiff class action counsel and by the LEXPERT Directory as "repeatedly recommended" (2013-2017) for class actions;

(vi) Sterns was co-counsel in a successful 41 day common issues trial that resulted in a $45 million award for the class (subsequently reduced to $36.9 million on appeal and subject to a further process before the trial judge to determine the final amount) (cited as *Trillium Motor World Ltd. v. Cassels Brock & Blackwell LLP*, 2017 ONCA 544);

(vii) Sterns was called to the Quebec bar in 1992 and to the Ontario bar in 1994;

(viii) Sokolov is co-counsel on two privacy class actions involving unauthorized review and dissemination of personal health information;

(ix) Sokolov is also co-counsel in certified overtime claims against ScotiaBank and CIBC, which allege systemic issues of wrongdoing;

(x) Sokolov was called to the Ontario bar in 1993. He has been recognized by Chambers Canada 2016 for his expertise as plaintiff class action counsel;

(xi) Leclerc is co-counsel with Sokolov on two privacy class actions. He was lead counsel at the Ontario Court of Appeal arising out of a jurisdiction motion brought by the Peterborough Regional Hospital regarding the applicability of the *Personal Health Information Privacy Act 2004*, S.O. 2004, c. 3, Sched. A to breach of privacy claims made in the class proceeding. The appeal was dismissed (cited as *Hopkins v. Kay,* 2015 ONCA 112, leave to appeal to Supreme Court of Canada denied);

(xii) Leclerc has spoken on privacy law issues before a number of organizations, including the Ontario Bar Association;

(xiii) Leclerc was called to the Ontario bar in 2001 and is recognized by Chambers Canada 2016 as an expert in plaintiff class action litigation;

(xiv) Sterns, Sokolov, and Leclerc have all been involved in several class action summary judgment motions; and

(xv) The Chambers rankings are based on their research and extensive interviews, involving no payment of any kind by Sotos. In their review of "notable practitioners" at Sotos, Chambers refers to each of Sterns, Sokolov, and Leclerc with favourable comments as to their advocacy skills, intellectual abilities, willingness to cooperate, analytical skills, and abilities to make strategic choices.

[57] The Sotos firm is ranked amongst the highest in Canada by Chambers as plaintiff class action counsel.

[58] No disciplinary findings have been made against either Sterns, Sokolov, or Leclerc over their collective experience.

**b) Evidence filed by Ballantine about the experience of the Merchant lawyers proposed to have carriage of the Ballantine Action**

[59] Ballantine filed evidence from Simoes by affidavit sworn November 2, 2017 (the "First Simoes Affidavit"). Simoes filed a supplementary affidavit sworn November 16, 2017 (the "Second Simoes Affidavit"), addressing some of the issues raised in the Seddigh Affidavit.

[60] Simoes set out the Merchant firm's participation "in a number of actions relating to the loss or breach of consumer personal information". Three of the files were settled and one file

was ongoing in Quebec. Simoes led no evidence that any of the lawyers proposed to be involved with the Ballantine Action had any involvement in those cases.

[61] Simoes also referred to the firm's experience as a national law firm in many class actions.

[62] With respect to the particular experience of proposed counsel "who have been actively involved with" the Ballantine Action "or who are anticipated to be involved", Simoes referred to six lawyers. Simoes provided no curriculum vitae for any of them, no information as to their recognition by external organizations and only a general description of their practices. Simoes provided no evidence as to the Merchant lawyers' years of call.

[63] Simoes set out the following evidence about the six lawyers, quoted verbatim:

(i) Venessa Vuia works primarily in the area of class actions. She has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including pharmaceutical class actions, automobile class actions, and tax shelter class actions. She has appeared before the courts of Saskatchewan and Ontario in connection with these matters;

(ii) Anthony Tibbs works almost exclusively in the area of class actions, has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including privacy breach class actions, and has appeared before the courts of British Columbia, Alberta, Saskatchewan, and Ontario in connection with these matters;

(iii) Iqbal S. Brar works primarily in the area of class actions. He has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including securities class actions, price-fixing class actions, automobile class actions, and government duty class actions;

(iv) Casey Churko has more than ten years of experience almost exclusively in class action litigation, having been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including securities class actions, and has appeared before the courts of British Columbia, Alberta, Ontario, Saskatchewan, Manitoba, Nova Scotia, and Newfoundland and Labrador in connection with these matters;

(v) Roch Dupont has many years of experience in the Department of Justice's commercial law and criminal prosecution divisions (including cartel enforcement, price-fixing, fraud, gangs, and fraudulent bankruptcy prosecutions), and has significant experience conducting large-scale complex litigation. For the past few years, Mr. Dupont has been working with MLG almost exclusively on class action matters;

(vi) Christopher Simoes practices civil litigation with a focus on class actions. He has prepared pleadings, affidavits, and certification records in several class actions.

He has appeared before the courts of Saskatchewan, Alberta, and Ontario in connection with these matters.

[64] Simoes states that Venessa Vuia ("Vuia") and Anthony Tibbs ("Tibbs") "have primary carriage of this matter".

**c) Evidence filed by Agnew-Americano about the experience of the Merchant lawyers proposed to have carriage of the Ballantine Action and about Anthony Merchant and Tibbs**

[65] In his affidavit, Seddigh sets out evidence as to Anthony Merchant, a senior lawyer at the Merchant firm.

[66] Anthony Merchant is listed as one of the lawyers in the Saskatchewan claim. He is referred to three times in the Merchant website in relation to the Equifax class action. On that Merchant website, Anthony Merchant is represented as "well known for pursuing class action lawsuits in Canada", and:

> known to be one of Canada's most active litigators with more than 600 reported cases in leading Caselaw Journals, having argued thousands of cases before the Canadian and American Courts, in Trial and Administrative Courts, and the Courts of Appeal of various American and Canadian jurisdictions, the Federal Court of Canada, and the Supreme Court of Canada. Tony Merchant, Q.C., has a long history in pursuing public policy cases and is a former Member of the Legislative Assembly (M.L.A.)

[67] The Seddigh Affidavit sets out uncontested evidence about the conduct of Anthony Merchant:

(i) The Saskatchewan Court of Appeal found that he engaged in misconduct involving retainer agreements;

(ii) He was found guilty of wilfully interfering with the lawful use of private property, contrary to the *Criminal Code*;

(iii) He was convicted of conduct unbecoming for withdrawing or authorizing the withdrawal of trust funds, contrary to court order and without client consent;

(iv) In 2014, the Saskatchewan Court of Appeal found that he was guilty of conduct unbecoming in respect of two counts involving breaches of court orders; and

(v) He is being sued by the Government of Canada in respect of allegations of illegitimate time entries and excessive disbursements in connection with residential school class action settlements. In that matter, former Justice Iacobucci commented that Merchant's billing raised "serious concerns about the information Mr. Merchant provided".

[68] The Seddigh Affidavit also sets out uncontested evidence that Ontario courts have expressed concerns about the conduct of Anthony Merchant and the practice of the Merchant firm which the courts have described as "disturbing", "the very antithesis of what is in the best interests of the class", and "inappropriate both as a matter of legal ethics but also in the context of civil procedure".

[69] By way of example, Justice Perell found that Merchant's conduct in writing to another lawyer's client "was inappropriate both as a matter of legal ethics but also in the context of civil procedure" (*Kutlu v. Laboratorios Leon Farma, S.A.*, 2016 ONSC 2127, at para. 18). Justice Winkler (as he then was) criticized Merchant for failing to disclose the existence of relevant claims (*Setterington v. Merck Frosst Canada Ltd.*, 2006 CanLII 2623 (ONSC) ("*Setterington*"), at para. 26).

[70] With respect to the conduct of Tibbs, Agnew-Americano relies in her factum upon the decision of Belobaba J. in *Quenneville v. Volkswagen*, 2016 ONSC 4607 ("*Quenneville*"). Justice Belobaba held that after carriage was denied to Merchant, the firm sought to "scoop" Ontario residents for class actions it was planning outside Ontario. Justice Belobaba found (*Quenneville*, at paras. 3, 15, 16, and 23):

(i) "extreme carelessness by Mr. Tibbs, who was in court on February 3 and must have understood the court's concerns";

(ii) Tibbs was "disingenuous";

(iii) Tibbs' e-mails to class members were "at the very least, misleading";

(iv) Tibbs' conduct was "careless, unprofessional, and arguably in breach of the carriage order"; and

(v) Tibbs "should have known better".

[71] Seddigh also filed uncontested evidence from a printout from Merchant's Toronto office website that indicates that Vuia was called to the bar in January 2016 and Simoes was called to the bar in June 2015.

**d) Responding evidence filed by Ballantine with respect to the resources and experience of the Merchant lawyers and firm**

[72] In the Second Simoes Affidavit, Simoes stated that Anthony Merchant "is uninvolved in the Ontario litigation". Simoes did not contest any of the court findings against Anthony Merchant, the Merchant firm, or Tibbs.

**iv) Factor 3: Evidence relevant to the state of the action including preparation and class engagement**

[73] I address the evidence of the state of the action including preparation and class engagement with respect to each firm below.

### a) Evidence filed by Agnew-Americano relevant to the state of the action including preparation and class engagement of Sotos

[74] By the date the Agnew-Americano Claim was issued, the Equifax Defendants had not provided information regarding the numbers of Canadians affected by the breach. Based on the Equifax US press release, it knew of the breach beginning August 1, 2017 and disclosed the existence of the breach on Thursday, September 7, 2017.

[75] On Monday, September 11, 2017, Agnew-Americano signed a written retainer agreement for Sotos to represent her and class members in the proposed class action.

[76] On Tuesday, September 12, 2017, the Agnew-Americano Claim was issued. In that claim, Agnew-Americano sought interim relief to compel the Equifax Defendants to give direct notice to affected Canadians that a data breach occurred in relation to their personal information. On the same day, Leclerc requested the appointment of a case management judge.

[77] The next day, Wednesday, September 13, 2017, Justice Perell advised Leclerc that I had been appointed as case management judge. On that day, Leclerc requested a case conference "on an urgent basis to request interim relief". My office advised Leclerc on Thursday, September 14, that I would make myself available on either Monday or Tuesday of the following week, *i.e.* September 18 or 19.

[78] Sotos then prepared a motion record for interim relief. On September 18, 2017, Leclerc sent an e-mail to my assistant advising that "[w]e are in discussions with counsel for Equifax Canada, pending which we do not require a case conference tomorrow." The next day, on September 19, 2017, Equifax Canada issued a press release advising its Canadian customers of the data breach.

[79] The first case conference was scheduled for October 17, 2017. Equifax Canada's website was updated the day before the case conference to advise that it would be giving direct notice to approximately 8,000 affected Canadians.

[80] I conducted the case conference with counsel for Agnew-Americano and the Equifax Defendants on October 17, 2017.

[81] As of October 19, 2017, Sotos received numerous enquiries from persons across Canada affected by the breach who received letters from Equifax Canada. To provide further assistance, Sotos sent a bilingual e-mail update on October 26, 2017 to all persons who had contacted Sotos regarding the class action. The update:

(i) informed e-mail subscribers that there was no obligation to register to be a member of the class action,

(ii) provided an update on the status of the class action and next steps in the case, and

(iii) provided immediate assistance to persons who had received letters from Equifax Canada advising that their personal information had been accessed by hackers.

[82] Sotos also gave several media interviews regarding the Equifax privacy breach and the class action.

[83] Sotos has prepared a certification record and it is ready to be served as soon as carriage is determined. Sotos also prepared a litigation plan which was attached as an exhibit to the Seddigh Affidavit.

**b) Evidence filed by Ballantine relevant to the state of the action including preparation and class engagement of Merchant**

[84] In the First Simoes Affidavit, Simoes' only evidence as to preparation was that (i) Merchant had prepared an amended statement of claim (only to replace Ballantine with Perisiol as the representative plaintiff) and (ii) the general statement that:

> MLG [Merchant] has been actively preparing for the upcoming steps in this litigation, including *inter alia* collecting publicly-available documents, including confirmation letters sent out by Equifax to individuals which have confirmed that their information had been breached.

