

CITATION: Del Giudice v. Thompson, 2020 ONSC 2676
COURT FILE NO.: CV-19-00625030-00CP
COURT FILE NO.: CV-19-00625262-00CP
DATE: 2020/04/30

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)
)
RINA DEL GIUDICE and DANIEL)
WOOD) *John A. Campion and R. Douglas Elliott for*
) *the Plaintiffs*
)
) Plaintiffs)
)
) - and -)
)
)
PAIGE A. THOMPSON, CAPITAL ONE)
FINANCIAL CORPORATION,)
CAPITAL ONE BANK (CANADA)
BRANCH), CAPITAL ONE)
(SERVICES) CANADA INC., CAPITAL)
ONE, N.A., CAPITAL ONE BANK)
(USA), N.A., and GITHUB, INC.)
) Defendants) *Laura Cooper for the Defendants Capital*
) *One Financial Corporation, Capital One*
) *Bank (Canada) Branch, Capital One*
) *(Services Canada Inc., Capital One, N.A.,*
) *Capital One Bank (USA), N.A.*
)
AND BETWEEN:)
)
DAVID MARK SLAPINSKI)
) Plaintiff) *Vadim Kats and Carlin McGoogan, for the*
) *Plaintiff*
)
) - and -)
)
)
CAPITAL ONE SERVICES (CANADA)) *Laura Cooper for the Defendants Capital*
INC., CAPITAL ONE FINANCIAL) *One Services Canada Inc. Capital One*
CORPORATION,) *Financial Corporation, Capital One, N.A.,*
CAPITAL ONE, N.A.,) *Capital One Bank (USA), N.A.*
and CAPITAL ONE BANK (USA), N.A)
) Defendants)
)
)

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion to determine which of two rival consortia of law firms shall have carriage of a data breach class action under the *Class Proceedings Act, 1992*.¹

[2] On July 29, 2019, it was disclosed to the public that the information technology systems of Capital One Financial Corporation, Capital One, N.A., Capital One Bank (USA), N.A., and Capital One Services (Canada) Inc., (collectively “Capital One”) had been hacked and personal information had been misappropriated. The data had been stored on computer servers owned by Amazon Web Services Inc. and Amazon Web Services (Canada) (collectively “Amazon”).

[3] As a consequence of this data breach, the personal and confidential information of an estimated 6 million Canadian Capital One customers was compromised.

[4] On August 6, 2019, Rina Del Giudice sued Capital One and GitHub Inc., a website operator which had published some of the personal information (the “Del Giudice Action”).

[5] As I shall describe below, subsequently, Daniel Wood joined Ms. Del Giudice in the Del Giudice Action as a Plaintiff, and they joined Paige A. Thompson, the arrested hacker, and Amazon as party Defendants.

[6] Proposed Class Counsel in the Del Giudice Action are a consortium of: (a) Cambridge LLP; (b) Gardiner Roberts LLP; (c) Hotz Lawyers; and (d) Scher Law Professional Corporation, which brand themselves as PDBL – Privacy and Data Breach Law Group.

[7] On August 8, 2019, David Mark Slapinski sued Capital One (the “Slapinski Action”). Subsequently, Ms. Thompson was added as a party Defendant to the Slapinski Action.

[8] Proposed Class Counsel in the Slapinski Action are a consortium of: (a) Du Vernet, Stewart; (b) Landy Marr Kats LLP; and (c) McKenzie Lake Lawyers LLP.

[9] For the reasons that follow, I grant carriage to the Del Giudice Action.

B. Facts

[10] Capital One Financial Corporation is a corporation incorporated under the laws of Delaware, USA with its head office in McLean, Virginia. It is the parent of Capital One, N.A. and Capital One Bank (USA), N.A, which are consumer banks with their principal place of business located in McLean, Virginia. One or the other these corporations is also the parent of Capital One Services (Canada) Inc., a Canadian federally incorporated corporation carrying on the business of banking with its head office in Toronto, Ontario.

¹ S.O. 1992, c.6.

[11] Capital One Financial Corporation, Capital One, N.A., Capital One Bank (USA), N.A., and Capital One Services (Canada) Inc. are collectively referred to as Capital One.

[12] Capital One issues credit cards for its banking business and also credit cards for Costco Wholesale and the Hudson's Bay Company.

[13] There are 106 million North American Capital One customers, including six million Canadians.

