**CITATION:** Evans v. The Bank of Nova Scotia, 2014 ONSC 2135
**COURT FILE NO.:** CV-12-55329
**DATE:** 2014/06/06

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

| | | |
|---|---|---|
| **BETWEEN:** | ) | |
| | ) | |
| Michael Evans and Crystal Evans | ) | |
| | ) | Michael S. Herbert and Cheryl Gerhardt McLuckie, for the Plaintiffs |
| Plaintiffs | ) | |
| | ) | |
| **– and –** | ) | |
| | ) | |
| The Bank of Nova Scotia and Richard Wilson | ) | Martin Sclisizzi and M. Kremer, for the Defendant Bank of Nova Scotia |
| | ) | |
| Defendants | ) | |
| | ) | |
| | ) | **HEARD in Ottawa:** February 13, 2014 |



## REASONS FOR DECISION ON CERTIFICATION MOTION

**R. SMITH J.**

### Overview

[1] The plaintiffs seek to certify their action as a class proceeding against the Bank of Nova Scotia (the "Bank") and Richard Wilson ("Wilson"). The plaintiffs seek to sue the Bank and Wilson for damages, including a breach of their privacy rights through the tort of "intrusion upon seclusion".

[2] Richard Wilson, an employee of the Bank, has admitted to providing private and confidential information of Bank customers to his girlfriend, who then disseminated the private information to third parties for fraudulent and improper purposes. As a result of the Bank employee's conduct, a substantial number of the Bank's customers became victims of identity theft and fraud, which has negatively affected their credit rating.

[3] Wilson was employed by the Bank as a Mortgage Administration Officer, from September 24, 2007, until June 12, 2012. In this position he had access to highly confidential customer information.

[4] The Bank identified a marked spike in the number of customer files accessed by Wilson commencing on or about July 1, 2011. The Bank has identified 643 Bank customers (the "Notice Group") whose files were accessed by Wilson from July 1, 2011, until his computer access was terminated on May 18, 2012.

[5] In June of 2012, the Bank wrote to the Notice Group and advised them that it was possible that there had been unauthorized access to their private information held by the Bank. The Bank offered them a complimentary subscription to a credit monitoring and identity theft protection service. To date, 138 members of the Notice Group have advised the Bank that they have been the victims of identity theft or fraud in the past year. The Bank has compensated these victims for the pecuniary losses that they have suffered.



**Position of the Parties**

[6] The Bank opposes the certification motion and submits as follows:

(a) That the claim fails to disclose a cause of action because:

(i) It fails to disclose a cause of action for negligence, breach of fiduciary duty, or breach of a duty of good faith by the Bank;

(ii) It fails to disclose a legal basis for the waiver of tort claim (disgorging of profits) because there is no causal connection between the allegedly wrongful conduct by the Bank and the profits it generated;

(iii) The Bank cannot be held vicariously liable for the tort of intrusion upon seclusion for a deliberate breach of customers' privacy rights by one of its employees; and

(iv) General damages cannot be awarded to members of the class, because they have failed to meet the required threshold to award general damages for emotional distress, namely by showing a recognized psychiatric or psychological injury;

(b) That the proposed class is overly inclusive as there is no evidence to establish which members of the Notice Group's private information was accessed for an improper purpose, other than the 138 identified customers. Stated another way, there is no evidence to determine whose information Wilson accessed and disclosed to third parties for an improper purpose, other than the 138 individuals who have been defrauded and have advised the Bank of same;

(c) That the plaintiffs have failed to raise any suitable common issues to be determined which are necessary to the resolution of each class members' claim;

(d) That a class proceeding is not the preferable procedure to resolve the common issues considering judicial economy, access to justice, and behaviour modification. The Bank submits that judicial economy would not be served by

certifying a class proceeding given its admission of responsibly to pay any pecuniary damages suffered by any member of the Notice Group as a result of fraud or identity theft;

(e) That the above admission of responsibility removes any common issue to be decided. The Bank suggests that proceeding with a test case or numerous individual actions in the Small Claims Court is a preferable procedure;

(f) Finally, that the plaintiffs are not appropriate representative plaintiffs because they have not demonstrated sufficient participation and have failed to advance the litigation in an effective manner.

[7] The plaintiffs disagree with the Bank's submissions, outlined above, and submit as follows:

(a) That their statement of claim discloses several causes of action alleged against the Bank including: negligence in supervising and monitoring their employees; breach of contract; the tort of intrusion upon seclusion; breach of fiduciary duty and good faith; vicarious liability of the Bank for its employee's conduct; and "waiver of tort", which is an alternative claim advanced to seek damages calculated by requiring the Bank to disgorge its profits during the relevant time period. The plaintiffs further submit that Kershman J. has already decided that a cause of action has been raised in waiver of tort, as he granted leave to amend their statement of claim to plead this tort.

(b) That the proposed class of 643 customers in the Notice Group, all of whose personal information was accessed during the time period that Wilson was providing copies of clients' personal files to third parties for fraudulent and improper purposes, is not overly inclusive. The Bank chose this group of customers as appropriate individuals to be given notice. The damages suffered by different members of the Notice Group are an individual inquiry;

(c) That the causes of action pleaded raise the common issues of whether the Bank is vicariously liable for the tort of intrusion upon seclusion; whether the Bank was negligent in its failure to supervise Wilson and its other employees and to implement appropriate safeguards to protect their customers' personal and financial information; whether the Bank breached its contract with its clients by its conduct; whether the Bank breached a fiduciary duty or duty of good faith; and whether doctrine of waiver of tort applies. A resolution of these issues would move the action forward for all class members and is necessary to resolve each class member's claim against the Bank.

(d) The plaintiffs further state that a class proceeding is the preferable method of proceeding and will promote access to justice and judicial economy. In addition, a class proceeding would achieve the objective of positively modifying the behaviour of corporations, such as Banks, which are entrusted with protecting

individuals' personal and financial information. The plaintiffs argue that determining all of the common issues in one court proceeding rather than in hundreds of individual Small Claims Court actions or arbitration is the preferable procedure because it makes efficient use of judicial resources. The damages for the tort of intrusion upon seclusion are modest, which could deter the proposed class members from seeking judicial remedies due to cost considerations. Therefore, access to justice would be enhanced if the class action is certified, as members of the class would incur no out of pocket fees to pursue their cause of action.

(e) The plaintiffs also submit that they are suitable representative plaintiffs and have retained a team of experienced counsel to pursue the action on behalf of the proposed class.



**Analysis**

[8] Section 5(1) of the C*lass Proceedings Act 1992*, S.O. 1992, c. 6, ("*CPA*") sets out five requirements to certify an action as a class proceeding, namely:

> The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
>
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> (c) the claims or defences of the class members raise common issues;
>
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[9] Section 6 of the *CPA* states that:

> The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

2. The relief claimed relates to separate contracts involving different class members.

3. Different remedies are sought for different class members.

4. The number of class members or the identity of each class member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.



[10] In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 20 and 25, the Supreme Court of Canada stated that the representative plaintiff must show some basis in fact for each of the certification requirements, as set out in section 5 of the *CPA*, and as outlined above.