[85] In the First Simoes Affidavit, Simoes stated that:

> In the event that carriage is awarded to Ms. Ballatine [*sic*] and/or Ms. Perisiol, it is expected that the motion record for certification of the action will be served and filed within 60 days.

[86] In the Second Simoes Affidavit, Simoes referred to media coverage about the litigation, including interviews with Anthony Merchant. Simoes referred to the number of people who left contact information on the Merchant website as being interested in the Equifax class action litigation.

[87] Simoes explained that Merchant had not finalized a certification record for the following reasons:

> We have not finalized the certification motion record as of yet because, as is evident from the evidence already before the Court, the Equifax situation has been quickly evolving and the parameters of the action changing.
>
> As the scope and nature of the breach and impact has become more clear, our litigation and evidence strategy has evolved. Further research is ongoing, aided in part by new information being provided by members of the putative class who have contacted our office.
>
> It is for that reason that we propose to serve our certification motion record *within* 60 days of carriage being determined. [Italics in original.]

### c) Evidence filed by Agnew-Americano relevant to the state of the action including preparation and class engagement of Merchant

[88] Seddigh filed as an exhibit a printout from MLG's website regarding the Equifax class action. Other than inviting the reader to join Merchant's e-bulletin contact list, the only statements on the website about the litigation are:

> Merchant Law Group LLP has launched a national class action lawsuit on behalf of all Canadians affected by the 2017 Equifax Data Breach.
>
> Equifax revealed that the breach discovered on July 29 could expose the personal information of about 143 million people in the United States. Equifax also indicated that the personal information of an undisclosed number of people in Canada and the United Kingdom was compromised.

[89] There is no evidence of further information available on the Merchant website about the Equifax class action.

## v) Factor 4: Evidence relevant to the fee arrangements

[90] Both parties filed their written retainer agreements. I review each of them below.

### a) The Agnew-Americano retainer agreement

[91] The retainer agreement between Agnew-Americano and Sotos was dated September 11, 2017, one day prior to issuing the Agnew-Americano Claim in its original form, when Agnew-Americano was the only proposed representative plaintiff.

[92] The retainer agreement between Jane Doe and Sotos is dated October 24, 2017. The Agnew-Americano Claim, which is the amended claim considered throughout these reasons, has not yet been issued.

[93] The Agnew-Americano retainer agreements contain the following relevant terms:

(i) "Class Counsel will prosecute the Action on a contingency basis";

(ii) "Class Counsel and the Client agree that the legal fees will be charged on a percentage basis and that Class Counsel shall be paid a legal fee of thirty-three percent (33%) of any Recovery plus disbursements and applicable taxes. The legal fee will be calculated based on all benefits obtained for the class, including costs";

(iii) "It is understood that Class Counsel's legal fees and disbursements shall be subject to approval by the court and that Class Counsel may make any motion for approval of this agreement and their fees and disbursements";

(iv) "The Client acknowledges that the amount of a reasonable settlement or judgment in this case will depend on a number of factors, including liability, and expert evidence, among other things. A precise estimate is not possible at this time. However, by way of example, if the Defendants pay, by way of settlement, $5,000,000 before certification, it is understood that the contingency fee requested will be 33% of $5,000,000, or $1,650,000, plus disbursements and taxes";

(v) "The Client understands that any settlement affecting the Class is subject to approval of the Court";

(vi) "Subject to this agreement being approved by the Court, it shall bind Class Counsel"; and

(vii) "This agreement may be amended from time to time in writing by the Client and Class Counsel, before it is approved by the Court".

**b) The Ballantine retainer agreement**

[94] The retainer agreement between Ballantine and Merchant was signed on November 2, 2017,[9] almost two months after the Ballantine Claim in its original form was issued.

[95] The retainer agreement between Perisiol and Merchant is dated November 1, 2017. The Ballantine Claim, which is the amended claim considered throughout these reasons, has not yet been issued.

[96] The Ballantine retainer agreements contain the following relevant terms:

(i) "I understand that this litigation is being pursued on a contingency basis such that legal fees and reasonable disbursements with respect to this class action will be payable only in the event of success in this litigation";

(ii) "I understand that success in these proceedings includes:

a) judgment on the common issues in favour of some or all class members; and

b) a settlement that benefits one or more class members and is approved by the court";

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[9] This was the same day carriage motion materials were to be exchanged between the parties. I find the timing disconcerting as it suggests that a written retainer agreement was only obtained to ensure it was before the court. However, given the deficiencies in the Ballantine retainer agreement that I review below, and the fact it was signed almost two months after the Ballantine Claim was issued, I do not rely on such an inference arising from the date Ballantine signed the retainer agreement.

(iii) "I understand that MERCHANT LAW GROUP LLP shall be entitled to a legal fee which is equivalent to a percentage of the total value of any settlement or judgment in favour of the Class, over and above any award of court costs, or claim for reasonable disbursements incurred by the MERCHANT LAW GROUP LLP;"[Block letters in original text.]

(iv) "I agree that the above percentage will be calculated as a 25% fee of the total value of the amount recovered, or on the basis of a 3 times multiplier of my lawyers [*sic*] regular hourly rates for the time spent pursuing this class action litigation, whichever is higher. . . . Payment is expected to be made by lump sum or as otherwise directed by the Court";

(v) "I understand that the total legal fee will vary according to the total value of any settlement or judgment which may result from this litigation"; and

(vi) "I understand that this Agreement, and any fees awarded pursuant to this Agreement, may be subject to approval by the Court".

**vi) Factor 5: Evidence relevant to the class definition**

[97] I set out the proposed class definition in each of the claims.

[98] The proposed class definition in the Agnew-Americano Claim is:

(a) all persons in Canada whose personal information was exposed to appropriation by unauthorized persons (i.e. "hackers") as a result of a security breach occurring between May 1, 2017 and August 1, 2017; and

(b) all persons in Canada who, on or before September 7, 2017, purchased from the defendants, their subsidiaries or related companies the following products:

(i) Equifax Complete Advantage;

(ii) Equifax Complete Premier;

(iii) Equifax Complete Friends and Family;

(iv) or any other Equifax products offering credit monitoring and identity theft protection (collectively, the "Equifax Contractual Claims").

[99] The proposed class definition in the Ballantine Claim is:

All persons in Canada (including but not limited to in [*sic*] individual, corporations, and estates) who had, at any time prior to September 7th, 2017, personal or credit data collected, and stored by Equifax and who were subject to

> risk of data loss as a result of the breach which occurred between May and July 2017 (hereinafter the "**Data Breach**") or any other Class(es) or Sub-Class(es) to be determined by the Court; (herein after, "**Class Member(s)**", the "**Class**", the "**Member(s)**" [*sic*] [Emphasis in original text.]

### vii) Factor 6: Facts relevant to class actions in more than one jurisdiction and intentions of the parties

[100] In the First Simoes Affidavit, under the heading "Proceedings in Quebec", Simoes referred to a "parallel proceeding before the Superior Court of Quebec, styled as *Daniel Li v. Equifax Inc. and Equifax Canada Co.*, No. 500-06-000885-174 (District of Montreal)". Simoes stated that "Erik Lowe from our Montreal office is leading the proceedings in Québec" and that "[t]o the best of our knowledge, the *Li* claim is the only proposed class proceeding in Québec relating to the Equifax data breaches."

[101] The Quebec action seeks to certify only a proposed class in Quebec, under the same class definition terms as in the Ballantine Action.

[102] Simoes did not mention in his first affidavit any parallel proceedings brought against the Equifax Defendants by Merchant before the British Columbia or Saskatchewan courts.

[103] In his affidavit, Seddigh referred to all of the four class actions brought against the Equifax Defendants with Merchant as counsel.

[104] In Saskatchewan, the Merchant firm is counsel in *Johnson v. Equifax Inc., Equifax Canada Inc., and Equifax Canada Co.* (Court File No. QBG 2290/2017) issued on September 8, 2017. The proposed class definition is for a national class on the same terms as the Ballantine Action. Anthony Merchant and Linh Pham of the Merchant firm are listed as the lawyers in the case.

[105] In British Columbia, the Merchant firm is counsel in *Azam and Patel v. Equifax Inc. and Equifax Canada Co.* (Court File No. NEW-S-S-194558) issued on September 8, 2017. The proposed class definition is for a national class on the same terms as the Ballantine Action. Steven Roxborough of the Merchant firm is listed as the lawyer in the case.

[106] Neither of the Simoes affidavits addressed Ballantine's intentions with respect to the Ontario action.

[107] Ballantine submits in her factum that "if carriage is awarded in Ontario to MLG it is expected that the Ontario action (in a national jurisdiction) will take the lead".

[108] However, at the hearing, counsel for Ballantine advised the court that he had no instructions as to whether he would proceed with the Ontario action, since it would need to be an issue discussed with Merchant clients in the other actions.

[109] It is the intention of Agnew-Americano to proceed forthwith with her action, based on the uncontested evidence that the certification record has been prepared and is "ready to be served as soon as carriage is determined and the Statement of Claim is amended".

**Factor 7: Facts relevant to the proposed anonymity of the second representative plaintiff in the Agnew-Americano Action**

[110] The Agnew-Americano Claim requests that the second representative plaintiff (referred to as "Jane Doe") be permitted to use an alias to prevent her personal information from being further impacted as a result of publicly identifying herself as an affected person in the class proceeding.

[111] Sotos sent counsel for the Equifax Defendants a copy of the unredacted letter that Jane Doe received from the Equifax Defendants and asked that her personal information be kept confidential. Consequently, the Equifax Defendants are aware of the identity of the proposed representative plaintiff, Jane Doe.

**Analysis**

[112] I first review the general principles and relevant factors for the court to consider on a carriage motion.

[113] I then address the relevant law and application of the facts to each of the factors which is in dispute.

**i) The general principles and relevant factors**

[114] The court in *Mancinelli* recently considered the general principles governing carriage motions and factors relevant to determining carriage of a class proceeding. Strathy C.J.O. held (*Mancinelli*, at paras. 11-14):

(i) "There cannot be two or more certified class actions in the same jurisdiction representing the same class in relation to the same claim";

(ii) "Where there are rival actions, a practice has developed for a proposed representative plaintiff to bring a motion for authorization to have his or her action proceed on behalf of all class members and to stay pending or future proceedings relating to the same issues";

(iii) The source of the court's jurisdiction to grant such relief is ss. 12 and 13 of the *CPA* and ss. 106 and 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 ("*CJA*"). Section 12 of the *CPA* authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 13 of the *CPA* gives the court jurisdiction to "stay any proceeding related to the class proceeding". Section 138 of the *CJA* provides that "[a]s far as possible, multiplicity of legal proceedings

shall be avoided." Section 106 of the *CJA* provides that a court may stay any proceedings in the court "on such terms as are considered just"; and

(iv) The main criteria for determination of a carriage motion are: "(a) the policy objectives of the *CPA*, namely, access to justice, judicial economy for the parties and the administration of justice, and behaviour modification; (b) the best interests of all putative class members; and, at the same time, (c) fairness to defendants." (citing what Strathy C.J.O. described as the "seminal carriage case" of Cumming J. in *Vitapharm Canada Ltd. v. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (SCJ)).

[115] Strathy C.J.O. then reviewed the applicable case law and listed 14 factors to consider in the analysis (*Mancinelli*, at paras. 14-16 and 18):

(i) the nature and scope of the causes of action advanced,

(ii) the theories advanced by counsel as being supportive of the claims advanced,

(iii) the state of each class action, including preparation,

(iv) the number, size and extent of involvement of the proposed representative plaintiffs,

(v) the relative priority of commencing the class actions,

(vi) the resources and experience of counsel,

(vii) the presence of any conflicts of interest,

(viii) funding,

(ix) definition of class membership,

(x) definition of class period,

(xi) joinder of defendants,

(xii) the plaintiff and defendant correlation,

(xiii) prospects of certification, and

(xiv) the proposed fee arrangement.

[116] In *Kowalyshyn*, Perell J. referred to similar factors and also considered the interrelationship of class actions in other jurisdictions, as a relevant factor in that case (*Kowalyshyn*, at para. 143).