[14] An applicant for a Capital One credit card must provide personal information including, name, social insurance number, date of birth, mother's maiden name, address, email address, phone number, employer name, housing situation, annual income, status of mortgage, banking information, credit scores, credit limits, balances, payment history, transaction data, linked bank account numbers, purchase and transaction history, and contact information.

[15] Capital One posts its privacy policy on its website www.capitalone.ca/privacypolicy.

[16] The personal information gathered by Capital One is stored on computer servers owned by Amazon Web Services Inc. and Amazon Web Services (Canada) Inc., which are subsidiaries of Amazon.com Inc. (collectively "Amazon"). Amazon operates the world's largest cloud-based storage service with global data centres.

[17] The Defendant Paige Thompson, who is a resident of Seattle, Washington, was a computer programmer at Amazon. She wrote a computer program that scanned customer accounts to locate a firewall misconfiguration that allowed access to data stored on a computer.

[18] Using the online pseudonym "Erratic", on March 22 or 23, 2019, Ms. Thompson accessed Capital One's stored data and misappropriated it. Amongst other things, Ms. Thompson used the stolen data to mine for cryptocurrency.

[19] Ms. Thompson also posted unencrypted data on a website known as GitHub, which is operated by GitHub Inc. The GitHub website is a forum for software developers to share information.

[20] GitHub Inc. is a Delaware corporation with its principal place of business in San Francisco, California. It is a subsidiary of Microsoft Corporation.

[21] Ms. Thompson boasted of her hacking exploit, and the data she posted remained on GitHub for months. Her GitHub posting ultimately led to Ms. Thompson's arrest.

[22] Capital One was not immediately aware of the data breach, but it was alerted to it by an email from a customer on April 21, 2019.

[23] On July 19, 2019, Capital One fixed the deficiency in its firewall that had allowed access to the stored data.

[24] On July 19, 2019, Ms. Thompson was arrested in Seattle.

[25] Ten days passed and on July 29, 2019, Capital One reported the data breach to the public. It published the following notice:

On July 19, 2019, we determined there was an unauthorized access by an outside individual who obtained certain types of personal information relating to people who had applied for our credit card products and to Capital One credit card customers.

We immediately fixed the configuration vulnerability that this individual exploited and promptly began working with United States federal law enforcement.

The FBI has arrested the person responsible.

[...]

Based on our analysis to date, we believe it is unlikely that the information was used for fraud or disseminated by this individual. However, we will continue to investigate.

Based on our analysis to date, this event affected approximately 100 million individuals in the United States and approximately 6 million in Canada. The largest category of information was information on consumers and small businesses as of the time they applied for one of our credit card products from 2005 through early 2019. This information included personal information Capital One routinely collects at the time it receives credit card applications, including, names, addresses, zip codes/ postal codes/ phone numbers, email addresses, dates of birth, and income.

Beyond the credit card application data, the individual also obtained portions of credit card customer data, including:

- Customer status data, e.g. **credit scores**, credit limits, balances, payment history, contact information
- Fragments of transaction data from a total of 23 days during 2016, 2017 and 2018

No long in credentials were compromised.

No bank account numbers or Social Security numbers were compromised other than:

- About 140,000 Social Security numbers of our small business credit card customers
- About 80,000 linked bank account numbers of our secured credit card customers

For our Canadian credit card customers, approximately 1 million Social Insurance Numbers were compromised in this incident.

We will notify affected individuals through a variety of channels. We will make free credit monitoring and identity theft insurance available to everyone affected.

Safeguarding our applicants and customers' information is essential to our mission and our role as a financial institution. We have invested heavily in cybersecurity and will continue to do so. We will incorporate the learnings from this incident to further strengthen our cyber defences.

The investigation is ongoing, and analysis is subject to change. As we will learn more, we will update this website and provide additional information.

[26] The Plaintiffs in both actions allege that the deficiency in the cyber security of Capital One was a notorious defect in information technology systems that was easily exploited by Ms. Thompson, and the Plaintiffs plead that any reasonably competent corporation would have known that a data breach was inevitable and would have done something to prevent its occurrence.

[27] For reasons that will become apparent later in these Reasons for Decision, I pause to note that the primary material facts that underlie the proposed class actions have been set out above in under 20 paragraphs.

C. Procedural Background

[28] On July 31, 2019, Penny Stewart commenced an action with respect to the Capital One data breach. The law firm Du Vernet, Stewart was the lawyer of record.