[11] In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, [2013] 3 S.C.R. 477, the Supreme Court emphasized that the certification stage does not allow for an extensive assessment of the evidence, nor of the complexities and challenges that a plaintiffs may face in establishing their case at trial.

[12] The plaintiffs have sued both Wilson and the Bank. As against the Bank, their claim alleges negligence, a breach of contract, the tort of intrusion upon seclusion, breach of fiduciary duty and of the duty of good faith, and waiver of tort. The claim further alleges that the Bank is vicariously liable for Wilson's wrongdoing for each of the above claims.

[13] The plaintiffs have claimed the following damages:

(a) General damages for breach of contract and negligence (general damages);

(b) Damages for the tort of intrusion upon seclusion;

(c) Damages for inconvenience, discomfort, distress and the aggravation of having to clear their credit reports (stress damages).

(d) An accounting and payment of profits earned by the Bank on the mortgages granted to the members of the notice group, pursuant to the doctrine of waiver of tort; and

(e) An order that damages be paid out an aggregate basis.

[14] The Bank has admitted the following facts:

(a) Wilson wrongfully accessed the confidential financial information of an indeterminate number of the Bank's customers and provided that information to unknown third parties;

(b) The Bank owed the plaintiffs a duty of care subject to the standard of a reasonable person and had an implied contractual obligation to the plaintiffs to make reasonable efforts to maintain the confidentiality of their personal information;

(c) Wilson was an employee of the Bank; and

(d) The Bank is vicariously liable for any pecuniary losses that Wilson's conduct may have caused to the Bank's customers.



**Admissibility of Lawyer's Affidavit**

[15] The plaintiffs filed an affidavit of a lawyer in the plaintiffs' counsel's firm largely setting out his legal opinion on this motion for certification. I agree with the Bank's submission that a partner's affidavit filed in support of the motion for certification, containing largely argument and legal opinion, is not to be given any weight with regards to any legal opinion contained therein.

## A. CAUSE OF ACTION [Section 5(1)(a)]

[16] In *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), the Ontario Court of Appeal affirmed that the "plain and obvious" test established in *Hunt v. Carey Canada* Inc., [1990] 2 S.C.R. 959, applies to determine if a cause of action has been pleaded. As in a Rule 21 motion, in determining whether the plaintiffs have established a cause of action, all of the facts pleaded are assumed to be proven, claims that are unsettled in the jurisprudence should be allowed to proceed, and the pleadings should be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of discovery information.

[17] The causes of action previously mentioned include the tort of intrusion upon seclusion, negligence, breach of contract, breach of fiduciary duty and of the duty of good faith, and waiver of tort. All claims are alleged against both defendants. Wilson has not filed a Statement of Defence and has been noted in default.

**The Tort of Intrusion upon Seclusion and Vicarious Liability**

[18] In the decision of *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241, at para. 71, the Court of Appeal set out the three elements required to establish the tort of intrusion upon seclusion, which are as follows:

a) The defendant's conduct must be intentional (which could include recklessness);
b) The defendant must have invaded the plaintiff's private affairs or concerns without lawful justification; and

c) A reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish.

[19] In this case, the plaintiffs do not allege that the Bank acted intentionally with respect to the unauthorized access by Wilson. However, they claim that the Bank is vicariously liable for Wilson's tort of intrusion upon seclusion. While the Bank agrees that the claim discloses a reasonable cause of action against Wilson, it submits that the claim does not disclose a cause of action for this tort against the Bank and that the Bank is not vicariously liable for Wilson's wrongful conduct.

[20] In *Bazley v. Curry*, [1999] 2 S.C.R. 534, at para. 37, the rationale for imposing vicarious liability on an employer was set out as follows:

> Underlying the cases holding employers vicariously liable for the unauthorized acts of employees is the idea that employers may justly be held liable where the act falls within the ambit of the risk that the employer's enterprise creates or exacerbates. Similarly, the policy purposes underlying the imposition of vicarious liability on employers are served only where the wrong is so connected with the employment that it can be said that the employer has introduced the risk of the wrong (and is thereby fairly and usefully charged with its management and minimization). The question in each case is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong, in terms of fair allocation of the consequences of the risk and/or deterrence.

[21] In *Bazley*, at para. 41, McLaughlin J. (as she was then) stated:

> The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. …
>
> In determining the sufficiency of the connection between the employer's creation or enhancement of the risk and the wrong complained of, subsidiary factors may be considered. These may vary with the nature of the case. When related to intentional torts, the relevant factors may include, but are not limited to, the following:
>
> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

(d)the extent of power conferred on the employee in relation to the victim;

(e)the vulnerability of potential victims to wrongful exercise of the employee's power.

[Emphasis in original]



[22] In this case, the Bank created the opportunity for Wilson to abuse his power by allowing him to have unsupervised access to customers' private information without installing any monitoring system. The release of customers' confidential information by Wilson to third parties did not further the employer's aim of generating profits on good loans. Also, Wilson's wrongful acts were not related to friction, or confrontation inherent in the Bank's enterprise, but they were related to his necessary intimacy with the customers' personal and financial information. Wilson was given complete power in relation to the victims' (customers) confidential information, because of his unsupervised access to their confidential information. Bank customers are entirely vulnerable to an employee releasing their confidential information. Finally, there is a significant connection between the risk created by the employer in this situation and the wrongful conduct of the employee.

[23] The plaintiffs have pleaded, and the Bank has acknowledged, a complete lack of oversight by the Bank of its employees, including Wilson, with regard to improper access to personal and financial customer information. While the Bank itself was not directly involved in the improper access of customer information, vicarious liability "is strict, and does not require any misconduct on the part of the person who is subject to it": *Straus Estate v. Decaire*, 2011 ONSC 1157, 84 C.C.L.T. (3d) 141 at para. 49.

[24] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, [2007] 2 S.C.R. 177, a partner of the defendant law firm engaged in activities which breached his fiduciary duty to a client. The majority of the Supreme Court of Canada held that the law firm itself had not breach its fiduciary duty to the plaintiff, Monarch. The firm's partners were innocent of victims of the breach, and the firm could not be held to have breached a fiduciary duty on the basis of facts of which its partners were ignorant. However, at para. 98, the Supreme Court held that, while the firm committed no breach of its fiduciary duty to Monarch, it was vicariously liable for the breach of fiduciary duty of one of its partners because of the provisions of section 12 of the British Columbia *Partnership Act*, R.S.B.C. 1996, c. 348. The case before me is distinguishable on the basis that there is no applicable section of the *Partnership Act*.

[25] The Bank further argues that the Courts in British Columbia and New Brunswick have not recognized the tort of breach of privacy, or intrusion upon seclusion, and submits that the proposed class includes 35 individuals who are residents of British Columbia and New Brunswick. As a result, the Bank argues that the claim fails to disclose a reasonable cause of action for the tort of intrusion upon seclusion for these 35 individuals.

[26] The tort of intrusion upon seclusion has only recently been recognized by the Ontario Court of Appeal and is settled in Ontario. However, until the matter is ultimately decided at the Supreme Court of Canada, I find that the law in Canada is not settled on this issue. While the

Courts in British Columbia and New Brunswick have not as of yet recognized the tort of intrusion upon seclusion, I was not given caselaw to suggest that they have definitively shut the door on this cause of action. For this reason, I find that it is not plain and obvious that the plaintiffs' claim that the Bank is vicariously liable for its employees' tort of intrusion upon seclusion would be unsuccessful.