[117] The list is non-exhaustive. Strathy C.J.O. held (*Mancinelli*, at para. 17):

> Other factors may have significance in the unique circumstances of other cases. Determinative factors in one case may have little or no significance in another.

[118] Strathy C.J.O. stated that a "best interests" approach should govern carriage motions. He held (*Mancinelli*, at para. 22):

> I would resist a "tick the boxes" approach to carriage motions. The issue is not which law firm "wins" on the most factors. Rather, it is the best interests of the class and fairness to the defendants, having regard to access to justice, judicial economy and behaviour modification.

[119] Strathy C.J.O. cited Justice Belobaba's carriage decision in *Mancinelli* (reported as 2014 ONSC 6516 ("*Mancinelli-SCJ*")), describing the critical question as: "which of the competing actions is more likely to advance the interests of the class?" (*Mancinelli*, at para. 23).

[120] The court has "a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion" (*Mancinelli*, at para. 72).

[121] Neither party raises any factor outside the *Mancinelli* or *Kowalyshyn* analysis. Further, both parties agree that many of the factors from those cases are neutral.

[122] I now review each of the contested relevant factors below. I first consider the applicable law, and then apply that law to the facts of the present case.

### ii) Factor 1: The nature and scope of the causes of action and the theories advanced

#### a) The applicable law

[123] A carriage motion is not a Rule 21 motion. The Equifax Defendants can later challenge the pleadings either directly or by submitting that the first requirement for certification under s. 5(1)(a) of the *CPA* has not been met.

[124] Even on a certification motion, "the certification stage is decidedly not meant to be a test of the merits of the action" (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 ("*Pro-Sys*"), at para. 99). The pleaded facts are assumed to be true and it is only if it is plain and obvious that the plaintiff's claim cannot succeed that the claim will not meet the s. 5(1)(a) requirement for certification (*Pro-Sys*, at para. 63).

[125] Otherwise, as Perell J. noted in *Kowalyshyn* (at para. 147), a carriage motion "may ultimately be detrimental to the interests of the putative Class Members" if competing class counsel "[treat] the carriage motion ... as an opportunity to play the Royal Navy in pursuit of the Battleship Bismarck" if "they did not hold back in pointing out allegedly very serious weaknesses and supposedly fatal flaws in the quality of their rival's legal, procedural, and evidentiary plans ... to the delight of the Defendants who were standing gauging on the sidelines".

[126] Consequently, the court has applied a "glaring deficiency" or "fanciful or frivolous" test in assessing the nature and scope of a claim, rather than engaging in a Rule 21 review. In *Mancinelli*, Strathy C.J.O. held (at para. 42):

> The appellants acknowledge that the merits of the respective claims are not at issue on a carriage motion. **In *Setterington*, at para. 19, Winkler J., as he then was, said that the claim may be scrutinized for "glaring deficiencies" or to see whether it is "fanciful or frivolous".** See also: *Sino-Forest* at para. 20. **Apart from this, however, he said it is inappropriate for the court to embark on an analysis of which claim is most likely to succeed.** [Emphasis added.]

[127] Strathy C.J.O. added (*Mancinelli*, at paras. 45-47):

> **In my view, it is and should be the rule that the court should not enter into an examination of the underlying merits of the respective claims on a carriage motion. The motion judge gave three good reasons for the rule: (i) it is impossible to predict how the litigation will unfold and which claims will succeed and which will not; (ii) it is unfair and inappropriate to undertake such an analysis in full view of defence counsel; and (iii) a merits analysis should not be done on a carriage motion when it is not done on certification. I respectfully agree.**
>
> It is also my view, consistent with the jurisprudence, that there may be cases in which the actions are sufficiently indistinguishable that, to use the language of *Locking*, "a more detailed analysis may be necessary": see, e.g., *Sharma*. This analysis will not consider the merits but will consider, as the Divisional Court said in *Locking*, at para. 23, "the nature and scope of the causes of action advanced and the theories advanced by counsel for their approach to the case". This may include an assessment of the efficiency and costs of the competing strategies. I regard this factor as important, but not necessarily of greater importance than every other factor.
>
> **While some cases have given preference to "lean" actions over more comprehensive ones, I would reject any firm rule that "less is more" or, indeed, that "more is better". The ultimate question is whether the proposed strategy is reasonable and defensible.** [Emphasis added.]

[128] Provided that the court finds that a claim is "genuinely viable", the role of the court is to consider whether it is in the best interests of the class to plead a broader or more narrow claim to determine which action "provided the class with a more effective framework within which to litigate the claims" (*Mancinelli*, at paras. 48-50).

[129] Competing class counsel can amend pleadings based on "lessons learned from their rival's criticisms" (*Kowalyshyn*, at para. 145). However, the court must still consider the nature and scope of the claim and the theories advanced by counsel "as legal theories applicable to pleaded facts assumed to be true" (*Kowalyshyn*, at para. 167).

[130] I now apply the above principles to the facts of the present case.

### b) Application of the law to the facts of the present case

#### 1. The positions of the parties

[131] In the present case, there is a significant difference in the legal theories relied upon in the proposed class actions. Neither plaintiff acknowledges that she has "learned" from the approach taken by the other plaintiff. Each plaintiff submits that her approach is preferable.

[132] Ballantine submits that "less is more" and that her proposed claim based solely on negligence is a more effective framework within which to litigate the claim. Ballantine submits that (i) the intrusion upon seclusion and breach of privacy legislation claims relied upon by Agnew-Americano are "fundamentally flawed", leaving the class members exposed to wasted time and costs arising from preemptive motions such as a motion to strike or a motion for summary judgment; and (ii) the breach of contract and consumer protection legislation claims relied upon by Agnew-Americano are duplicative of the negligence claim since those claims can only succeed if the negligence claim is successful.

[133] Agnew-Americano submits that in the present case, "more is better" because the claims she advances are genuinely viable and provide a "further basis of liability" to "significantly [open] up the defendants' exposure" such that "it was in the best interests of the class to plead the broader" claims "resulting in a more comprehensive litigation framework" and "a more effective framework within which to litigate the claims" (as those expressions are found in *Mancinelli*, at paras. 47-49).

[134] For the reasons that follow, I agree with the position of Agnew-Americano.

#### 2. Analysis

[135] Both parties advance a negligence claim, effectively on the same basis that the Equifax Defendants breached their duty of care by failing to put into place a mechanism to prevent the data breach when they were aware by March 2017 of their exposure to hackers. Neither party suggests that one pleading of negligence is stronger than the other.

[136] The issue between the parties concerns the claims for (i) intrusion upon seclusion and breach of provincial privacy legislation, and (ii) breach of contract and breach of provincial consumer protection legislation.

[137] I first address the intrusion upon seclusion and provincial privacy legislation claims.

*i. Intrusion upon seclusion and provincial privacy legislation claims*

a. Intrusion upon seclusion

[138] There are three elements that must be established for a claim in intrusion upon seclusion, as set out in the leading case of *Jones v. Tsige*, 2012 ONCA 32 ("*Jones*") (at paras. 71-72):

(i) the defendant's conduct must be intentional or reckless;

(ii) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and

(iii) the invasion must be such that a reasonable person would regard it as being highly offensive causing distress, humiliation, or anguish (*e.g.* intrusion into financial or health records).

[139] Under a claim for intrusion upon seclusion, proof of harm to a recognized economic interest is not required (*Jones*, at para. 71). By contrast, a claim in negligence requires proof of a duty of care, a breach, damage, and a legal and factual causal relationship between the breach and the damage (*Saadati v. Marchand*, 2017 SCC 28, at para. 19).

[140] Consequently, an intrusion upon seclusion claim, if viable, provides a broader claim which opens up a defendant's exposure.

[141] In *Douez v. Facebook Inc.*, 2017 SCC 33 ("*Douez*"), the Supreme Court emphasized the importance of privacy as having "quasi-constitutional status", and stated that the court "has emphasized the importance of privacy – and its role in protecting one's physical and moral autonomy – on multiple occasions" (*Douez*, at para. 59).

[142] Ballantine submits that the intrusion upon seclusion claim is "fundamentally flawed" on the second branch of the *Jones* test. Ballantine submits that since hackers and not the Equifax Defendants accessed the personal information, the requirement under the *Jones* test that "the defendant must have invaded ... the plaintiff's private affairs or concerns" could not be met.

[143] The Ballantine Claim, as currently drafted, pleads intrusion upon seclusion as a basis for the negligence claim. However, in her factum, Ballantine submits that "the reference in the [Ballantine] pleadings to intrusion upon seclusion (in the context of the negligence claim) is a drafting remnant inadvertently left in the claim and to be removed in due course, as that cause of action is wholly inapplicable to the within situation".

[144] Ballantine does not submit any case that rejects an intrusion upon seclusion claim on the basis upon which she relies.[10] Instead, Ballantine relies on intrusion upon seclusion cases in which a defendant invaded the plaintiff's affairs. However, those cases do not address the situation of a defendant who allegedly permits an outside party to access private financial or other records.

[145] As I note above, the present carriage motion is not a Rule 21 motion. The only role for the court is to determine whether the claim has a "glaring deficiency" or is "fanciful or frivolous" (*Mancinelli*, at para. 42).

[146] Agnew-Americano relies on the decision of Belobaba J. in *Bennett v. Lenovo*, 2017 ONSC 1082 ("*Bennett–Rule 21*"), in which Belobaba J. dismissed a motion under Rule 21 by the defendants to strike the claim for intrusion upon seclusion. In *Bennett-Rule 21*, the intrusion was alleged to have occurred because a computer manufacturer pre-loaded laptops with a program that injected unauthorized advertisements and which "allows hackers ... to collect ... bank credentials, passwords and other highly sensitive information" (*Bennett–Rule 21*, at para. 4). That situation raises some similarities with the allegation in the present case since the Equifax Defendants allegedly knew that their system was at risk from hackers yet allegedly took no steps to protect the system from the hackers.

[147] Justice Belobaba held (*Bennett–Rule 21*, at para. 27):

> The risk of unauthorized access to private information is itself a concern even without any *actual* removal or actual theft. For example, if a landlord installs a peephole allowing him to look into a tenant's bathroom, the tenant would undoubtedly feel that her privacy had been invaded even if the peephole was not being used at any particular time. [Italics in original.]

[148] Ballantine seeks to distinguish the *Bennett–Rule 21* decision on the basis that Lenovo:

> knowingly installed software which would intercept private information and send it to third parties without the knowledge and authorization of the user [in circumstances] that the software even when working as intended (and not at the behest of unscrupulous hackers) was designed to intercept private information and send it to a third party (Superfish) without the knowledge and consent of the end user.

[149] Consequently, Ballantine submits that "the blame for that intrusion upon seclusion [falls] squarely within the four walls of Lenovo's own house" since Lenovo took a "deliberate or

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[10] Ballantine's counsel, Merchant, relies on the same cause of action for intrusion upon seclusion in the related Saskatchewan action, pleaded in almost identical terms to the Agnew-Americano Claim. I do not rely on this inconsistency but note that Merchant in Saskatchewan does not appear to take the position advanced before me.

intentional action to intercept and misuse private information of consumers for its own (or its partners') gain".

[150] I do not agree with Ballantine that the intrusion upon seclusion claim is "frivolous or fanciful".

[151] The court in *Bennett–Rule 21* found that "the risk of unauthorized *access* to private information is itself a concern". [Italics in original.] If a "peephole" analogy were to be applied to the alleged conduct of the Equifax Defendants, a court could find on the pleadings that the Equifax Defendants recklessly permitted a peephole to be established. If so, it would be a viable issue as to whether the claim for intrusion upon seclusion may lie.

[152] Further, in *Bennett–Rule 21*, the intrusion upon seclusion was alleged not only on the basis of the program installed by Lenovo, but also on the basis that Lenovo exposed its computer users to the risk of hacking, allegations similar to those in the present case.