[29] On August 6, 2019, Ms. Del Giudice commenced an action with respect to the data breach against some of the Capital One Defendants; namely: Capital One Financial Corporation and Capital One Bank (Canada Branch). The Statement of Claim was 120 paragraphs. The lawyers of record were Diamond and Diamond Lawyers LLP and Hotz Lawyers. Diamond and Diamond Lawyers subsequently decided that it did not wish to be a Class Counsel.

[30] On August 8, 2019, Mr. Slapinski commenced an action with respect to the data breach against the Capital One Defendants. The Statement of Claim was 77 paragraphs. The lawyers of record were Landy Marr Kats LLP and McKenzie Lake Lawyers LLP. Subsequently, Du Vernet, Stewart joined the consortium to prosecute the Slapinski Action rather than its own for Ms. Stewart.

[31] There were now two rival proposed class actions, and on December 16, 2019, at a case conference, I fixed a timetable for a carriage motion. I directed that the rival consortia simultaneously exchange motion materials on January 20, 2020, and I fixed a timetable for the carriage motion.

[32] On January 20, 2020, the motion material in the Slapinski Action was served in accordance with my file direction. The Slapinski Action now had a 105-paragraph Fresh as Amended Statement of Claim dated January 14, 2020. The revised pleading added Ms. Thompson as a party Defendant.

[33] The Slapinski Motion Record included an affidavit from Emily Assini dated January 15, 2020. Ms. Assini is a senior associate in the Class Action Group at McKenzie Lake Lawyers LLP. The Motion Record included an affidavit from Mr. Slapinski dated January 14, 2020.

[34] On February 7, 2020 - 18 days late -, the motion material in the Del Giudice Action was served. The Del Giudice Motion Record included a 182-paragraph Amended Amended Statement of Claim dated February 7, 2020, which amended a 172-paragraph pleading dated January 20, 2020, which pleading was also included in the Motion Record.

[35] The amended pleadings added Mr. Wood as a party Plaintiff and Ms. Thompson, Capital One (Services) Canada Inc., Capital One, N.A., Capital One Bank (USA), N.A., and GitHub Inc. as party Defendants.

[36] On February 20, 2020, the Reply Motion Record was delivered in the Del Giudice Action and also on February 20, 2020, a 181-paragraph Fresh as Amended Statement of Claim was delivered in the Del Giudice Action.

[37] The Reply Motion Record included: (a) an affidavit from Jeff Childs dated February 20, 2020; (b) an affidavit from Ms. Del Giudice dated February 18, 2020; and (c) an affidavit from Mr. Wood dated February 19, 2020. Mr. Childs is a lawyer working in association with Scher Law PC.

[38] On March 31, 2020, counsel in the Del Giudice Action delivered another affidavit from Mr. Childs dated March 31, 2020.

[39] The parties exchanged Factums on April 1, 2020.

[40] The parties exchanged Reply Factums on April 15, 2020.

[41] On Sunday April 26, 2020, the day before the argument of the carriage motion, Counsel in the Del Giudice Action delivered a revised 227-paragraph Fresh as Amended Statement of Claim that added Amazon Web Services Inc. and Amazon Web Services (Canada) Inc. as party Defendants.

[42] There are three rival class actions in British Columbia; namely: (a) Duncan Campbell and Matthew Clement v. Capital One Financial Corporation and Capital One Bank (Canada Branch). (The proposed representative plaintiff in this action was previously Adele J. Taylor who was replaced by Campbell and Clement.); (b) Sukhpal Singh Gill v. Capital One Financial Corporation and Capital One Bank (Canada Branch); and (c) Theresa Botterell and Adam Botterell v. Capital One Bank (Canada Branch). Justice Iyer of the British Columbia Supreme Court has been appointed the case management judge.

[43] There are two rival national class actions in Alberta; namely: (a) Meagan Wozniuk v. Capital One Financial Corp. and Capital One Bank; and (b) Anastasia Stacie Lehman, Mandy Dawn Fischer, and Donald Raymond Murphy v. Capital One Services (Canada) Inc., Capital One Financial Corporation, and Paige Thompson. No case management judge has yet been appointed.