[27] Finally, the Bank further submits that damages awarded for the tort of intrusion upon seclusion fall into the category of symbolic or moral damages. The Bank submits that moral damages awarded in such a case are analogous to punitive damages, and that vicarious liability is not been imposed for punitive damages. I find that the law is not settled on this issue and that it is not plain and obvious that the plaintiffs would be unsuccessful for this reason.

[28] The Bank further argues that the class members are not entitled to receive any further damages because the Bank has already paid the pecuniary damages suffered by individuals in the Notice Group. The Bank's admission of responsibility to pay for the pecuniary damages suffered is a different situation from the absence of a claim for compensatory damages.

[29] In *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), Winkler J. (as he then was) held that binding the defendant to its admission of liability was one of the reasons a class proceeding was the preferable proceeding. If the action is certified as a class proceeding, the Bank will be bound by its admission of liability for any pecuniary damages suffered by all members of the class. If the action is not certified, the Bank would not be legally bound by its admission.

[30] While Wilson was an employee of the Bank and not a partner of a law firm, I find that it is not plain and obvious in these circumstances that the Bank would not be held vicariously liable for the serious wrongful conduct of its employee in these circumstances considering the five factors set out in *Bazley* and especially because of the connection between the risk created by the Bank and the wrongful conduct of its employee. I further find that it is not settled law that damages awarded for the tort of intrusion upon seclusion are treated in the same manner as an award of punitive damages where an employer, such as the Bank, gives an employee unsupervised access to customers' private information.

**Negligence**

[31] The plaintiffs have also pleaded that the Bank was negligent in its supervision of one of its employees, which is similar to the situation outlined in the case of *Blackburn v. Midland Walwyn Capital Inc.* (2003), 32 B.L.R. (3d) 11 (Ont. S.C.J.). In *Blackburn*, the Court held that the Branch Manager and the Compliance Officers of an investment broker at Midland Walwyn, George Georgiou, failed in their duty to supervise their employee. The Court found that it was reasonably foreseeable that, if the brokerage firm did not supervise its employees, did not properly monitor the accounts, and did not warn clients, their clients would sustain losses at the hands of Mr. Georgiou. In imposing liability on the employer, the Court held that the employer had a duty to supervise its employees, and that had it complied with its duty, the losses sustained by the plaintiffs would have been prevented or minimized.

[32] In this case, the Bank had the ability to monitor Wilson's activities and yet the Bank admitted that it has done nothing to supervise the activities of its employees, including Wilson, with regards to the access of customers' confidential information for improper purposes. The Bank was able to determine that on July 23, 2011, Wilson had accessed 47 customer profiles in about 46 minutes. The Bank also knew that, on average, Wilson would normally access between 15 and 40 profiles a day. Wilson also attended at the office late at night to access customer profiles on some occasions.

[33] In addition, there was an inexplicable spike in Wilson's access to customer profiles during the seven months before the Bank was notified by the Calgary Police Department, in May of 2012, that a number of the Bank's customers' personal information and identities had been stolen.

[34] I am satisfied that the plaintiffs' claim discloses a cause of action in negligence and that it is not plain and obvious that this cause of action would be unsuccessful against the Bank.

**Breach of Contract**

[35] The plaintiffs have submitted that there is a contractual relationship between the Bank and its customers. The plaintiffs have pleaded that one of the terms of this contact is explicitly stated in the Bank's Privacy Code Guidelines, namely that customers' confidential information will be kept secure and only used for the purposes of their business relations. This is the context within which customers' confidential personal and financial information was provided to the Bank.

[36] In the *Blackburn* decision, the Court held that the employer was in breach of its contract with the plaintiffs because it failed to maintain its bargain by exposing its clients to a stockbroker that it knew or ought to have known was dishonest. The plaintiffs have pleaded that the Bank provided Wilson with access to its customers' confidential personal and financial information and then failed to supervise his activities, which allowed the dissemination of the customers' private information to third parties for fraudulent purposes.

[37] The Bank has admitted that it had an implied contractual obligation to the plaintiffs to make reasonable efforts to maintain the confidentiality of their personal information.

[38] In these circumstances, I find that it is not plain and obvious that the plaintiffs' claim for breach of contract cannot succeed. The fact that the Bank has admitted responsibility to pay for the pecuniary damages suffered by its customers as a result of the release of their confidential information does not change the fact that damages have been suffered by a number of the individual members of the proposed class, which could have been caused by conduct which constitutes a breach of contract by the Bank.

**Breach of Fiduciary Duty and Duty of Good Faith**

**Fiduciary Duty**

[39] The plaintiffs have pleaded that the Bank owed them a fiduciary duty and a duty of good faith. The plaintiffs submit that the Bank has profited from their business relationship and divulged their highly confidential, personal and financial information to third parties. The plaintiffs submit that they trusted the Bank with possession of their information and had a reasonable expectation that it would be kept safe and secure during and after the course of their business relations, and that this information would be used only for a proper business purposes.

[40] The Bank argues that there is no reasonable cause of action against the Bank for breach of fiduciary duty or a breach of good faith.

[41] In *Frame v. Smith*, [1987] 2 S.C.R. 99, at para. 60, the Supreme Court of Canada stated:

> Relationships in which a fiduciary obligation have been imposed seem to possess three general characteristics:
>
> (1)The fiduciary has scope for the exercise of some discretion or power.
>
> (2)The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests.
>
> (3)The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.

[42] In *Baldwin v. Daubney* (2006), 83 O.R. (3d) 308 (Ont. C.A.) at para. 12, the Court of Appeal stated that it was settled law that, absent a special relationship or exceptional circumstances, the relationship between a bank and a customer is that of a debtor and creditor.

[43] In *Baldwin*, the Court of Appeal quoted from *Pierce v. Canada Trustco Mortgage Co.*, (2005), 254 D.L.R. (4th) 79 (Ont. C.A.), at para. 27, as follows:

> Generally speaking, the relationship between a financial institution lender and its customer borrower is a purely commercial relationship of creditor and debtor. Absent any special relationship or exceptional circumstances such as would give rise to a fiduciary duty (which is not pleaded by Mrs. Pierce), the courts have consistently held that the lender owes no duty to the borrower in connection with the making of the loan. In particular, the bank owes no duty to its customer to advise the customer not to undertake the loan: see *Bertolo v. Bank of Montreal* (1986), 57 O.R. (2d) 577 (Ont. C.A.) and *Bank of Montreal v. Duguid* (2000), 47 O.R. (3d) 737 (Ont. C.A.).

[44] In this case, I find that there is no basis in fact that a special relationship or exceptional circumstances existed that justify imposing a fiduciary duty on the Bank with regards to its

customers. For this reason, and based on the settled law on this issue, I find that it is plain and obvious that the plaintiffs will be unsuccessful at trial on the claim that the Bank owes them a fiduciary duty.