[153] In *Bennett–Rule 21*, Justice Belobaba refused to strike the plaintiff's claims that installing the program "compromises the security of sensitive personal, financial and otherwise confidential information that is commonly stored on computers and other electronic devices" by allowing hackers "to intercept a user's internet connections ... and collect their bank credentials, passwords and other highly sensitive information" including "confidential personal and financial information" which "exposed the class members to significant risks, including the risk that their personal and financial information will be stolen and sold to third parties for commercial purposes" (*Bennett–Rule 21*, at paras. 18-19).

[154] Further, those claims were certified by Justice Perell (*Bennett–Certification*, at para. 76 (iii) to (viii)).

[155] In essence, the Ballantine submission is that it is "fanciful or frivolous" to plead intrusion upon seclusion because the difference between the Agnew-Americano Claim and the claim against Lenovo in *Bennett* is that the Equifax Defendants failed to install a program to protect privacy while Lenovo installed a program which did not protect privacy. I do not agree that such a factual distinction renders the claim "fanciful or frivolous".

[156] The viability of the claim for intrusion upon seclusion in the present action is supported by the recent decision of Masuhara J. in *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 ("*Tucci*"). Masuhara J. certified a claim against Peoples Trust Company (including a claim for intrusion upon seclusion) for permitting unauthorized access by hackers to personal financial information stored in the Peoples Trust database, a claim similar to the present case. In *Tucci*, the plaintiff alleged that Peoples Trust (*Tucci*, at para. 2):

> did not adequately secure personal information collected on its online application portal and stored in online databases. As a result, it is asserted that unauthorized persons were able to access the personal information, putting the proposed class members at risk of identity theft, cybercrime, and "phishing".

[157] Masuhara J. held that it was not "plain and obvious" that an intrusion upon seclusion claim could not succeed under federal common law and certified that cause of action (*Tucci*, at paras. 151 and 257).[11]

[158] The approach in *Bennett–Rule 21* and in *Tucci* could apply given the pleading (and acknowledgement by Equifax US in its press release) that (i) the vulnerability was identified and disclosed by the United States Computer Emergency Readiness team in March 2017; and (ii) the hacker intrusions occurred from May 13, 2017 through July 30, 2017. Agnew-Americano pleads that the conduct of the Equifax Defendants to allow the "peephole" to exist was either intentional, reckless, or wilful.

[159] The approach in *Bennett-Rule 21* and in *Tucci* could also be supported on the basis of the broad approach to privacy law set out by the Supreme Court in *Douez*. Consequently, there is a viable argument that the Agnew-Americano claims for intrusion upon seclusion and breach of provincial privacy legislation are consistent with the broad and liberal approach courts have adopted with respect to privacy rights.

[160] In *Jones*, the court referred to "routinely kept electronic databases" that "render our most personal financial information vulnerable" when discussing "technological change [which] has motivated the legal protection of the individual's right to privacy", and stated that "[i]t is within the capacity of the common law to evolve to respond to the problem posed by the routine collection and aggregation of highly personal information that is readily accessible in electronic form" (*Jones*, at paras. 67-68). Those comments further demonstrate that a claim for intrusion upon seclusion arising from hacking is not "fanciful or frivolous".

[161] Finally, I note that two of the cases settled by Merchant against both Walmart Canada and The Home Depot involved hackers rather than intrusions by the defendant (see *Drew v. Walmart Canada Inc.*, 2017 ONSC 3308 ("*Drew*") and *Lozanski v. The Home Depot Inc.*, 2016 ONSC 5447 ("*Lozanski*")). While it is not clear whether the claim in *Lozanski* relied upon intrusion upon seclusion, the claim in *Drew* did so (*Drew*, at paras. 7-8).

[162] While the approval of the settlement in *Drew* did not review whether the intrusion upon seclusion claim would survive certification, it is yet another example, along with *Tucci*, *Bennett-Rule 21*, *Bennett-Certification*, and the comments of the courts in *Douez* and *Jones*, all of which demonstrate that the Agnew-Americano claim of intrusion upon seclusion is viable. It does not contain a "glaring deficiency" nor is it "fanciful or frivolous".

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[11] Masuhara J. did not certify the intrusion of seclusion claim under British Columbia common law, relying on the decision in *Foote v. Canada (Attorney General)*, 2015 BCSC 849, at para. 116, that the British Columbia privacy legislation occupied the field. I do not address this issue at this time, as the claim in the present case is viable whether at common law or under provincial privacy protection legislation.

[163] Such a claim provides a significantly broader basis for the claim of the class members, as it is not necessary to prove harm.

b. Breach of provincial privacy statutes

[164] Ballantine's submission that Agnew-Americano's claim for breach of provincial privacy legislation is not viable[12] is based on a similar argument as the intrusion upon seclusion claim, *i.e.* Ballantine submits that no claim can lie since the violation of the right to privacy would not be by the "party" against whom relief is sought, and there is no evidence that the Equifax Defendants acted in a wilful or intentional manner. I do not agree.

[165] It is not "fanciful or frivolous" that a court could apply the approach in the above case law and conclude that the legislation applies to a "party" who wilfully permits hackers to access their network to obtain personal information of the customers of the "party".

[166] Further, at a carriage motion the facts are accepted as true for the purpose of determining whether a claim is "fanciful or frivolous", and the reckless and intentional conduct of the Equifax Defendants is pleaded.

[167] In *Bennett–Rule 21*, Belobaba J. found, for the same reasons as with respect to the intrusion upon seclusion claim, that he was "not persuaded that the statutory privacy claims are certain to fail" (*Bennett–Rule 21*, at para. 29). Perell J. certified common issues on the breach of those provincial statutes (*Bennett–Certification*, at para. 76 (ix) to (xii)).

[168] In *Bigstone v. St. Pierre*, 2011 SKCA 34 ("*Bigstone*"), Ottenbreit J.A. held (Smith J.A. dissenting) that it was inappropriate to strike a claim under *The Privacy Act*, R.S.S. 1978, c. P-24 (the *"Saskatchewan Privacy Act"*), when it was alleged that Saskatchewan Power Company was vicariously liable for an employee's breach of privacy. While *Bigstone* did not address whether a "party" can be liable under provincial privacy legislation for allowing a hacker to access personal information, Ottenbreit J.A. held that (i) the concept of privacy under the *Saskatchewan Privacy Act* is "arguably quite broad" (*Bigstone*, at para. 23); (ii) it can "cover a wide spectrum of privacy interests" (*Bigstone*, at para. 26); and (iii) "the essential elements of the statutory tort have yet to be fully defined by our courts" (*Bigstone*, at para. 19).

[169] Ottenbreit J.A. held that if the claim alleges (i) the action is pursuant to the *Saskatchewan Privacy Act*; (ii) the impugned conduct falls within the arguable scope of the *Saskatchewan Privacy Act*; (iii) the privacy is that of a person; (iv) the type of privacy interest is generally identifiable; and (v) the violation is wilful and without claim of right, a claim under privacy

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[12] The claim in Saskatchewan on which Merchant is counsel pleads breach of provincial and territorial privacy statutes. However, as I discuss at footnote 10, I do not rely on this apparent inconsistency to find that the Agnew-Americano claim for breach of provincial privacy legislation is not "fanciful or frivolous".

legislation could stand "[a]t this stage of the development of the jurisprudence respecting the *Act*" (*Bigstone*, at para. 34).

[170] Consequently, I do not accept Ballantine's submission that "the privacy legislation will be of no meaningful assistance to the class". Regardless of whether such a claim can withstand a Rule 21 motion or a certification challenge under s. 5(1)(a) of the *CPA*, I cannot find these claims have a "glaring deficiency" or are "fanciful or frivolous" such that it is "fundamentally flawed" to seek relief under provincial privacy legislation for alleged wilful conduct in permitting criminal hacking of confidential information.

[171] Similarly, a claim under the provincial privacy statutes also "significantly [opens] up the defendants' exposure",[13] since the class members will not have to establish proof of harm to their economic interests. Consequently, I find that it is in the best interests of the class to plead the broader breach of provincial privacy legislation.

*ii. Breach of contract and consumer protection legislation claims*

[172] Ballantine submits that the Agnew-Americano claim for breach of contract is "a redundant exercise" and that "success in the claim for negligence would entitle recovery of damages by the alleged breach".

[173] Similarly, with respect to the Agnew-Americano claim for breach of provincial consumer protection legislation, Ballantine submits that "[t]his is essentially a duplication of the breach of contract claim".

[174] Ballantine acknowledges that there are no "fatal flaws" with either argument, but submits that these claims will generate increased costs and decrease efficiency.

[175] I do not agree. I agree with the Agnew-Americano submission that the breach of contract and consumer protection claims could open the Equifax Defendants' exposure to contractual damages and other remedies, including rescission, not available under negligence claims. It would be in the best interests of the class members to plead the broader claims, resulting in a more comprehensive litigation framework.

[176] I address each of those claims below.

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[13] (particularly if Ballantine's submission is correct that the "field is occupied" for an intrusion upon seclusion claim by provincial legislation in some jurisdictions, an issue I do not decide)

a. Breach of contract

[177] The basis for the breach of contract claim and the relevant pleadings are set out at paragraphs 47 and 48 above.[14] Agnew-Americano pleads that the Equifax Defendants breached their contracts with class members.

[178] I agree with Agnew-Americano's submission that a breach of contract claim for the class members who had a contract with the Equifax Defendants for credit protection services is distinct from the negligence claim.

[179] Ballantine submits that a finding of negligence for failure to exercise due care in protecting the financial information will be the same basis upon which a court could find breach of contract for those class members who have a contractual relationship with the Equifax Defendants.

[180] However, counsel for Ballantine acknowledged at the hearing that the damages sought by class members with contractual claims (for those who paid for Equifax services) would not be available to those class members who only had negligence claims through exposure of their personal information stored on Equifax's computer system.

[181] On that basis, I find that the contractual claim broadens the Equifax Defendants' exposure to damages and should proceed in the best interests of the class members who had a contractual relationship with the Equifax Defendants.

b. Breach of consumer protection legislation

[182] With respect to the claims under consumer protection legislation, I agree with Agnew-Americano that those claims also provide a broader basis for potential liability of the Equifax Defendants. They are not simply duplicative as submitted by Ballantine.

[183] I adopt the following summary of the consumer protection claim from the Agnew-Americano factum:

> The Sotos claim also claims consumer protection legislation remedies on behalf of persons having a breach of contract claim. It alleges that Equifax made representations that they maintained strict security safeguards, but failed to do so. Subsection 14(1) of the *Consumer Protection Act, 2002* [S.O. 2002, c. 30, Sch. "A"] states that it is "an unfair practice for a person to make a false, misleading or deceptive representation." Subsection 14(2) states that "[w]ithout limiting the

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[14] As at footnote 10 above, in the Saskatchewan claim on which Merchant is counsel, the representative plaintiff pleads "breach of contract and warranty". Again, while I note the inconsistency in positions advanced, I do not take that into account for my analysis of whether the Agnew-Americano breach of contract claim is duplicative.

> generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representations: 1. A representation that the [...] services have [...] benefits or qualities that they do not have. 3. A representation that the [...] services are of a particular standard, quality, [...] if they are not." Consistent with the scheme of the CPA, based on the existence of these unfair practices, the Sotos claim seeks remedies pursuant to the statute.

[184] Section 7(1) of the *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sched. A (the "*Consumer Protection Act, 2002*") provides that the rights under that Act exist despite any agreement or waiver to the contrary. The remedies under the *Consumer Protection Act, 2002* include rescission and any remedy that is available at law, including damages (ss. 18(1) and 18(2) of the *Consumer Protection Act, 2002*).

[185] Rescission may be available under the *Consumer Protection Act, 2002* if the breach is established, even if it might not be available as a contractual remedy.

[186] In contrast, under contract law, "[d]amages arising out of breach of contract are governed by the expectation of the parties at the time the contract was made" (*Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, at para. 19).

[187] Consequently, I accept the Agnew-Americano submission that the available remedies under the *Consumer Protection Act, 2002* "could be important to the extent that Equifax seeks to plead or rely on defences to the contractual claim like part performance to argue that class members obtained the benefit of the bargain despite the privacy breach".