[44] There is a regional class action in Québec; namely: Michael Royer and Ala'a Abou-Khadra v. Capital One Bank (Canada Branch), Capital One Financial Corporation, Capital One Bank (USA), N.A., Amazon.com.ca, Inc., Amazon.com, Inc., Amazon Web Services Canada, Inc., Amazon Web Services, Inc., and Amazon Technologies, Inc. This action is being case managed by Justice Bernard Tremblay of the Québec Superior Court.

[45] There are also some individual actions that have been brought against Capital One in Canada with respect to the data breach incident.

[46] In British Columbia, the proposed Class Counsel in the Campbell and Clement Action is Theodore Charney. If carriage is granted to the Campbell and Clement Action in British Columbia and if carriage is granted to the Slapinski Action in Ontario, Counsel in the Slapinski Action plan to work cooperatively with Mr. Charney. What working cooperatively means, however, has not been determined.

[47] There is parallel multi-district litigation in the United States, and Slapinski Counsel have a cooperative working relationship with counsel who were recently appointed as the co-lead of the Plaintiff's Steering Committee in the multi-district litigation in the Virginia Federal Court.

D. Basic Comparators

	Del Giudice Action	Slapinski Action
Representative Plaintiffs	Rina Del Giudice, Bolton, Ontario, holder of a Capital One Platinum Costco Wholesale Mastercard Daniel Wood, Standard, Alberta, holder of a Capital One credit card	David Mark Slapinski, Toronto, Ontario, holder of a Capital One Gold Mastercard
Defendants	Amazon Web Services Inc. Amazon Web Services (Canada) Inc. Capital One Bank (Canada Branch) Capital One Bank (USA), N.A.	- - - Capital One Bank (USA), N.A.

	Capital One Financial Corporation Capital One, N.A. Capital One (Services) Canada Inc. GitHub, Inc. Paige A. Thompson	Capital One Financial Corporation Capital One, N.A. Capital One (Services) Canada Inc. - -
Class Definition	Persons in Canada who applied for credit cards between 2005 to 2019 or provided financial information and other Personal Information to Capital One or its clients, including credit card applications to the Hudson's Bay Company through Capital One Bank (Canada Branch) and Costco's Capital One Mastercard or Costco's Cash Back Credit Card through Capital One, and others, and who are subjected to this data breach beginning in March of 2019, and caused or contributed to by the vulnerabilities in the system developed, maintained, operated and used by Capital One and the cloud based storage of Amazon Web Services. Included also are the Class Members' estates, executors, and personal representatives.	All persons in Canada (including their estates, executors or person representatives) whose Data was stored in database(s) owned and/or operated by the Corporate Defendants or any of their affiliates or subsidiaries which Data was stolen from, released to, obtained by or accessed by unauthorized persons on or around March 22 or 23, 2019 (or such further or different period that is specified as investigations of this case progress).
Class Period	Class Period means the date of the losses resulting from the data breach up to the date the court hears the motion for certification of this action as a class proceeding	[Undefined in the Statement of Claim. Presumably the same as in the Del Giudice Action]
Causes of Action	Breach of Confidence Breach of Contract Breach of Statute(s) Breach of Trust/Fiduciary Duty Privacy tort(s) Misrepresentation Negligence Theft and conversion	Breach of Confidence Breach of Contract Breach of Statute(s) Breach of Trust/Fiduciary Duty Privacy tort(s) * Negligence Theft and conversion
Main Relief Requested	[\$10.9 billion] damages in the amount of \$1,500 per person impacted in Canada solely by the breach of Personal Information excluding their SIN; and \$2,500 (an additional \$1,900) per person for those whose SIN was included in the breach, based upon the breach of Personal Information of a total of 6 million Canadians, including the SIN of 1 million Canadians \$15 million for special damages. \$25 million for punitive damages	\$0.6 billion \$20 million for punitive damages
Statutes Relied Upon	<ul style="list-style-type: none"> • <i>Act Respecting the Protection of Personal Information in the Private Sector</i>, R.S.Q., c. P-39.1 • <i>Bank Act</i>, S.C. 1991, c. 46 • <i>Consumer Protection Act</i>, 2002, S.O. 2002, c. 30, Schedule A 	<ul style="list-style-type: none"> • <i>Consumer Protection Act</i>, 2002, S.O. 2002, c. 30, Schedule A