**Good Faith**

[45] The Bank submits that the same principles apply to the claim for an alleged breach of a duty of good faith, as set out above and in *Scarvelli v. Bank of Montreal* (2004), 69 O.R. (3d) 295 (Ont. S.C.J.). I agree that there is no free-standing duty of good faith, other than in cases such as disability insurance claims, where the courts have recognized that the insurer owes the insured an utmost duty of good faith. Furthermore, the plaintiffs have not alleged that the Bank has acted with an improper motive, self-interest, ill-will or a dishonest purpose and therefore the Bank is not alleged to have acted in bad faith. I therefore find that the Bank has not breached any duty of good faith, even if one did exist, and that it is plain and obvious that such a claim will fail based on the Bank's conduct.

[46] However, Richard Wilson, the Bank's employee, has acted in his own self-interest and also for a dishonest purpose by providing bank customers personal and private information to third parties for an improper purpose. I find that the claim that Wilson acted in bad faith is not certain to be unsuccessful and, further, that it is not plain and obvious that the Bank would not be held vicariously liable for Wilson's acts of bad faith for the same reasons given above in my analysis of plaintiffs' claim based on the tort of intrusion upon seclusion.

**Damages for emotional suffering and inconvenience**

[47] The Bank argued that because it agreed to pay for any pecuniary damages suffered by members of the Notice Group, there were no longer any claims in negligence or for any other damages. I do not agree with this submission and find that there remains a potential claim for compensatory damages both in negligence and in contract, and in vicarious liability for the tort of intrusion upon seclusion. Whether any damages have been suffered and the amount of damages is an individual issue to be determined once the common issues are resolved.

[48] The plaintiffs' claim for damages is not defeated by the fact that the Bank has admitted liability for the pecuniary damages suffered, nor by the fact that it has already paid for part of the damages claimed in this action. In addition to the pecuniary damages suffered, the plaintiffs have claimed damages for emotional suffering and inconvenience, as well as compensatory damages for the tort of intrusion upon seclusion.

[49] The Bank submits that it is plain and obvious that, in the absence of evidence of a recognized psychiatric or psychological harm, the plaintiffs' claim for damages for emotional suffering and inconvenience will be unsuccessful. The Bank submits that, even if the plaintiffs have suffered substantial emotional stress, they have not pleaded that they suffered a recognizable psychological or psychiatric illness and, as a result, damages for their emotional stress, discomfort, and inconvenience cannot be awarded.

[50] In the case of *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55, 103 O.R. (3d) 401, at paras. 39 and 42, the Court of Appeal stated as follows:

> … It is well-established that, absent physical injury, there is a threshold that the plaintiff must meet when claiming damages for the negligent infliction of mental, psychological or psychiatric harm. …
> …
>
> … Suffice it to say that the affiants variously described their reactions to the notices and to awaiting the results of their tests as being depression, fear, shock, anxiety, anger, frustration, shame, outrage, distress and sleeplessness. Many of them feared for the health and safety of friends and family, and temporarily disrupted their social and family lives … None of the affiants suffered a recognizable psychiatric illness…

[51] The plaintiffs do not allege that they have suffered a recognizable psychiatric illness or serious or prolonged psychological injury as a result of the defendants' conduct. Rather, they alleged that the class members, whose personal and financial information was provided to third parties and who have incurred pecuniary losses, have suffered emotional distress, inconvenience and upset. These plaintiffs have suffered real financial damages as a result of the alleged commission of the tort of negligence, a breach of contract and/or the tort of intrusion upon seclusion.

[52] I find that it is not plain and obvious that the plaintiffs who have suffered real pecuniary damages would not also have the right to claim additional damages for the emotional suffering, hardship and inconvenience they have suffered. This is a unique situation, where their personal financial records were distributed to third party criminals and where such confidential information has been used to steal their identity and commit fraud and has negatively affected their credit ratings.

**Waiver of Tort**

[53] As an alternative to the causes of action in tort, the plaintiffs seek to waive the torts and recover a disgorgement of the profits generated by the Bank as a result of its business dealings with the members of the class. Peter D. Meda and John D. McCamus, authors of *The Law of Restitution, Canada Law Book*, 2013 (updated May 2013, release No.10), state, at paras 26 and 93 of their text, that the waiver of tort occurs where the plaintiffs give up the right to sue in tort and elect to base their claim in restitution, thereby seeking to recoup the benefits that the defendants have derived from their tortious conduct.

[54] In *Serhan (Trustee of) v. Johnson & Johnson* (2006), 85 O.R. (3d) 665 (S.C.J. (Div. Ct.)), Epstein J. reviewed a claim of waiver of tort. She found that the authorities accepted the viability that a waiver of tort was its own cause of action, which was intended to discourage a defendant's unjust enrichment. Given the unsettled law, Epstein J. ultimately stated, at para. 68:

> Clearly it cannot be said that an action based on waiver of tort is sure to fail and that the questions about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exists here, involve matters of policy that should not be determined at the pleading stage.

[55] In the decision of *Pro-Sys, supra,* the Supreme Court found that there were contradictory decisions on the issue of whether an underlying tort needs to be established in order to sustain an action in waiver of tort. The Supreme Court held that a certification motion was not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. I agree.

[56] The plaintiffs further argue that the claim of waiver of tort, as a cause of action, has already been decided by Kershman J. in his decision dated July 12, 2013, when he allowed the pleadings to be amended to include a claim for waiver of tort. The Bank submits that the pleadings motion before Kershman J. was for a different purpose and under a different Rule, and that I am considering the cause of action as if it were brought under Rule 21 of the *Rules of Civil Procedure*. I agree that a different test is applicable here, and I will therefore consider the matter.

[57] The Bank submits that the plaintiffs have not pleaded that the Bank has earned any profits as a result of any alleged wrongdoing on the part of the Bank. As a result, it submits that, even if the plaintiffs are deemed to have proven all of the facts alleged in the Statement of Claim, they will be unable to show that the Bank has earned profits as a result of any wrongdoing. As a result, the Bank submits that the plaintiffs are not entitled to a disgorgement of profits under the doctrine of waiver of tort.

[58] The Bank acknowledges that it is not plain and obvious that waiver of tort is unavailable in negligence cases and a, in this case, claim has been made in negligence. However, the Bank submits that a waiver of tort claim is only available where the defendants have profited as a direct result of the wrongful conduct. The Bank submits that there is a requirement for a causal connection between the alleged wrongdoing and the profits that the Bank has earned.

[59] The decisions in *Heward v. Eli Lilly & Co.* (2007), 39 C.P.C. (6th) 153 (Ont. S.C.J.), ("*Heward 1*"), leave to appeal granted, (2007), 45 C.P.C. (6th) 309 (Ont. S.C.J.) ("*Heward 2*"), and confirmed in (2008), 295 D.L.R. (4th) 175 (Ont. S.C.J. (Div. Ct.)) ("*Heward 3*"), speak to the "wrongful gain" requirement of waiver of tort. In *Heward 2* Lederman J. held as follows, at paras. 26 and 28:

> While *Serhan* says entitlement to a remedy in waiver of tort may not require proof of loss, *Serhan* does not change the requirement that there be proof of a "wrongful gain" that will be subject to disgorgement or a constructive trust. Generally speaking, a gain is a "wrongful gain" only if it is attained through "wrongful conduct", i.e. the wrongful conduct must cause the gain. Consequently, for the amount subject to disgorgement and constructive trust to be a common issue in this class action, the pleadings and evidence must demonstrate a way to prove on a class-wide basis that the alleged wrongful conduct (i.e. "the failure to warn") caused the gain (i.e. proceeds from Zyprexa sales").
>
> …

> Cullity J. was correct in stating there must be a causal connection on a class-wide basis between the gain subject to disgorgement or constructive trust and the wrongful conduct…
>
> [Emphasis added]

[60] Wrongful conduct was committed by Mr. Wilson, an employee of the Bank who improperly accessed and released copies of the plaintiffs' confidential, personal, and financial information to third parties for fraudulent purposes. While Mr. Wilson's conduct was wrongful, there is no causal connection between Mr. Wilson's wrongful conduct and the profits made by the Bank from his wrongful actions. Any profits generated by the Bank on mortgages or other loans, or on investments made by the members of the class were not caused by Mr. Wilson's wrongful conduct of releasing copies of their confidential personal, and financial information to third parties. I agree with the analysis of Cullity J. in *Heward 1* and Lederman J. in the *Heward 2* that the wrongful conduct must cause financial gain for a claim in waiver of tort to succeed.