*iii. Conclusion*

[188] For the above reasons, I find that the Agnew-Americano Claim raises viable causes of action that broaden the Equifax Defendants' exposure. It is in the best interests of the class members to plead the broader claims, resulting in a more comprehensive litigation framework. This factor is important to my conclusion that Agnew-Americano have carriage of the class action.

[189] As this is not a Rule 21 motion, or an issue of certification under s. 5(1)(a) of the *CPA*, I make no findings as to whether any of the proposed claims could withstand such attack. Fairness to the defendants requires the court to limit its conclusion to the "glaring deficiencies" or "fanciful or frivolous" tests.

**iii) Factor 2: The resources and experience of counsel**

**a) The applicable law**

**1. The positions of the parties**

[190] Counsel for Agnew-Americano and Ballantine disagreed as to whether the court ought to engage in a review of the experience of counsel proposed to have carriage of the action.

[191] Ballantine relies on cases that held that the court should not engage in a "beauty pageant". Ballantine submits that the "experience" factor is neutral since both law firms have the capabilities to act as litigation counsel.

[192] Agnew-Americano submits that the court can consider the experience of counsel under the *Mancinelli* test.

[193] For the reasons that follow, I accept the position of Agnew-Americano and find that the experience of counsel is a relevant factor which can be considered.

### 2. The relevant legal principles

[194] The court in *Mancinelli* set out the factor of "the resources and experience of counsel" as a separate factor to consider in a carriage motion. This is distinct from the factor of the nature and scope of the causes of action and theories advanced by counsel in the respective claims.

[195] Given the guiding principles in *Mancinelli* that (i) the court must consider the "best interests of the class"; (ii) the critical question is "[w]hich of the competing actions is more likely to advance the interests of the class?"; and (iii) the court has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion, it would be counter-intuitive that counsel's experience or resources should be ignored when there is evidence of a difference between counsel proposed to have carriage of a class action.

[196] Similarly, it would be counter-intuitive to ignore objective evidence of a difference in experience given Winkler J.'s statement in *Setterington* (at para. 26) that "the court is required to consider first and foremost the interests of the silent class members".

[197] Ballantine relies on the statement of Belobaba J. as motion judge in *Mancinelli-SCJ* that "the task of the court is not to choose between the competing firms according to their relative resources and expertise; rather, it is to determine which of the competing actions is more or most likely to advance the interests of the class" (*Mancinelli–SCJ*, at para. 12).

[198] In *Mancinelli-SCJ*, the court had no concern about any differences between the experience of counsel relevant to which action would most likely advance the interests of the class. Belobaba J. held that "any *one* of the elite class action firms involved herein – Koskie Minsky, Siskinds, Sutts Strosberg, Rochon Genova or Merchant – have more than enough expertise and experience *on their own* to do an excellent job as carriage counsel"[15] (*Mancinelli–SCJ*, at para. 13). [Italics in original.]

[199] Ballantine also relies on the comment of the court in *Mancinelli* which rejected the appellants' submission that the motion judge "should have engaged in a detailed weighing of the

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[15] (a passage referred to by Strathy C.J.O. in *Mancinelli*, at para. 69)

resources and expertise of the two counsel groups", including "the presence of Merchant in the consortium" (*Mancinelli*, at para. 68).

[200] Ballantine relies on the above comments to submit that in the present case I should find that the experience of the lawyers proposed for the class action is a neutral factor. I do not agree.

[201] If the court is satisfied that either legal team proposed to have carriage of the class action can equally represent the interests of the class members, the court should not "choose between the competing firms according to their relative resources and expertise". However, I do not take Belobaba J. to conclude that the court should ignore the experience of counsel if there is evidence relevant to "which of the competing actions is more likely to advance the interests of the class" (see *Mancinelli-SCJ*, at para. 12).

[202] The comments of Belobaba J. in *Mancinelli–SCJ* are consistent with the analysis of Perell J. in *Sharma v. Timminico Inc.* (2009), 99 O.R. (3d) 260 (SCJ) ("*Sharma*"). In *Sharma*, Perell J. stated that "for the case at bar", it was not helpful to hold a "beauty pageant", "where the rival law firms describe their current talents and past accomplishments" (*Sharma*, at para. 18). In *Sharma*, Perell J. found that the "the best interests of the class members could be satisfied by choosing either firm to be class counsel" since Perell J. was satisfied that both firms were "capable of providing a similar quality of service to the class" (*Sharma*, at paras. 83-86).

[203] Consequently, the Ballantine submission that "The reality is that the 'resources and experience of counsel' factor will often be a neutral and unhelpful metric in the comparative analysis", is based on case law where the court was satisfied on the evidence that any of the proposed law firms (or lawyers if such evidence was led) would equally have been able to represent class members in the proposed class action (see also *Kowalyshyn*, at para. 183).

[204] However, there is a difference between (i) the court selecting a winner of a "beauty pageant" between lawyers or law firms who both satisfy the court that they would be equally capable of leading a class action, and (ii) the court finding a difference between the relevant expertise of the lawyers proposed to have carriage of the class action. In the latter situation, the "experience" factor set out by the court in *Mancinelli* must be considered.

[205] There may also be a difference between the expertise of a law firm and the expertise of the lawyers proposed to act on a class action. If there is evidence before the court as to relevant differences in experience between proposed counsel for the litigation, it would be contrary to the principles and factors in *Mancinelli* to ignore such a difference.

[206] It is not "mudslinging" (as that term was used by Edmond J. in *Thompson v. Manitoba (Minister of Justice)*, 2016 MBQB 169, at para. 55) to lead evidence of the experience of the lawyers who are proposed to have carriage of the case.

[207] Further, leading evidence about who will be counsel on the action is consistent with the obligation on lawyers on a carriage motion to set aside the adversarial system and instead provide the court with all relevant information, regardless of whether it assists one law firm over the other.

[208] In *Setterington* (at para. 26), Winkler J. set out the general principle that "[i]t is incumbent upon representative plaintiffs and their counsel seeking [carriage orders] to make full disclosure to the court of all factors that could logically impact on the determination of the motion."[16] Winkler J. held (*Setterington*, at para. 26):

> **On a carriage motion, much as in the case of a settlement approval hearing, there is a requirement of utmost good faith on the part of counsel to forego reliance on the adversarial system as a fact-finding mechanism and place all material facts which can have any bearing on the issues before the court, whether these may be against their interests or not.** It would be to ignore the reality of class proceedings to disregard the fact that counsel granted carriage of a class proceeding stand to reap a substantial fee if successful. **Accordingly, there must be a concomitant obligation to ensure full and frank disclosure of all material facts because the protection of the interests of the silent class members, in those circumstances, demands no less.** [Emphasis added.]

[209] If the court must consider "all factors that could logically impact on the determination of the motion" (*Setterington*, at para. 26) and the court "has a duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion" (*Mancinelli*, at para. 72), then the experience of proposed counsel may be a relevant factor.

[210] Also, contrary to Ballantine's submission, the court in *Mancinelli* held that past misconduct of counsel (and in particular, Anthony Merchant) could be considered. The court found no basis to interfere with Belobaba J.'s review of the evidence before him on the carriage motion, which included the past misconduct (*Mancinelli*, at para. 72).

**b) Application of the law to the facts of the case**

**1. The experience of counsel**

[211] Counsel agreed at the hearing that the "resources" of the respective law firms was a neutral factor.[17]

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[16] I address this issue in more detail below given the failure of Simoes to disclose other relevant litigation in Saskatchewan and British Columbia.

[17] Ballantine submitted in her factum that as a "national" firm, Merchant could provide more "face-to-face" contact with class members which "past experience has shown" to be important to class members, "particularly where data breach class actions are concerned", since "class members ... are understandably skittish about relying on technology to address their concerns". This is an example of Ballantine making submissions to the court unsupported by any evidence (see also paragraph 247 of these Reasons). Ballantine led no evidence as to whether the Merchant firm had any face-to-face contact with class members either in this matter or in any other similar matters. At the hearing, counsel for Ballantine did not pursue this argument and agreed that the "resources" factor was neutral.

[212] Both parties rely on their experience as law firms in matters relating to (i) the loss or breach of personal information and (ii) class action litigation. In that regard, the factor is neutral, as both firms have considerable experience.

[213] However, the court can review the experience of the individual lawyers on the proposed team[18] of lawyers to determine if, on the evidence, there is a distinction relevant to carriage of the class action.

[214] Consequently, I review the experience of the members of the team of lawyers proposed to be involved in the litigation, and in particular those with primary carriage of the file.

[215] Based on the evidence I review at paragraphs 56 to 58 above, the expertise of the proposed Sotos team cannot be impugned. Ballantine takes no issue with their experience and agrees that the Sotos lawyers are qualified to act as counsel in this matter.

[216] The expertise of the proposed Sotos class counsel is confirmed by the evidence as to (i) their role as counsel in significant breach of privacy class actions, (ii) independent rankings for each of Sterns, Sokolov, and Leclerc as plaintiffs' class action counsel, (iii) the lawyers' record of involvement in class action litigation including summary judgment, Rule 21, and jurisdictional motions, (iv) experience as speakers on privacy law issues, and (v) leadership roles in class action and civil litigation bar association organizations.

[217] In contrast, there is no evidence of any involvement by Vuia in any cases related to the issue of the loss of personal information which is central to the present case. Other than a general statement that she has "participated" in "dozens of class actions", the exclusion of privacy matters[19] from the description of her practice[20] is telling: there is no evidence before the court of her experience relevant to the issues in the present action on which she is to share "primary carriage".

[218] Further, Ballantine filed no evidence as to Vuia's background or years of experience. It was Agnew-Americano (through Seddigh) who led evidence that Vuia was called to the bar in 2016. Consequently, the court cannot have the confidence that the class members would be equally served by Vuia as one of two counsel with "primary carriage of this matter".

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[18] Ballantine relies on that distinction when she submits that the conduct of Anthony Merchant should not be taken into account because he will not be involved in the Ontario litigation.

[19] Simoes only states that Vuia has experience in "dozens of class actions, including pharmaceutical class actions, automobile class actions, and tax shelter class actions".

[20] Even if there had been a general reference to Vuia's experience in privacy law matters (as there was with Tibbs), there still would have been no specific evidence as to relevant matters to assist the court in contrast to the evidence in the Seddigh Affidavit.

[219] In no way do I seek to impugn the abilities of Vuia. However, on a motion where the court has a "duty to protect class members and a broader duty to the administration of justice when approving counsel in a carriage motion" (*Mancinelli*, at para. 72), the objective difference between the experience of Vuia and that of the Sotos lawyers is compelling.

[220] There is no evidence that any of the other lawyers proposed for the Ballantine legal team (except Tibbs) have any experience in breach of privacy cases, again a significant difference with the lawyers from Sotos proposed by Agnew-Americano.

[221] With respect to Tibbs, the only reference to his privacy law experience is a general comment that he "has been involved in the preparation of pleadings, affidavits, and certification records in dozens of class actions, including privacy breach actions". In light of the evidence as to the expertise of the proposed Sotos lawyers, such a general statement about Tibbs' experience, without any evidence of prior retainers, professional experience, or independent rankings, does not establish that the experience factor is neutral.

[222] Consequently, this is not a situation of picking a "winner" in a "beauty pageant" when faced with law firms and lawyers with proposed carriage of the case of similar experience.

[223] On the one hand, the evidence about the two lawyers proposed to have primary carriage of the Ballantine Action (in a proposed team of six lawyers) consists of (i) a bald assertion that one of the lawyers (Tibbs) has been "involved" in "privacy breach class actions" and (ii) the other lawyer (Vuia) was called to the bar in 2016 with no evidence of experience in privacy law matters. There is no evidence that any of the other four lawyers on the proposed team have privacy law experience, and Simoes proffers only general comments as to their experience.

[224] On the other hand, Agnew-Americano's evidence is that carriage of her class action will be conducted by three senior counsel with experience both in privacy law cases and in class action litigation in which they had active or leading roles on pivotal certification and jurisdictional issues.