	<ul style="list-style-type: none"> • <i>Civil Code of Quebec</i>, L.R.Q., c. C-1991, art. 35-40 	
	<ul style="list-style-type: none"> • <i>Electronic Commerce Act</i>, 2000, S.O. 2000, c. 17 	
	<ul style="list-style-type: none"> • <i>Freedom of Information and Protection of Privacy Act</i>, R.S.O. 1990, c. F.31 	
	<ul style="list-style-type: none"> • <i>Negligence Act</i>, R.S.O. 1990, c. N.1 	
	<ul style="list-style-type: none"> • <i>Personal Information Protection and Electronic Documents Act</i>, S.C. 2000, c. 5 	<ul style="list-style-type: none"> • <i>Personal Information Protection and Electronic Documents Act</i>, S.C. 2000, c. 5
	<ul style="list-style-type: none"> • <i>Privacy Act</i>, R.S.B.C. 1996, c. 373 	<ul style="list-style-type: none"> • <i>Privacy Act</i>, R.S.B.C. 1996, c. 373
	<ul style="list-style-type: none"> • <i>Privacy Act</i>, RSC 1985, c P-21 	
	<ul style="list-style-type: none"> • <i>The Privacy Act</i>, C.C.S.M., c. P125 	<ul style="list-style-type: none"> • <i>The Privacy Act</i>, C.C.S.M., c. P125
	<ul style="list-style-type: none"> • <i>Privacy Act</i>, R.S.N.L. 1990, c. P-22 	<ul style="list-style-type: none"> • <i>Privacy Act</i>, R.S.N.L. 1990, c. P-22
	<ul style="list-style-type: none"> • <i>The Privacy Act</i>, R.S.S. 1978, c. P-24 	<ul style="list-style-type: none"> • <i>The Privacy Act</i>, R.S.S. 1978, c. P-24
Retainer Agreements	<p>February 7, 2020 Contingency Fee Agreement:</p> <ul style="list-style-type: none"> • 15% if the action is settled before delivery of the motion record for certification • 17.5% if the action is settled before certification but after the delivery of a certification record • 23% if the action is settled at or after the hearing of the certification motion • capped at 30% if the action is resolved after commencement of examinations for discovery • 28% if the action is settled after the commencement of a trial 	<p>August 7, 2019 Contingency Fee Agreement:</p> <ul style="list-style-type: none"> • 15% if the action is settled before delivery of the motion record for certification • 20% if the action is settled after the delivery of the motion record for certification • 25% if the action is settled after commencement of the contested motion for certification or after a consent order is made certifying the class action • capped at 30% if the action is resolved after commencement of examinations for discovery. • includes an indemnity with respect to any adverse costs awards.
Consortium	<p>Cambridge LLP</p> <p>Gardiner Roberts LLP</p> <p>Hotz Lawyers</p> <p>Scher Law Professional Corporation</p>	<p>Du Vernet, Stewart,</p> <p>Landy Marr Kats LLP</p> <p>McKenzie Lake Lawyers LLP</p>
Lawyers	<p>Campion, John, A.</p> <p>Childs, Jeff</p> <p>Elliott, R. Douglas</p> <p>Giacomelli, Jon-David</p> <p>Hosseini, Ruzbeth</p> <p>Hotz, Darrel N.</p> <p>Hotz, Glyn</p> <p>MacLeod, Chris</p> <p>Nehmetallah, Jonathan</p> <p>Scher, Hugh</p>	<p>Assini, Emily</p> <p>Baer, Matthew</p> <p>Baretto, Kate</p> <p>Du Vernet, Christopher</p> <p>Kats, Vadim</p> <p>McGoogan, Carlin</p> <p>Peerless, Michael J.</p>

E. Case Theories

1. The Slapinski Action

[48] The theory of the Slapinski action is that there was a contractual relationship, a duty of care

relationship, a fiduciary relationship, and a confidentiality relationship between the Class Members and Capital One.

[49] It is alleged that Capital One is liable for breach of contract, negligence, breach of fiduciary duty, breach of confidence, and invasion of privacy based on the tort of intrusion on seclusion.

- a. The breach of contract claim is infused by the privacy policy of Capital One and also statutory provisions designed to protect privacy.
- b. The Class Members also seek damages for breach of various privacy statutes including the *Consumer Protection Act, 2002*.
- c. The invasion of privacy tort claim is designed to address the possible restrictions or narrowness of the tort of intrusion on seclusion as it was defined by the Court of Appeal in *Jones v. Tsige*.² In this regard, the Statement of Claim focuses on the alleged negligence, recklessness, and thoughtlessness of Capital One in managing the personal information of its customers.