[61] However, the plaintiffs have also alleged that the Bank negligently supervised Mr. Wilson and, for the purposes of this stage of the proceedings, the allegation is deemed proven. The negligent supervision of its employees, including employees like Mr. Wilson, who have access to many customers' confidential, personal, and financial information could also be found to be wrongful conduct. The Bank has generated additional profits by saving the cost of implementing an electronic system or of hiring additional employees to supervise and check on any suspicious conduct of its employees in order to ensure that their customers' confidential personal, and financial information remained private. It is possible to infer that the Bank earned additional profits from its alleged wrongful conduct of failing to incur the costs necessary to ensure adequate supervision of its employees in order to protect customers' confidential information.

**Disposition on Waiver of Tort**

[62] For the above reasons and because the law is unsettled in this area, I find that it is not plain and obvious that the plaintiffs' claim in waiver of tort will not succeed and, as a result, I find that it constitutes a cause of action at this stage of the proceeding.

**Disposition of Cause of Action Issue**

[63] I find that the plaintiffs have raised the following causes of action, for which it is not "plain and obvious" that they cannot succeed at trial:

a) Whether the Bank is vicariously liable for its employee's tort of intrusion upon seclusion or his breach of the duty of good faith;

b) Whether the Bank was negligent in failing to adequately supervise Wilson to ensure that the plaintiffs' personal and financial information remained confidential;

c) Whether the Bank is liable for breach of contract for failing to take reasonable steps to ensure that the plaintiffs' personal and financial information remained confidential;

d) Whether the Bank is liable based on waiver of tort; and

e) Whether damages may be awarded for emotional stress, hardship and inconvenience if the Bank is found liable under any of the causes of action alleged.



## B. IS THERE AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS?

**[Section 5(1)(b)]**

[64] The Bank became aware that Wilson had accessed various customers' files for an improper purpose in May of 2012, when the Calgary Police Service advised it that they had recovered several personal profiles of the Bank's customers. The Police had been executing a search warrant against several individuals who were attempting to use the profiles to perpetrate a fraud in Alberta. The profiles identified Mr. Wilson as the individual who had accessed and printed the customer profiles. Mr. Wilson was confronted and he confessed that he had improperly accessed and printed personal customer profiles for individuals who had applied for mortgages during a period from about November of 2011 until the end of May 2012 and that he had delivered them to third parties.

[65] The Bank conducted a detailed analysis of all of the profiles that Mr. Wilson had accessed during his employment with the Bank and identified a marked increase in his access to customers' profiles beginning in July of 2011. The Bank has determined that between July of 2011 and May 18, 2012, Mr. Wilson accessed 643 customer profiles, 492 of whom have mailing addresses in Ontario. As noted above, the Bank gave notice to these 643 individuals, and they are referred to as the "Notice Group".

[66] To date, 138 members of the Notice Group have advised the Bank that they have been victims of identity theft and/or fraud in the past year. The Bank has compensated every member of the Notice Group who has come forward for the pecuniary losses they have suffered as a result of the unauthorized access to their personal profiles. These losses include those resulting from fraudulently obtained credit, including credit cards, the purchase of merchandise, account takeovers, and counterfeit deposits.

[67] The plaintiffs propose that that same Notice Group that was identified by the Bank be confirmed as the identifiable class. The Bank argues that the proposed class of all 643

individuals whose personal profiles were accessed by Wilson from July 2011 until May 12, 2012, is over-inclusive because it consists of many individuals who are without a valid claim. That is, some of the 643 customers in the Notice Group may have had their profiles accessed for legitimate business purposes, some of those individuals may not have had their files provided to third parties, and some individuals whose profiles were provided to third parties by Mr. Wilson, may not have been used by the third parties to commit fraud or identity theft. The Bank further argues that there is no way to identify which members of the proposed class have been affected by the unauthorized access to their personal profiles, without resorting to individual inquiries.

[68] In the case of *Dennis v. Ontario Lottery and Gaming Corp.*, 2013 ONCA 501, 116 O.R. (3d) 321, the Ontario Court of Appeal, in finding that the definition of class members was over-inclusive, stated as follows, at para. 61:

> I agree with the motion judge that the proposed class definition of Class A Members is fatally over-inclusive. It includes all individuals who signed self-exclusion forms over a period exceeding five years. That class will include many individuals who have no claim, even if a potentially actionable failure on the part of OLG to enforce the self-exclusion form is made out. It is apparent that the problem of the class definition raises very similar issues to the question of common issues.

[69] Here, there are two possible choices for membership in the class. The first possibility is to include all of the 643 individuals whose profiles were accessed during the relevant time period, as identified above. The second is for the class to be defined as the 138 self-identified individuals whose profiles were improperly accessed by Wilson and were provided to third parties, and who have responded to the Bank's notice and have been the victims of identity theft or fraud. The plaintiffs propose to create two classes, one which includes only the 138 identity theft victims, and one which includes the other 505 individuals whose profiles were accessed by Wilson during the relevant time period but no resulting fraudulent transactions have occurred to date.

[70] The plaintiffs propose to define the overall class as the "Notice Group" identified by the Bank, namely, all those persons who:

1. Reside in Canada;

2. Provided personal information, which may include but is not limited to their name, financial and employment information, date of birth, address, telephone number, or government identification numbers, to the defendant and Bank for the purposes of obtaining credit or opening an account;

3. Received a letter or telephone call from the Bank on or about June 2002 in which they were advised that there was a risk that their personal information may have been provided by a former employee of the Bank to third parties for possible fraud or other purposes.

[71] In *Bywater, supra,* at para. 10, Winkler J.(as he then was) held that the purpose of a class definition was as follows:

> a) It identifies those persons who have a potential claim for relief against the defendant;
> b) It defines the parameters of the lawsuit so as to identify those persons who will be bound by the result; and
> c) It describes who is entitled to notice pursuant to the [*CPA*]. Thus for the mutual benefit of the plaintiff and the defendant the class definition ought not to be unduly narrow or widely broad.

[72] In *Hollick, supra,* the Supreme Court held that the plaintiff must define the class by reference to objective criteria so that a given person can be determined to be a member of the class without reference to the merits of the action. The class must be "bounded" in the sense that it is not unlimited. The proposed class definition must be limited.