[225] Ballantine submits in her reply factum that whoever is lead counsel "would not change the real-world reality that a great deal of work on the file would necessarily be done … by more junior associates and assistants" and that "each task will generally be completed by the least expensive individual with the competence to do so". I agree that such an approach is typical for significant litigation. However,

(i) work would be done under the direction of lead counsel, whose expertise is pivotal to the court's level of confidence that the best interests of the class would be advanced; and

(ii) the experience of the proposed members of the team can be considered by the court if there is evidence to that effect.

[226] Consequently, whether experience is considered of an individual lawyer or the team of lawyers with proposed carriage, the members of the Sotos team have significantly more relevant experience to best advance the interests of the class members.

[227] Ballantine submits that the factor of experience of counsel is one of "optics" alone. Ballantine's approach is well-illustrated by her submission in her factum that "we could have just as easily named – to take an example only – Roch Dupont as primary counsel of record" as a method of satisfying the court of the experience factor. I find Ballantine's submission contrary to the law and disconcerting.

[228] It would be improper to list a lawyer as having a lead counsel role when that is not the case, but rather just for "optics". It is not a question of randomly "naming Mr. Dupont as primary counsel"[21] as submitted by Ballantine. Rather, it is a question of leading evidence, based on full and fair disclosure to the court, to satisfy the court of the expertise of the proposed counsel for the case.

### 2. Factors relating to the conduct of counsel

[229] While not necessary to my analysis above as to the relative experience of the proposed counsel for the actions, the failure of Simoes to disclose all material facts before the court (as required under *Setterington*) is also a matter relevant to the choice of counsel.

[230] In particular, as I discuss below in my consideration of the other class actions brought in more than one jurisdiction, Simoes did not disclose any information about the Saskatchewan and British Columbia litigation on the same matter brought by Merchant (even though Simoes expressly referred to the Quebec litigation). That same failure to disclose the existence of other litigation was the subject of criticism of Winkler J. in *Setterington*, yet Merchant chose to take the same non-disclosure approach before this court (see *Setterington*, at para. 26).

[231] Counsel who continue to ignore disclosure obligations already the subject of prior court criticism raise a legitimate concern as to whether that counsel should be selected to represent the interests of class members.

[232] Agnew-Americano submitted that the court should consider the comments of the courts and past disciplinary proceedings affecting Anthony Merchant, as well as the comments of Belobaba J. in *Quenneville* about Tibbs.

[233] Ballantine relies on the court's comment in *Mancinelli* that the motion judge did not err in the weight he attributed to "the presence of Merchant in the consortium" (*Mancinelli*, at para. 68). However, this submission does not support a conclusion that the conduct of Anthony Merchant or Tibbs cannot be considered by the court.

[234] The court held in *Mancinelli* that "prior misconduct" of counsel could be a factor relevant to discharge its duty to protect class members (*Mancinelli*, at para. 72). If I were to consider that factor, the findings of Belobaba J. as to Tibbs' conduct before the Ontario courts would further

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[21] In any event, there is no evidence that Mr. Dupont has any experience in privacy law cases.

weigh against granting carriage to the Merchant firm, as would the conduct of Anthony Merchant, when compared to the uncontested evidence of no findings of misconduct against any of the members of the Sotos team.

[235] However, given the significant discrepancy in experience which already exists between which counsel can best advance the interests of the class members, it is not necessary for me to rely on the above conduct as a factor.

[236] For the above reasons, on the evidence in the present case, I find that the factor of experience of counsel favours carriage for Agnew-Americano.

### iv) Factor 3: The state of the action including preparation and class engagement

#### a) The applicable law

[237] The extent of preparation is a factor that can be considered by the court on a carriage motion (*Mancinelli*, at para. 51). As Strathy C.J.O. held (*Mancinelli*, at para. 52):

> But since only one firm will go into battle, it is not unreasonable to ask which has done the best job in preparing itself for battle and whether its preparation has yielded benefits for the class. And this is precisely what the motion judge did.

[238] In the present case, it is early in the proceedings. However, there are some differences between the state of the action including preparation and class engagement, I address the relevant evidence below.

#### b) Application of the law to the facts of the present case

[239] The evidence at paragraphs 74 to 83 above demonstrates that Sotos has taken the following steps in the action:

(i) prepared for a motion for interim relief to compel the Equifax Defendants to give direct notice to affected Canadians that a data breach occurred in relation to their personal information,

(ii) prepared a certification record that is ready to be filed following the carriage motion, and

(iii) prepared a thorough update to class members about the proposed class action and steps consumers at risk of the data breach could take to protect themselves from identity theft.

[240] The evidence at paragraphs 84 to 89 above demonstrates that Merchant:

(i) has not finalized the certification motion record but proposes to serve it within 60 days of carriage being determined, and

(ii) set out two general paragraphs on its website to describe the four actions it has brought in British Columbia, Saskatchewan, Ontario and Quebec.

[241] None of the above factors are determinative of who should have carriage of the matter. However, on the evidence, the Sotos firm has done more in relation to the litigation and class engagement.

[242] There is no evidence from the Equifax Defendants[22] as to whether their decisions to:

(i) issue a press release on September 19, 2017 to advise Canadian customers of the data breach, immediately after Agnew-Americano sought a case conference,

(ii) notify affected Canadians, posted on the Equifax Canada website on October 16, 2017, a day before the scheduled case conference, and

(iii) send letters out within days of the case conference,

were affected by the interim relief sought and steps taken by Sotos in the Agnew-Americano Action. While the timing of the decisions could support such an inference, I make no finding on the evidence before me.

[243] However, there is also no evidence to support Ballantine's submission that the steps taken by Sotos with respect to requiring the Equifax Defendants to give direct notice to affected Canadians were irrelevant and a waste of resources.

[244] The steps taken by Sotos were appropriate to protect the interests of the class members whose personal information was accessed by hackers. The decision to pursue that relief was reasonable, and important for class members who unlike Equifax customers in the United States, did not know if they had been personally affected by the data breach.

[245] Also, the level of detail in the Sotos e-mail update, as compared to the "bare bones" approach of the Merchant website, demonstrates class engagement by the Sotos firm that is relevant to the carriage issue.

[246] Ballantine submitted that the decision in *Quenneville* prohibits, or cautions against, communications by counsel with the class before the carriage motion is decided. Ballantine submitted in her factum that, as a result of Belobaba J.'s comments in *Quenneville*, "a lawyer or a firm could be fairly critiqued for actively communicating with putative class members prior to carriage being determined or certification achieved and ***not*** fully informing them of the existence of, in this case, competing proposed class proceedings". [Italics and emphasis in original.]

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[22] (nor would any reasonably be expected)

[247] Ballantine also submitted in her factum that:

> Given our experience in *Quenneville*, we have deliberately chosen to limit communication with the general public regarding this action until carriage has been resolved,[23] to minimize the potential for confusion among the prospective class.

[248] I do not agree with Ballantine's interpretation of *Quenneville*.

[249] In *Quenneville*, the issue before Belobaba J. was the conduct of Tibbs and the Merchant firm after carriage was decided. Belobaba J. held (*Quenneville*, at paras. 2-7, 10, and 15-16):

(i) After the Merchant firm was not granted carriage, Merchant sent an email "blast" inviting recipients to retain the firm for either an individual joinder action or a class proceeding;

(ii) At an immediate motion to address the email blast, Belobaba J. "suggested to Mr. Tibbs that the MLG email blast may well be misleading and in breach" of the carriage order;

(iii) In his endorsement from the motion, Belobaba J. concluded that Merchant's breach of the carriage order was "deserving of censure and condemnation" and awarded costs to the plaintiffs on a substantial indemnity basis;

(iv) Belobaba J. then heard a contempt motion when Merchant continued to recruit Ontario residents for the Merchant class action; and

(v) Belobaba J. characterized Tibbs' conduct as "careless, unprofessional and arguably in breach" of the carriage order, and ascribed "extreme carelessness" to Tibbs' conduct which Belobaba J. described as "disingenuous".

[250] *Quenneville* does not support Ballantine's submission that counsel who seek to have carriage of a class action should not communicate with potential class members who have signed up for e-mail updates during that time.

[251] With respect to the date of delivery of the certification record, I adopt the comments of Belobaba J. in *Kaplan v. Casino Rama Services Inc.*, 2017 ONSC 2671 ("*Kaplan*") that "I am not persuaded that carriage should turn on" the date of delivery of certification materials when "the more likely scenario" is that the Equifax Defendants and the representative plaintiff would have to agree on a reasonable schedule for the certification motion that could well accommodate a 60-day preparation time for the certification motion material (*Kaplan*, at para. 10).

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[23] This is another example of Ballantine making submissions to the court for which there was no evidentiary support.

[252] The preparation and class engagement is not extensive at present. Nevertheless, I do not accept Ballantine's submission that "nothing turns on this". This factor, while not as significant, still favours carriage of the Agnew-Americano Action.

### v) Factor 4: Fee arrangements

#### a) The applicable law

[253] In *McCallum-Boxe v. Sony*, 2015 ONSC 6896 ("*McCallum-Boxe*"), Belobaba J. found that there was a practice of the Merchant firm to (i) commence class actions without a written retainer agreement in place, and (ii) enter into such non-written agreements that provided only for Merchant to seek legal fees from the defendant as part of the settlement agreement. Belobaba J. held that such a practice was "the very antithesis of what is in the best interests of the class" and was "disturbing" (*McCallum-Boxe*, at paras. 1 and 11).

[254] Section 32(1) of the *CPA* requires that "[a]n agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing". In *Smith Estate v. National Money Mart Company*, 2011 ONCA 233 ("*Smith Estate*"), Juriansz J.A. reiterated the principle under s. 32(1) of the *CPA* that all class action fee agreements must be in writing (*Smith Estate*, at para. 53).

[255] Section 32(2) of the *CPA* requires court approval of an agreement respecting fees and disbursements:

> An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor.

[256] Also, in *Smith Estate*, the court held that the fee agreement must make specific reference to the requirement for class counsel to obtain court approval to seek a multiplier. Juriansz J.A. held (*Smith Estate*, at para. 64):

> Nowhere else in the agreement is it stipulated that class counsel is permitted to bring a motion to have their fees increased by a multiplier. Recital D of the agreement merely states that "[t]he Act provides, among other things, that a Fee Agreement: . . . (d) may permit a solicitor to be paid by having a Base Fee increased by a multiplier or as a percentage of the Recovery". While this is accurate as a general statement, it does not bring the fee agreement under s. 33(4) of the CPA. It does not, as a matter of contract, "permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier".

[257] In *Smith Estate*, the court further found that it is not sufficient for the retainer agreement to make clear that the agreement must be approved by the court. The retainer agreement must expressly indicate that the court shall determine what fees will be allowed to counsel (*Smith Estate*, at para. 66).

### b) Application of the law to the facts of the present case

[258] Agnew-Americano raises several concerns about the Ballantine retainer agreements.[24]

[259] Merchant commenced the Ballantine Action without a written retainer agreement from their client. That agreement was dated November 2, 2017, the date the motion material was to be exchanged between counsel, and almost two months after the Ballantine Claim was issued.

[260] Merchant's conduct repeats the same "disturbing" practice already criticized by Belobaba J. in *McCallum-Boxe*. Section 32(1) of the *CPA* requires that such an agreement be in writing. I adopt Belobaba J.'s view that it is improper for counsel to have a client serve as a representative plaintiff without the client considering the consequences of acting as a representative plaintiff based on a written retainer agreement.

[261] The Merchant approaches in the present case and in *McCallum-Boxe* encourage a rush to the courthouse with a claim the instant a potential class action arises, with a representative plaintiff who has not received the written fee agreement required by law, and has not had the opportunity to consider the legal consequences of such a written agreement. Consequently, the present Ballantine fee agreement remains antithetical to the interests of the proposed representative plaintiff, and contrary to both s. 32(1) of the *CPA* and settled law in *Smith Estate*.

[262] I contrast the Ballantine retainer agreement with that of Agnew-Americano, in which Sotos ensured that a written fee agreement was in place with Agnew-Americano prior to commencing the action.