[50] In the Slapinski Action, the claim against Ms. Thompson is for the tort of intrusion on seclusion, breach of various privacy statutes, theft and conversion.

[51] Although the Slapinski Action pleads the involvement of GitHub, there is no claim advanced against GitHub.

[52] The Slapinski Action does not advance any claims against Amazon. The Statement of Claim notes Amazon providing hosting services (it leased servers to Capital One), but the pleading notes that the sole responsibility for setting up and configuring the firewall for security rested with Capital One.

[53] Various allegations in the Slapinski action appear designed to support the claim for punitive damages.

2. The Del Giudice Action

[54] The theory of the Del Giudice Action is that there was a contractual relationship, a duty of care relationship, a fiduciary relationship, and a confidentiality relationship between the Class Members and Capital One.

[55] In the Del Giudice Action, it is alleged that Capital One is liable for breach of contract, negligence, breach of fiduciary duty (breach of trust), breach of confidence, and invasion of privacy claim based on the tort of intrusion on seclusion and the tort of “publicity given to private life.” The Class Members also seek damages for breach of various privacy statutes, including the *Consumer Protection Act, 2002*.

- a. It is alleged that Capital One is liable for negligence and liable for the negligence of its employees and agents.
- b. The invasion of privacy tort claims and the negligence claim is designed to address the possible restrictions or narrowness of the tort of intrusion on seclusion as it was defined by the Court of Appeal in *Jones v. Tsige*.³

² 2012 ONCA 32.

³ 2012 ONCA 32.

- c. It is alleged that Capital One is liable for negligent misrepresentations in its privacy policy.

[56] The theory of the Del Giudice Action is that Ms. Thompson was a rouge employee of Amazon, which was an agent of Capital One. It is alleged that Ms. Thompson is liable for negligence, breach of fiduciary duty (breach of trust) breach of confidence, and the torts of intrusion upon seclusion and publicity given to private life. It is also alleged that she is liable for theft and conversion.

[57] The theory of the Del Giudice Action is that there is a duty of care relationship, an outsourced fiduciary relationship and a confidentiality relationship between the Class Members and Amazon.

- a. It is alleged that Amazon is liable for negligence, breach of fiduciary duty (outsourced breach of trust), breach of confidence and invasion of privacy based on the torts of intrusion on seclusion and publicity given to private life.
- b. It is alleged that Amazon is liable for theft and conversion.
- c. It is alleged that Amazon is liable for negligence and liable for the negligence of its employee and agents. It is alleged that Amazon is vicariously liable for the misconduct of Ms. Thompson.
- d. It is alleged that Amazon caused or materially contributed to Capital One's breach of trust.

[58] The theory of the Del Giudice Action is that there is a duty of care relationship, a fiduciary relationship and a confidentiality relationship between the Class Members and GitHub.

- a. It is alleged that GitHub is liable for negligence, breach of fiduciary duty, breach of confidence and invasion of privacy based on the torts of intrusion on seclusion and publicity given to private life.
- b. It is alleged that GitHub is liable for theft and conversion.
- c. It is alleged that GitHub is liable for negligence and liable for the negligence of its employees and agents.
- d. It is alleged that GitHub caused or materially contributed to Capital One's breach of trust.

[59] Various allegations in the Del Giudice action appear designed to support the claims for punitive damages.

[60] It should be appreciated that the negligence causes of action are several and discrete. I say this because the Class Members have different proximate relationships with Capital One, Ms. Thompson, GitHub, and Amazon.

[61] It should be appreciated that the tort claim of intrusion on seclusion is also several and discrete. I say this because the nature of the intrusions is different for each of the Defendants.

F. The Test for Carriage

[62] The *Class Proceedings Act, 1992*, confers upon the court a broad discretion to manage the

proceedings. Section 13 of the *Act* authorizes the court to "stay any proceeding related to the class proceeding", and s. 12 of the *Act* 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 138 of the *Courts of Justice Act*,⁴ directs that "as far as possible, multiplicity of legal proceedings shall be avoided".