[73] A number of decisions have held that a proposed class is not overbroad because it may include persons who ultimately will not have a claim against the defendants, including *Bywater*, at para 10*; Boulanger v. Johnson & Johnson Corp.* (2007), 40 C.P.C. (6th) 170 (Ont. S.C.J.), at para 22, leave to appeal refused, [2007] O. J. No. 1991 (S.C.J. (Div. Ct.)); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O. R. (3d) 98 (S.C.J.), leave to appeal refused (2008), 54 C.P.C. (6th) 167 (Ont. S.C.J. (Div. Ct.)); *Silver v. Imax Corp*. (2009), 86 C.P.C. (6th) 273 (Ont. S.C.J.), at paras. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035, 105 O.R. (3d) 212 (Div. Ct.). A number of the individuals whose accounts were accessed by Wilson in the time period may not ultimately be able to prove that their accounts were accessed for an improper purpose; however, this does not mean that the proposed class is too broad.

[74] I am satisfied that there is a properly identified class of individuals, who were identified, selected by the Bank, and referred to as the Notice Group, who are limited in time, and who are known to the Bank. Class members do not have to have identical claims and it need not be proven that a class member would be successful in establishing a claim for a remedy to be included as a member of the class. The definition of the proposed class does not depend on determining the merits of the claim.

[75] I find that there is an identifiable class that can be broken into two subgroups, as suggested by the plaintiffs. I find that including the 643 individuals identified by the Bank as the appropriate customers to receive notice, whose personal profiles were accessed by Wilson between July of 2011 and May 12, 2012, and who were advised by the Bank that there was a risk that their personal information may have been provided by Mr. Wilson to third parties for possible fraud or other purposes, would include all individuals with a possible claim for damages and be an appropriate identifiable class.

[76] I find that defining the class to include the group of 643 customers in the Notice Group is preferable to limiting the class to the 138 customers who have responded to the Bank and advised that they have been the victims of identity theft or fraud, for the following reasons:

a) the group of 643 individuals is not overly large and is not unmanageable;

b) this group of individuals was identified by the Bank of Nova Scotia as the appropriate notice group;

c) the two groups can be divided into two subclasses that are not in conflict;

d) the damages suffered, if any, is an individual issue;

e) while a number of the individuals included in the class may not have suffered any damages, the number of class members is not unmanageable and damages can be determined on individual damage claims once the common issues have been decided.



[77] The *Bywater* case involved an accident on the Toronto subway where the existence and extent of each class member's actual injuries suffered in the accident was unknown. Winkler J. (as he then was) stated, at paras. 10 and 11, that the individuals who have a potential claim do not have to prove damages in order to be included as class members, and held that including everyone who was on the train at the time of the accident was not unduly narrow or broad.

[78] I find that the Bywater situation is similar to the one before me as some of the members of the proposed class may ultimately not be successful in proving damages if their files were accessed for a proper business purpose, or if their private information was not transferred to third parties for an improper purpose. However, this does not mean that the class should not be defined to include everyone with a possible claim.

**Disposition of Identification of the Class**

[79] For the above reasons, I find that there is an identifiable class of 643 individuals who would be represented by the representative plaintiffs and membership is defined as follows:

All persons who:

i) reside in Canada;
ii) provided personal information, which may include, but is not limited to, their name, financial and employment information, date of birth, address and telephone number or government identification numbers, to the defendant the Bank of Nova Scotia for the purpose of obtaining credit or opening an account;
iii) who received a letter or telephone call from the Bank of Nova Scotia or Scotiabank in or about June of 2012 in which they were advised that there was a risk that their personal information may have been provided by a former employee of the Bank of Nova Scotia to third parties for possible fraud or other purposes.

## C. Does the Claim by the Class Members Raise Common Issues? [Section 5(1)(c)]

[80] Section 5(1)(c) of the *CPA*, requires that "the claims or defences of the class members raise common issues." Common issues are defined in Section 1 of the *CPA* as follows:

> a) Common but not necessarily identical issues of fact, or
>
> b) Common but not necessarily identical issues of law that arise from common but not necessarily identical facts…

[81] In *Hollick, supra*, at para. 18, the Supreme Court stated as follows: "Further, an issue will not be "common" in the requisite sense unless the issue is a "substantial … ingredient" of each of the class members' claims."

[82] In *Fehringer v. Sun Media Corp.* (2002), 27 C.P.C. (5th) 155 (Ont. S.C.J.), the Court stated that the underlying question is whether the resolution of a proposed common issue will avoid duplication of fact finding or legal analysis.

[83] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 39 and 40, the Supreme Court of Canada addressed the commonality question, stating that the following factors needed to be considered:

> The commonality question should be approached purposively… an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues…however, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues.
>
> …success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[84] In *Cloud v. Canada (Attorney General), supra*, at para. 53, the Ontario Court of Appeal stated that:

> … an issue can constitute a substantial ingredient of the claims and satisfy s. s. 5(1)(c) even if it makes up a very limited aspect of the liability question, and even though many individual issues remain to be decided after its resolution.

[85] The plaintiffs have removed their claim for punitive damages thereby reducing the number of proposed common issues. I have changed the order of the proposed common issues to follow my analysis of the causes of action.

**Proposed Common Issues**

**Negligence and Breach of Contract (Common Issues #1 and #2)**

[86] The issues of whether the defendants have breached their contractual obligations owed to the class members by disseminating their private and confidential information to third parties, and whether the Bank was negligent in failing to provide adequate supervision or electronic monitoring of Mr. Wilson which allowed class members' private and confidential information to be disseminated to third parties for improper and fraudulent purposes is a substantial part of each class members claim.

[87] In addition, the resolution of whether the Bank was negligent or breached its contractual obligations to class members would avoid a duplication of fact finding and legal analysis.

[88] The finding of facts required to determine if the Bank was negligent in the manner that it supervised Mr. Wilson to ensure that customers' information remained private would apply to all class members. The fact finding and legal analysis would be done once rather than 643 times if the action is certified. The same reasoning applies to deciding whether the Bank breached its contract with all class members, as this would also avoid duplication of both fact finding and legal analysis.

[89] As a result, I find that these two issues are common to all class members and that the resolution of both the negligence and the breach of contract allegations is necessary to the resolution of each class members' claim.

**The Tort of Intrusion upon Seclusion and Vicarious Liability (Proposed Common Issue #3)**

[90] In *Jones v. Tsige*, *supra*, at para. 71, Sharpe J.A. described the key features of the cause of action of intrusion upon seclusion as follows:

> The key features of this cause of action are, first, that the defendant's conduct must be intentional, within which I would include reckless; second that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.

[91] The Bank argues that it should not be held vicariously liable for Wilson's tort of intrusion upon seclusion on the basis that it has already compensated the 138 plaintiffs who have come forward for all of their pecuniary damages. It submits that vicarious liability should not be imposed on the employer for such a tort committed by its employee. The issue of whether the Bank of Nova Scotia is vicariously liable for the actions of Wilson, for negligence, breach of

contract, or for the tort of exclusion upon seclusion is a substantial ingredient and is necessary to the resolution of each class members' claim.