[263] Further, contrary to the conclusion of the court in *Smith Estate* and under s. 33(4) of the *CPA*, the Ballantine retainer agreement does not set out that Merchant "is permitted to bring a motion to have their fees increased by a multiplier". The court in *Smith Estate* was clear that an agreement which only states that a solicitor may obtain such fees without indicating that a court application is required is in violation of the *CPA* (*Smith Estate*, at para. 64).

[264] The Ballantine retainer agreement states only that Merchant's legal fee "will be calculated as a 25% fee of the total value of the amount recovered, or on the basis of a 3 times multiplier of my lawyers [*sic*] regular hourly rates for the time spent pursuing this class action litigation, whichever is higher".

[265] Further, while s. 32(2) of the *CPA* requires all fee agreements to be approved by the court, the Ballantine retainer agreement improperly states that "any fee awarded pursuant to this Agreement **may** be subject to approval of the court". [Emphasis added.] This permissive language is again contrary to the mandatory language required (*Smith Estate*, at para. 66).

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[24] The retainer agreements are essentially identical for Ballantine and Perisiol.

[266] In contrast, in the Agnew-Americano retainer agreements, Sotos advises the clients that:

> It is understood that Class Counsel's legal fees and disbursements **shall** be subject to approval by the court and that Class Counsel may make any motion for approval of this agreement and their fees and disbursements. [Emphasis added.]

[267] Ballantine submits that the above issues should not be a factor because those concerns are "technicalities and, in the final analysis, neither firm has an advantage over the other in this respect". I do not agree.

[268] The retainer agreement requirements under the *CPA* exist for the protection of the representative plaintiff and the members of the class. Ballantine entered into litigation without a written retainer agreement and then signed a written retainer agreement without it setting out important requirements under the *CPA*.

[269] Counsel for Ballantine did not dispute that the Merchant retainer agreement with Ballantine was (i) signed after the Ballantine Claim was issued and (ii) subject to the above criticisms.

[270] Consequently, I do not accept Ballantine's submission that "Nothing significant or meaningful, in our respectful submission, turns on these alleged technical deficiencies". They are not technical deficiencies.

[271] Ballantine submits that the Agnew-Americano retainer agreement[25] is "hardly a specimen of perfection", raising three technical breaches of Reg. 195/04 of the *Solicitors Act,* R.S.O. 1990, c. S.15. Those breaches relate to (i) the proper title of the retainer agreement (s. 1(1)(a) of Reg. 195/04), (ii) the failure to include the firm's and lawyer's name, address, and telephone number (s. 2(1) of Reg. 195/04), and (iii) the agreement not including a statement that "the solicitor shall not recover more in fees than the client recovers as damages or receives by way of settlement" (s. 3(1) of Reg. 195/04).

[272] However, Ballantine concedes that "We fully acknowledge that, as drafted, MLG's retainer agreement is also lacking in these [technical] respects".

[273] Ballantine does not submit that the Agnew-Americano retainer agreement breached the *CPA*.

[274] The technical breaches of Reg. 195/04 which are common to both parties' retainer agreements cannot be classified in the same manner as the substantive breaches in the Ballantine retainer agreement of both the *CPA* and case law in which Ontario courts have directly

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[25] The Agnew-Americano retainer agreement is essentially identical to the Jane Doe retainer agreement.

commented on Merchant's practice with respect to retainer agreements. The same substantive defects recur in the present case.

[275] All of the above flaws in the Ballantine retainer agreement support carriage to Agnew-Americano. The continued pattern of Merchant either being unaware of or ignoring the requirements under both the *CPA* and the settled law raises concerns that the Ballantine Action would not best advance the interests of the class members in this litigation.

### vi) Factor 5: Class definition

[276] Counsel for Ballantine acknowledged at the hearing that the class definition in the present case is intertwined with the nature and scope of the causes of action pleaded. Given that the only aspect of the class definition challenged at the hearing related to those Equifax customers with contractual claims, the Agnew-Americano class definition would be appropriate given my finding above that the breach of contract and consumer protection legislation claims are not duplicative.

[277] I find the proposed class definition preferable in the Agnew-Americano Claim, for the reasons I review below.

#### a) The applicable law

[278] It is within the discretion of the court to narrow the class definition based on the evidence at the certification motion, so an over-inclusive class definition which can be amended as a result of the certification process ought not to be determinative for a carriage motion. Perell J. stated in *Kowalyshyn* (at para. 215):

> Generally speaking, having regard to the goals of class actions to provide access to justice, behaviour modification, and judicial economy, more serious than an over-inclusive Class Membership, which can be pruned, is an under-inclusive definition. One, however, cannot be definitive about the extent of a class definition because class size involves several concerns and the nature of the particular class action makes a difference. In the immediate case, in my opinion, Ms. O'Brien's class definition is preferable to Ms. Kowalyshyn's but Ms. Kowalyshyn's is not objectionable.

[279] The class definition will identify those with potential claims against the defendants, will help to define the parameters of the action, and will describe those who are entitled to receive notice of certification if the action is certified. Any person's membership in the class must be determined by stated, objective criteria (*Sun Rype Products Ltd. v. Archer Daniels Midland Co.*, 2013 SCC 58, at para. 57).

#### b) Application of the law to the present case

[280] As in *Kowalyshyn*, neither class definition in this matter is "objectionable". Each class definition reflects the nature and scope of the proposed claims from each party.

[281] In the Agnew-Americano Claim, the class definition was modified from the initial claim. It now includes as part of the class those persons in Canada "whose personal information was exposed to appropriation by unauthorized persons (i.e. "hackers") as a result of a security breach occurring between May 1, 2017 and August 1, 2017". The revised class definition in the Agnew-Americano Claim is similar to the proposed class definition in the Ballantine Claim of persons in Canada "who had, at any time prior to September 7th, 2017, personal or credit data collected, and stored by Equifax and who were subject to risk of data loss as a result of the breach which occurred between May and July 2017".

[282] The Oxford English Dictionary defines "expose" as "cause someone to be vulnerable or at risk".[26] Consequently, both definitions encompass persons whose information was placed at risk by the impugned conduct of the Equifax Defendants.

[283] I do not agree with Ballantine that the group of proposed class members with contractual claims in the Agnew-Americano Action is unnecessary as a subclass.

[284] By proposing a class of members with contractual relationships, the class definition expands the class to those who have a cause of action for (i) breach of contract because the "Privacy Policy" statement of strict security was allegedly breached (assuming contractual damages can be proven) or (ii) claims under the consumer protection legislation for rescission (or damages) on the basis of a false representation. In either event, these contractual class members have a potential remedy which may not be available to those members who only have a negligence claim.

[285] Consequently, I do not find that the Agnew-Americano class definition is "over-inclusive", "unnecessary" or "duplicative".

[286] Even if there was a need to create subclasses as a result of the breach of contract and consumer protection claims, subclasses are provided for in the *CPA* and are frequently certified (see *Da Silva v. 2162095 Ontario Ltd.*, 2016 ONSC 2069, at paras. 10-11; *578115 Ontario Inc. (c.o.b. McKee's Carpet Zone) v. Sears Canada Inc.*, 2010 ONSC 5673, at paras. 7-8).

[287] Section 6 (5.) of the *CPA* states that:

> The court shall not refuse to certify a class proceeding solely on any of the following grounds:
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

[288] Consequently, I prefer the class definition proposed in the Agnew-Americano Claim.

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[26] *Oxford Dictionary*, "expose", online: <https://en.oxforddictionaries.com/definition/expose>.

### vii) Factor 6: Interrelationship of class actions in more than one jurisdiction

#### a) The positions of the parties

[289] Ballantine submits that this factor favours carriage for the Ballantine Action, since the Merchant firm is counsel in class actions brought in the same matter in Saskatchewan, Quebec, and British Columbia. A national class is sought in both the Saskatchewan and British Columbia actions, while the Quebec claim seeks only to certify a Quebec class.

[290] Simoes did not disclose the existence of the Saskatchewan or British Columbia litigation in his first affidavit. Rather, Seddigh disclosed the existence of those actions in his affidavit.

[291] In his second affidavit, Simoes took the position that (i) the Saskatchewan and British Columbia filings were required to preserve limitation periods; and (ii) the Quebec filing was required to address Quebec practice that "often proceeds on its own track due to the differing legal system and principles which apply" since "Quebec civil procedure rules require that the Quebec courts consider, first and foremost, the interests of Quebec class members".

[292] Agnew-Americano submits that this factor favours carriage for her action, since (i) Ballantine's intentions with respect to proceeding on the Ontario class action are not clear; (ii) bringing duplicative class proceedings in multiple jurisdictions which counsel does not intend to pursue is an abuse of process and unnecessary to protect limitation periods; and (iii) there is no evidence that Sotos could not work cooperatively with other counsel.

#### b) The applicable law

##### i) The intentions of the party to proceed are relevant

[293] In *Kowalyshyn*, Perell J. reviewed the issues arising in relation to class actions seeking certification of a national class brought in multiple jurisdictions. Justice Perell did not find that the mere bringing of an action by counsel in another jurisdiction gave that same counsel an advantage towards carriage.

[294] Instead, Justice Perell considered the evidence before him that "Ms. O'Brien prefers to have her ally, Mr. Catucci, prosecute the Québec action while she parks her Ontario action", while in the Kowalyshyn action, "Ms. Kowalyshyn prefers to prosecute the Ontario action and park the British Columbia proceedings while prosecuting the Ontario action" (*Kowalyshyn*, at para. 225).

[295] The existence of multiple class actions in different jurisdictions is not a basis to award carriage to a law firm that managed to file multiple claims. Such an argument would transform a carriage motion into an indirect stay motion, allowing counsel to park litigation in multiple jurisdictions in order to have full control over a national class. Such a result would neither be in the best interests of class members nor fair to defendants who should be able to participate in any consideration of stay issues.

[296] Perell J. held that "there are similar but not identical class actions in British Columbia, Ontario, and Québec" (*Kowalyshyn*, at para. 225).

[297] Perell J. held that the O'Brien action was, in effect, indirectly seeking a stay of the Ontario litigation in favour of the Quebec proceedings, without bringing such a motion before the court. Consequently, Perell J. granted carriage to the Kowalyshyn action subject to a future motion for a stay in which the defendants could participate (*Kowalyshyn*, at paras. 227-30 and 269-73).

[298] Fairness to the defendants is a core consideration of the carriage motion (*Mancinelli*, at para. 13). Justice Perell's focus on this factor when addressing the interjurisdictional issue in *Kowalyshyn* is consistent with the requirements for a carriage motion.

[299] In other words, if the court has concerns that a party is using a carriage motion to indirectly stay Ontario proceedings, it would be a factor against granting carriage to that party.

### ii) The existence of Quebec litigation does not mean that carriage should be granted to the same law firm

[300] The existence of Quebec litigation brought by the same firm seeking carriage in Ontario is not, on its own, a basis to prefer carriage. As Perell J. reviewed in *Kowalyshyn*, it is the intentions of the parties with respect to those actions that ought to be reviewed by the court.

[301] If a Quebec court certifies the action on behalf of persons in Quebec, a plaintiff can amend the Ontario class definition to exclude Quebec residents (*Shah v. LG Chem, Ltd.*, 2017 ONSC 7206, at para. 14). I agree with the Agnew-Americano submission that "[t]here is nothing unworkable in having a national class action certified in Ontario only to then have another class action certified in Quebec".

[302] Further, just because a law firm's Quebec office succeeds in being the first to file in Quebec does not mean that the firm should be granted carriage in Ontario. In *Wilson and Shah v. LG Chem et al*, 2014 ONSC 1875 ("*Wilson and Shah*"), Conway J. held that "there is no reason why different firms in Ontario and Québec cannot work cooperatively with one another in prosecuting their proposed class actions" (*Wilson and Shah*, at para. 28).

### iii) Abuse of process/limitation periods

[303] At the hearing, Agnew-Americano submitted that Merchant had a "practice" of filing class actions in multiple provinces, and that such conduct has been found by courts to constitute an abuse of process. Agnew-Americano submitted that this was a further basis to award carriage to the Agnew-Americano Action.