[63] Where two or more class proceedings are brought with respect to the same subject-matter, a proposed Representative Plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject-matter.⁵ There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected.⁶

[64] The court will grant carriage to the putative Class Counsel whose proposed action is better for the interests of the putative Class Members while being fair to the defendants and promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy.⁷ Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel 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.⁸

[65] Courts generally consider a list of overlapping and non-exhaustive factors in determining which action should proceed; including:⁹ (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; (8) Preparation and Performance on Carriage Motion; (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition; (14) Class Period; (15) Prospect of Success: (Leave and) Certification; (16) Prospect of Success against the Defendants; and (17)

⁴ R.S.O. 1990, c. 43.

⁵ *Settingington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 at paras. 9-11 (S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

⁶ *Vitapharm Canada Ltd. v. F. Hoffman-Laroche Ltd.*, [2000] O.J. No. 4594 (S.C.J.).

⁷ *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 at para. 14 (S.C.J.); *Settingington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 at para. 13 (S.C.J.); *Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2000] O.J. No. 4594 at para. 48 (S.C.J.).

⁸ *Simmonds v. Armtec Infrastructure Inc., sub nom. Locking v. Armtec Infrastructure Inc.*, 2012 ONSC 44, leave to appeal to Div. Ct. granted, 2012 ONSC 5228, affirmed 2013 ONSC 331 (Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (S.C.J.), *sub. nom. Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (S.C.J.), *aff'd* [2009] O.J. No. 821 (Div. Ct.), application for leave to appeal to C.A. *ref'd* May 15, 2009, application for leave to appeal to S.C.C. *ref'd* [2009] S.C.C.A. No. 261.

⁹ *Earle v. Cantrust*, 2020 ONSC 579; *Winder v. Marriott International Inc.*, 2019 ONSC 5766; *Rogers v. Aphria Inc.*, 2019 ONSC 3698; *David v. Loblaws*, 2018 ONSC 1298; *Agnew-Americanano v. Equifax Canada Co.*, 2018 ONSC 275; *Kaplan v. Casino Rama Services Inc.*, 2017 ONSC 2671; *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819; *Mancinelli v. Barrick Gold Corp.*, 2014 ONSC 6516 *aff'd* ONSC 2015 ONSC 2717 (Div. Ct.), *aff'd* 2016 ONCA 571; *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875; *McSherry v. Zimmer GMBH*, 2012 ONSC 4113; *Smith v. Sino-Forest Corporation*, 2012 ONSC 24; *Sharma v. Timminco Ltd.*, (2009), 99 O.R. (3d) 260 (S.C.J.); *Genier v. CCI Capital Canada Ltd.*, *; *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (S.C.J.).

Interrelationship of Class Actions in more than one Jurisdiction.¹⁰

[66] It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel.¹¹

G. Discussion and Analysis

1. Preliminary Observations

[67] I begin the discussion by making two observations, one faint praise and the other a scold.

[68] The faint praise is that carriage could be given to either the Del Giudice Action or the Slapinski Action and the Class Members would be well enough served. For the purposes of a carriage motion, both actions achieved passing grades and there are no disqualifying factors. That said, it should not be taken that either action would survive the crucible of a certification motion.

[69] In coming to my decision about carriage, it was a close call as to which action should be granted carriage of the proposed class action. There were pros and cons to both litigation plans, but, in any event, I was satisfied that the putative Representative Plaintiffs and the putative Class Counsel in either action would fulfill their responsibilities to the Class Members and pursue the objectives of the class proceedings legislation.

[70] The scold is that in reading the materials for the carriage motion, on more than one occasion I grimaced, and I suppressed the urge to gag. As unfortunately has become too common in class actions, the prose is prolix, tedious, whiningly-polemic, conceited, pompously preachy, wanting in objectivity, and grossly overstated. I could give examples, from this and other class actions but why make the reader retch.

[71] The prose in the immediate case may be designed to please the Class Members or to vilify the Defendants in the media, but, speaking for myself, the prose in the immediate case, particularly in the Statements of Claim, is disappointing and unprofessional.

[72] When there is a carriage motion, I say once again that it would be preferable if the putative Class Counsel retained external genuinely independent counsel to both: (a) professionally prepare the material for the motion; and (b) professionally argue the motion.¹²

[73] In the immediate case, I anticipate that because of numerous egregious violations of the rules of pleading, and the novelty of some of the claims, Capital One and the other Defendants will bring a motion to strike the Statement of Claim in the Del Giudice Action, which was very-very far from being a concise statement of the material facts but not the evidence or argument by which those facts are to be proved.