[92] The claim based on agency is rejected because there is no basis in fact that Mr. Wilson acted as an agent for the Bank at any time. The only evidence is that Mr. Wilson was, at all times, an employee at the Bank, and there is no evidence that he had no direct relationship with any of the class members.

[93] In *Bazley, supra*, at para. 20, the Supreme Court of Canada set out the test for vicarious liability as follows:

> Neither furtherance of the employer's aims nor creation of situations of friction, however, suffice to justify vicarious liability for employee theft or fraud, according to cases like *Lloyd v. Grace, Smith & Co.*, [1912] A.C. 716 (H.L.), and *The Queen v. Levy Brothers Co.*, [1961] S.C.R. 189. The language of authority, whether actual or ostensible, is inappropriate for intentional, fraudulent conduct like the theft of a client's property. A bank employee stealing a client's money cannot be said to be furthering the bank's aims. Nor does the logic of a situation of friction apply, unless one believes that any money-handling operation generates an inexorable temptation to steal. Nevertheless, courts considering this type of case have increasingly held employers vicariously liable, even when the employee's conduct is antithetical to the employer's business: see, e.g., *Boothman v. Canada*, [1993] 3 F.C. 381 (T.D.) (unauthorized intentional infliction of nervous shock by supervisory employee on his subordinate found to invoke vicarious liability for the employer, albeit it based on statutory, as opposed to common law, principles).

[94] The test was summarized by Justice McLachlin C.J. in *Blackwater v. Plint*, 2005 SCC 58, [2005] 3 S.C.R. 3, at para. 20, as follows:

> Vicarious liability may be imposed where there is a significant connection between the conduct authorized by the employer or controlling agent and the wrong. Having created or enhanced the risk of the wrongful conduct, it is appropriate that the employer or operator of the enterprise be held responsible, even though the wrongful act may be contrary to its desires: *Bazley v. Curry*, [1999] 2 S.C.R. 534. The fact that wrongful acts may occur is a cost of business. The imposition of vicarious liability in such circumstances serves the policy ends of providing an adequate remedy to people harmed by an employee and of promoting deterrence. When determining whether vicarious liability should be imposed, the court bases its decision on several factors, which include: (a) the opportunity afforded by the employer's enterprise for the employee to abuse his power; (b) the extent to which the wrongful act furthered the employer's interests; (c) the extent to which the employment situation created intimacy or other conditions conducive to the wrongful act; (d) the extent of power conferred on the employee in relation to the victim; and (e) the vulnerability of potential victims.

[95] I have held that there is some basis in fact to support the claim that the Bank is vicariously liable for Wilson's tort of intrusion upon seclusion and for the same reason this is an appropriate common issue.

**Disposition**

[96] The following question is therefore approved as common issue #3: Is Richard Wilson liable for the tort of intrusion upon seclusion and should the Bank of Nova Scotia be held vicariously liable for same?

**Breach of Fiduciary Duty and Duty of Good Faith (Proposed Common Issue #4)**

[97] Absent a special relationship or exceptional circumstances, the defendants do not owe the plaintiffs a fiduciary duty. As stated above, the plaintiffs are not pleading any special relationship or exceptional circumstances in this regard. I also note that, in *Jones, supra*, where the defendant's, employee, accessed the plaintiffs' bank account numerous times for an improper purpose, the motion judge held that no fiduciary duty could be inferred on those facts. This finding was not appealed. I have held that there is no basis in fact for the allegation that the Bank or Wilson owed or breached a fiduciary duty to the plaintiffs.

[98] With respect to the breach of a duty of good faith, in *Nareerux Import Co. Ltd. v. Canadian Imperial Bank of Commerce*, 2009 ONCA 764, 97 O.R. (3d) 481, at para. 69, the Ontario Court of Appeal stated as follows:

> Although Canadian law has not yet recognized a stand-alone "duty of good faith" in the performance of a contract that is independent from the terms of the contract, as the United States has done, the jurisprudence establishes that there is an implied contractual duty of good faith not to act in a way that defeats or eviscerates the very purpose and objective of the agreement …

[99] At paras. 71 and 72 of *Nareerux Import*, the Court of Appeal further stated:

> …Contracts in which performance is dependent upon the exercise of discretion on the part of one of the parties are contracts that are particularly characterized by the implied duty of good faith performance. In such circumstances, the discretion must be exercised reasonably and in good faith: see CivicLife.com, at para. 49; *Greenberg v. Meffert*, at p. 763 O.R.; McCamus, at p. 788.
>
> Breach of a duty of good faith in the performance of a contract may be found where there is "evidence that some sort of bad motive -- such as self-interest, ill will or a dishonest purpose -- underlay a decision" (emphasis added): *Hembruff v. Ontario Municipal Employees Retirement Board* (2005), 78 O.R. (3d) 561, [2005] O.J. No. 4667 (C.A.), at para. 116. Here, the Bank acted out of self-interest, as the trial judge found.

[100] Based on the evidence introduced and assuming the pleadings are proven, it may be found that the Bank acted negligently, but there is no evidence that the Bank acted dishonestly or with any ill will or self-interest in failing to monitor Mr. Wilson and ensure the protection of the plaintiffs' private information. I have previously held that there is no basis in fact that the Bank owed a duty of good faith to the plaintiffs and that, even if there were, there is no basis in fact that the Bank breached this duty.

[101] With respect to Mr. Wilson's conduct, I find that there is no special relationship or circumstances giving rise to a duty of good faith. If Wilson owed such a duty the evidence is clear that he would have breached it.

**Disposition of Proposed Common Issue #4**

[102] To summarize, I find that there is no claim or common issue of breach of fiduciary duty against either defendant, or of a breach of good faith directly against the Bank, but that a common issue could be reframed with regard to Wilson from the plaintiffs' proposed common issues as follows:

> Did Wilson breach a duty to act in good faith with respect to the handling and use of class members' private and confidential information? If so, is the Bank vicariously liable for Wilson's breach of his duty of good faith?

**Waiver of Tort (Disgorgement of Profits) (Proposed Common Issue 5)**

[103] As I have discussed above, prior jurisprudence has not resolved the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded. If waiver of tort was to be recognized as an independent cause of action, it would require that the plaintiff show that the defendant had derived benefits from its wrongful conduct.

[104] Wilson's actions of releasing confidential, private information of class members to third parties for improper, fraudulent purposes did not provide any benefit to the Bank. The handling of the plaintiffs' private information is part of the Bank's business model. The plaintiffs allege that the Bank failed to install a system to adequately supervise its employees to ensure that its customers' confidential information remained private, which they claim is negligent and wrongful conduct. It could be inferred that the Bank has made additional profits from saving the expenses of implementing a supervision system and therefore made additional profits from the class members' business while not adequately protecting their privacy interests.

[105] Waiver of tort does not require that individual damages be proven, and therefore this issue could easily be addressed as a common issue and its resolution would be necessary for each class members' claim. Damages suffered by individual class members may be an individual matter if the plaintiffs are successful on the waiver of tort claim.

**Disposition of Issue #5**

[106] The common issue with respect to waiver of tort damages can be reframed as follows:

What damages can the class members claim on the basis of waiver of tort?