[304] In *Bancroft-Snell v. Visa Canada Corporation*, 2016 ONCA 896 ("*Bancroft-Snell*"), Blair J.A. held that "[t]here are many cases as well where the courts have attempted to discourage [...] multiple class actions, for the purpose of securing carriage of the national class proceedings. Coincidentally, many have involved the Merchant Law Group" (*Bancroft-Snell*, at para. 83).

[305] In *BCE Inc. v. Gillis*, 2015 NSCA 32 ("*BCE*"), the Nova Scotia Court of Appeal held that it was an abuse of process to file a claim with no intention to advance the litigation. Scanlan J.A. commented on Merchant's conduct in that case (*BCE*, at paras. 38-41):

> **This case involves one of nine virtually identical national class actions brought on behalf of the same plaintiffs, by the same firm; MLG. I leave it to other courts to determine whether that can ever be justified. I am satisfied that there must be an intention to pursue the action in the jurisdiction in which it was filed.** MLG's correspondence with the prothonotary in Nova Scotia made it clear that the intention was to pursue the Saskatchewan claims seeking national certification in that province. **Dr. Gillis is bound by the national litigation strategy adopted by MLG.**
>
> I refer to the comments in [*Drover v. BCE Inc.*, 2013 BCSC 1341], where the Court said:
>
> > 46 **It is plain that Mr. Merchant's plan was to commence virtually identical class action proceedings in Saskatchewan, Manitoba, Ontario, Quebec, Alberta and British Columbia with the goal of certifying one national class in Saskatchewan. Once that goal had been achieved, the plan was to obtain either a settlement or a judgment on behalf of the national class. If that plan failed, one or more of the dormant actions in the other provinces would be resuscitated.**
>
> [...]
>
> I also refer to the comments of Lord Wolfe in *Grovit et al. v. Doctor et al.*, [1997] 2 All E.R. 417 at p. 424 where he says:
>
> > **The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process.** [...]
>
> Absent an intent to prosecute the Nova Scotia claims, bringing an action in Nova Scotia serves no proper purpose. **It is improper to file a claim in multiple jurisdictions, or even to file a single claim in a single jurisdiction when there is no intention to advance that litigation.** The absence of intention to prosecute the Nova Scotia claim or an attempt at re-litigation here, weighs against the respondents on the issue of abuse of process. [...] [Emphasis added.]

[306] Scanlan J.A. concluded (*BCE*, at para. 46):

> MLG suggests that starting virtually identical actions across the country is not unusual and can be sound practice. **Commencing multiple class actions and then doing nothing is not permissible "tactics". It is an abuse of process.** [Emphasis added.]

[307] In the present case, Ballantine submits that it was necessary to file multiple class actions in multiple jurisdictions to protect the limitation periods of class members. Ballantine relies on the decision in *Duong v. Stork Craft Manufacturing Inc.*, 2011 ONSC 2534 ("*Duong*"). However, in *Duong*, that issue was not before the court.

[308] In *Duong*, R. Smith J. held that an Ontario class action should not be discontinued upon settlement of a British Columbia action, since that would have triggered the limitation period for Ontario residents since British Columbia had an opt-in (rather than opt-out) provision. That concern was the subject of the decision. The court did not find that it was necessary to file multiple class actions to preserve limitation periods (*Duong*, at paras. 5, 9-10, 22, 31, 39-49, and 54).

[309] In *Turon v. Abbott Laboratories Ltd.*, 2011 ONSC 4343 ("*Turon*"), Strathy J. (as he then was) stated that "The practice of commencing actions solely for the purpose of tolling the limitation period has been characterized as an abuse of process" (*Turon*, at paras. 27-30). Strathy J. relied on jurisprudence in which Merchant had engaged in such a practice.

[310] In *Turon*, Strathy J. commented that counsel cannot "stake out claims to national class actions in multiple jurisdictions, keep some of the actions inactive or 'parked' in some jurisdictions, and leave the defendants, the potential class members and the court up in the air about their intentions" (*Turon*, at para. 14).

[311] Lederman J. dismissed the motion for leave to appeal in *Turon* (cited as 2011 ONSC 4676 (Div. Ct.)) and held (at para. 7):

> As Strathy J. found, it is not appropriate to issue class proceedings merely to toll the limitation period in Ontario for Ontario members just to keep their options open. This amounts to an abuse of process both to the proposed class and to the defendants who are held in limbo.

[312] Similarly, Ball J. in *Duzan v. Glaxosmithkline, Inc.*, 2011 SKQB 118 ("*Duzan*"), commented with respect to Merchant that "it is not acceptable for plaintiffs to commence class actions in multiple jurisdictions and then leave the courts and the defendants guessing as to whether and when any particular action will proceed" (*Duzan*, at para. 36). Ball J. characterized Merchant's approach as a "multijurisdictional game of class action 'whack-a-mole' [which] would in itself be sufficient basis for an unconditional stay on the basis of abuse of process" (*Duzan*, at para. 37).

[313] Agnew-Americano relies on s. 28 of the *CPA* that provides "any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding" to submit that in Ontario, as an opt-out jurisdiction, all members of a proposed national class are protected from the running of the limitation period, regardless of the residence of the particular class member.

[314] Agnew-Americano further relies on the decision of the Supreme Court of Canada in *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60, in which Côté J. held (at para. 60):

> The purpose of s. 28 *CPA* is to protect potential class members from the winding down of a limitation period until the feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights. [...] Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter.

[315] As I discuss below, I accept Agnew-Americano's submission that the uncertainty as to Ballantine's intentions, given the positions taken in the Ballantine factum and in Ballantine's submissions before the court, is sufficient to find that the existence of multiple actions brought by Merchant favours carriage for the Agnew-Americano Action.

[316] Consequently, it is not necessary for me to decide the legal issue as to the effect on limitation periods against non-Ontario residents arising from a class action brought in Ontario. That issue should be addressed in the context of a matter where the issue is properly before the court.

### c) Application of the law to the facts of the case

[317] As I set out at paragraphs 106 to 108 above, Ballantine's intentions for her action are uncertain. Counsel for the Ballantine Action acknowledged at the hearing that he could not provide certainty, since the Merchant firm acted for other representative plaintiffs in the other actions and he did not have instructions. In her factum, Ballantine submits that "it is expected" her action would "take the lead".

[318] I agree with the Agnew-Americano submission that:

> The result of these inconsistent statements with qualifying language gives Merchant the liberty to do whatever it wants to do with its class actions.

[319] Also, Simoes did not disclose the Saskatchewan or British Columbia actions in his first affidavit. Instead, he only disclosed the Quebec action as other related litigation on which Merchant was counsel. That breach of the *Setterington* obligation of full disclosure creates further concern that the present carriage motion is an indirect attempt to stay the Ontario action.

[320] There is no evidence that Sotos could not work with counsel in other jurisdictions to address issues related to national class actions. If counsel cannot accommodate interjurisdictional issues, then either Agnew-Americano or the Equifax Defendants can exercise their rights to address such issues.

[321] Consequently, given the vague submissions in Ballantine's factum as to her intent to proceed with the Ontario action and Ballantine's counsel's submissions on that issue to the court, compared to the uncontested evidence that Agnew-Americano will proceed with the litigation, the interrelationship of multiple class actions in multiple jurisdictions brought by Merchant as counsel favours carriage to the Agnew-Americano Action.

### viii) Factor 7: The anonymity of the proposed additional representative plaintiff in the Ballantine Action

[322] Ballantine submitted in her factum that there is no difference between the adequacy of the proposed representative plaintiffs, except for the issue of anonymity.

[323] In her factum, Ballantine submitted that while not a significant factor, the proposed anonymity of Jane Doe as an additional representative plaintiff favoured carriage by the Ballantine Action.

[324] However, at the hearing, Ballantine abandoned this position and acknowledged that this factor was neutral, because Agnew-Americano was remaining as a representative plaintiff and could still represent other class members even if Jane Doe could not remain anonymous or no longer could serve as a representative plaintiff.

[325] While I accept that Ballantine's concession at the hearing is proper, I briefly address this issue.

[326] In her factum, Ballantine submitted that because the additional proposed representative plaintiff in the Agnew-Americano Action intends to proceed by way of pseudonym (Jane Doe), then the Agnew-Americano Action would breach s. 17(6) of the *CPA*, which requires that the notice of certification "describe the proceeding including the names and addresses of the representative parties and the relief sought". Consequently, Ballantine submitted in her factum that this factor favours carriage to her.

[327] In her factum, Ballantine relied on the decisions in *T.L. v. Alberta (Director of Child Welfare)*, 2006 ABQB 104 ("*T.L.*") and *Canada v. John Doe*, 2016 FCA 191 ("*Canada*"), in which the courts declined to order a publication ban on the identity of the representative plaintiff.

[328] Agnew-Americano distinguished *T.L.* on the basis that in that case, the defendant did not know the identity of its accuser. In the present case, the Equifax Defendants have the unredacted letter the proposed representative plaintiff received from Equifax Canada, and as such, know her identity.

[329] With respect to the *Canada* decision, Agnew-Americano submitted:

> [T]he rationale of the Federal Court of Appeal is not consistent with the CPA or the reality of the sheer numbers of class members in this case. While class counsel should be expected to have resources to field enquiries from class members, it is not reasonable to expect a representative plaintiff to field questions from potentially 19,000 class members (more if class members having claims for

> breach of contract are included). Moreover, this would not be desirable either, as class members would be expected to have questions about the legal process that a class member may not be equipped to answer.

[330] The issue of whether Jane Doe will be required to proceed without a pseudonym is not before me. Counsel for the Equifax Defendants may wish to make submissions on the issue. The amendment to permit Jane Doe to be added is without prejudice to any submissions the Equifax Defendants may make once that claim is served.

[331] Also, even if a representative plaintiff cannot personally assert all the claims at issue, the representative plaintiff may be entitled to represent the claims of other class members who do not have those claims (*Patel v. Groupon Inc.*, 2012 ONSC 1799, at para. 7).

[332] In any event, if a proposed representative plaintiff is not approved, the court can adjourn the proceeding to substitute an appropriate representative. This issue can also be addressed early in the proceedings if necessary (see *Graham v. Impark Parking Corp. (c.o.b. Impark)*, 2010 ONSC 4982, at para. 201; *6323588 Canada Ltd. v. 709528 Ontario Ltd. (c.o.b. Panzerotto Pizza and Wing Machine)*, 2012 ONSC 2985, at paras. 96-102).

[333] Consequently, this factor is neutral.

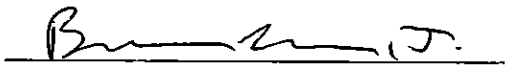
**Order and costs**

[334] For the above reasons, I order that carriage of the proposed class action is granted to the plaintiffs in the Agnew-Americano Action. I order the Ballantine Action to be stayed.

[335] I order that no other actions be commenced in Ontario without leave of the court in respect of the subject matter of this action.

[336] I also grant leave to add Jane Doe as a representative plaintiff and to make other amendments to the statement of claim in the form of the Agnew-Americano Claim, without prejudice to the Equifax Defendants.

[337] As agreed by counsel, I order no costs of the motion. Counsel may provide me with a draft order approved as to form and content for my review, or if any issues arise with respect to the order, they can be addressed at a hearing to be scheduled through my assistant.



Glustein J.

**Date:** January 24, 2018

**CITATION:** Agnew-Americano v. Equifax Canada, 2018 ONSC 275
**COURT FILE NO.:** CV-17-582551CP & CV-1582566CP
**DATE:** 20180124

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

BETHANY AGNEW-AMERICANO,

Plaintiff

AND:

EQUIFAX CANADA CO. AND EQUIFAX, INC., Defendants (Court File No. CV-17-582551CP)

Defendants

**AND BETWEEN:**

LAURA BALLANTINE,

Plaintiff

AND:

EQUIFAX CANADA CO. AND EQUIFAX, INC., Defendants (Court File No. CV-17-582566CP)

Defendants

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**REASONS FOR DECISION**

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Glustein J.

**Released: January 24, 2018**