## D. IS A CLASS PROCEEDING THE PREFERABLE PROCEDURE FOR THE RESOLUTION OF THE COMMON ISSUES? Section 5(1)(d)

[107] The preferability inquiry is viewed through the lens of achieving three goals, namely access to justice, judicial economy, and behaviour modification, and by taking into account the importance of common issues to the claims as a whole, including the individual issues (*Pro-Sys, supra*, at para. 26; *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 69; and *Cloud, supra*, at para. 73).

[108] The preferability requirement has two concepts at its core: first whether the class action would be a fair, efficient and manageable method of advancing the claim; and second, whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

[109] The Bank's admission to pay for all pecuniary damages suffered by any members of the Notice Group is not binding on it unless the action is certified. Binding a defendant to its admission for all class members, as was the case in the *Bywater* decision, moves the action forward. This is another strong argument that a class proceeding is a preferable procedure because the Bank will then be bound by its admission to be responsible for all pecuniary damages suffered by all members of the class.

[110] The Bank submits that either a test case, which the Bank submits would be binding upon all class members, or alternatively, a series of 138 or 643 Small Claims Court actions would make a more efficient use of judicial resources and be the preferable procedure. As a further alternative, the Bank proposed that all members advance their claims by way of arbitration before a retired judge.

[111] The resolution of a number of common issues that have been identified above is necessary for the resolution of each class member's claim and would substantially advance the litigation. A determination of whether the Bank is vicariously liable for Wilson's tort of intrusion upon seclusion and the damages suffered can be decided as a common issue because these damages are not based on actual injuries or losses suffered by individuals, which make a class action the preferable procedure.

[112] Deciding the common issues in one legal proceeding rather than hundreds of Small Claims Court proceedings or arbitration proceedings is a much more efficient use of judicial resources. In addition it promotes access to justice given the relatively small amount of the damages claimed and the complexity and the novelty of the legal issues in these claims.

[113] With regards to the Bank's proposal of a test case, absent an agreement between the parties, there is no mechanism for enforcing a decision which would be binding on all members of the class. In addition, there is no method of giving notice to all members of the class in the proposed test case, nor a mechanism to ensure that different individuals are bound by the result. A class proceeding provides a method for giving notice, gives potential class members an option to opt-out, if they do not wish to be part of the class proceeding, and produces a legal decision

that is binding on all members of the class. I find that a class proceeding is preferable to an unstructured, unenforceable test case that is without the agreement of all parties and without a method of giving notice.

[114] The *CPA* has been designed to promote access to justice and to resolve common issues in one legal proceeding for all members of the class. This approach also makes efficient use of judicial resources. The same comments apply to the Bank's proposal to proceed by way of individual arbitrations before a retired judge. A binding precedent is not created by arbitration hearings, which would be the case with a class proceeding. Many arbitration hearings would have to be held, rather than one legal proceeding under a class action. I therefore find that a class proceeding is the preferable method of proceeding and that it would be fair, manageable and efficient, as it would make much more efficient use of judicial resources than having many small claims trials or arbitrations. A class proceeding is preferable to other possible means of resolving the claims as outlined above.



[115] A class proceeding would also promote access to justice as the members will be able to pursue their claims of fairly modest amounts without any legal costs, unless the action is successful, and without the risk of being responsible to pay costs if the action is unsuccessful.

[116] With respect to behaviour modification, the Bank has argued that it has acted responsibly and, as a result, there is no need for behaviour modification. I find the Bank has acted quite appropriately since discovering the breach of the Bank's customers' confidentiality and privacy by Wilson. However, there is still the issue of whether or not the Bank was negligent by failing to appropriately supervise Wilson's activities to ensure the security of the class members' private and confidential information, which is conduct that should be deterred.

**Disposition of Preferable Procedure Issue**

[117] Considering the factors of promoting access to justice and making efficient use of judicial resources, and deterring negligent supervision, I find that a class proceeding is the preferable way to resolve the common issues.

**E. ARE THE PLAINTIFFS APPROPRIATE REPRESENTATIVE PLAINTIFFS?** (Section 5(1)(e))

[118] Section 5(1)(e) of the *CPA* requires that there be a representative plaintiff who will fairly and adequately represent the interests of the class, who has produced a suitable litigation plan, with a workable plan of advancing the proceeding, and who does not have a conflict of interest on the common issues with other class members.

[119] In *Western Canadian Shopping Centres Inc.*, *supra*, at para. 69, the court stated that the standard is not perfection, but that the court must be satisfied that "the proposed representative will vigorously and capably prosecute the interests of the class."

[120] The proposed representative plaintiffs, Michael and Crystal Evans, were customers of the Bank who provided their personal and confidential information to the Bank and were notified by

letter in June 2012 that their information may have been disseminated to third parties for fraudulent and improper purposes as such they are part of the Notice Group.

[121] In addition, the proposed representative plaintiffs also do not have any conflict with other potential class members on the proposed common issues.

[122] The proposed representative plaintiffs have retained a lawyer with over 30 years' experience in the commercial and civil litigation areas. The lawyer's firm has assembled a legal team comprised, in addition to Mr. Hebert, Mr. Nicholson, a lawyer with over 30 years of litigation experience, Ms. Maglukie, a lawyer with 10 years of civil and commercial litigation experience, and Ms. Hasra, who has four years of litigation experience. The team has been involved in five previous class action proceedings. I find that the representative plaintiffs, with the assistance of their legal team, have the capability to adequately represent the interests of the class members.



[123] The Bank objects to the approval of the proposed representative plaintiffs because it alleges that they have not participated actively, because they stated that they had not reviewed the material that the Bank had filed in response to this motion and because they had not spoken to or written to any other members of the proposed class.

[124] The Bank further suggests that the proposed litigation plan is inadequate. The plaintiffs reply that the reason that only a relatively small number of individuals have been contacted to date is partly because they have not been able to give the proper notice which a class proceeding would provide. I agree with this explanation. The plaintiffs further submit that there is no evidence that they are uninterested or unmotivated, or that they will not move the action forward; they have, in fact, brought this action forward and have brought this certification motion.

[125] As a result, I am satisfied that the proposed representative plaintiffs will fairly adequately represent the interests of the class as they have the appropriate qualifications, and have retained an experienced law firm, have the ability to move the action forward on behalf of all class members, and have no interests in conflict with those of other members of the class.

**Litigation Plan**

[126] I have received very few submissions on the actual litigation plan or the actual terms of the notice. The parties should attempt to negotiate the terms of the litigation plan and the method of giving notice. If necessary, a further case conference or motion may be set before me either by teleconference, if that is deemed necessary, or in person, to resolve the further issues now that the terms of the certification motion, the class definition and common issues have been identified.

**Costs**

[127] The plaintiffs may make submissions on costs within 15 days, the Bank shall have 15 days to respond, and the plaintiffs shall have 10 days to reply.

Mr. Justice R. Smith J.

**Released:** June 6, 2014

**CITATION:** Evans v. The Bank of Nova Scotia, 2014 ONSC 2135
**COURT FILE NO.:** CV-12-55329
**DATE:** 2014/06/06



**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Michael Evans and Crystal Evans

Plaintiffs

**– and –**

The Bank of Nova Scotia and
Richard Wilson

Defendants

---

**REASONS FOR DECISION**
**ON CERTIFICATION MOTION**

---

R. Smith J.

**Released:** June 6, 2014