[74] In the Slapinski Action, I counted at least 35 paragraphs of the 105-paragraph Statement of Claim that contravened the rules of pleading. In the Del Giudice Action, I counted 120

¹⁰ *Winder v. Marriott International Inc.*, 2019 ONSC 5766; *Quenneville v. Audi AG*, 2018 ONSC 1530.

¹¹ *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 at para. 146.

¹² *Quenneville v. Audi AG*, 2018 ONSC 1530

paragraphs of the 227-paragraph Fresh as Amended Statement of Claim that contravened the rules of pleading.¹³ I, therefore, recommend that the consortium in the Del Giudice Action preempt or mitigate that motion by delivering a fresh pleading that complies with the *Rules of Civil Procedure*.

2. The Non-Determinative, Neutral, or Offsetting Carriage Factors

[75] Turning then to the certification criteria, the first eight criteria are non-determinative. In other words, in terms of: (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; and (8) Preparation and Performance on Carriage Motion, the actions are neck and neck as they head into the stretch of the carriage race to the finish line.

[76] With respect to these non-determinative factors, I have four observations.

[77] First, I was displeased and disappointed that the lawyers in the Del Giudice Action failed to comply with my direction about the carriage motion, but keeping in mind that ultimately it is the interests of the Class Members that matters and given that I heard the carriage motion on its merits, I did not grant a default victory to the Slapinski Action. I shall, however, deal with the non-compliance with my case management direction as a matter of the costs of the motion.

[78] Second, notwithstanding the argument of the Slapinski Counsel, it is not a not a pivotal issue and it is not an important negative distinguishing factor between the two actions that Del Giudice obtained costs insurance without disclosing the cost of that insurance. The Del Giudice Counsel will have to obtain approval for this form of third-party funding, but assuming that it is approved, then if the Del Giudice Action settles, the costs of this insurance can be dealt with as part of the fee approval motion. If the billion dollar Del Giudice Action succeeds at trial, the cost of this insurance will be *de minimus* and, in any event, it will be dealt with as a matter of approving Class Counsel's fees and disbursements. If the Del Giudice Action fails, then the costs insurance will be a prudent investment. If the court does not approve the third-party funding, then the Del Giudice Counsel will have to agree to indemnify the representative plaintiffs before the certification motion.

[79] Third, with the greatest respect, Messrs. Du Vernet and McGoogan are not responsible for establishing the tort of intrusion upon seclusion, and it is not the case that Slapinski Counsel have considerably more experience in prosecuting intrusion upon seclusion claims.

[80] Fourth, it was incorrect and sloppy for Del Giudice Counsel in their factum to refer to Ms. Thompson as an employee of Capital One and counsel in the Del Giudice Action were ridiculed by counsel in the Slapinski Action for this error, but it is clear from the Del Giudice currently proposed Statement of Claim that Ms. Thompson is a former employee of Amazon, the cloud based company that Capital One had used to maintain its data. The embarrassing infelicity of the factum does not disqualify the Del Giudice Counsel from being granted carriage.

¹³ Paragraphs 1, 7, 8, 11, 22, 23, 24, 25, 26, 29, 30, 31, 41, 45, 46, 47, 48, 49, 50, 51, 52, 54, 56, 57, 58, 59, 60, 61, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 81, 82, 83, 84, 85, 87, 88, 91, 92, 93, 94, 95, 97, 98, 99, 100, 104, 105, 106, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 121, 123, 134, 135, 137, 138, 139, 143, 144, 147, 148, 150, 151, 152, 154, 164, 165, 166, 167, 168, 170, 171, 175, 181, 185, 186, 189, 191, 196, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 213, 214, 215, 216, 217, 218, 219, 220, 223, and 224 contravened the rules of pleading.

[81] Factor (14) Class Period is also non-determinative.

[82] Factor (17) Interrelationship of Class Actions in more than one jurisdiction is also non-determinative, although I make the following observation with respect to this factor.

[83] For the reasons that I expressed in *Winder v. Marriott International Inc.*,¹⁴ it is not necessarily a positive factor that there is more than one national class action. It is not necessarily a positive factor when an Ontario action is “parked” to give way to a co-operative arrangement with counsel prosecuting a class action in a sister province. In the immediate case, however, it is too early to say what is the interrelationship of class actions in more than one jurisdiction.

3. Determinative Factors.

[84] Thus, in the circumstances of the immediate case, the determinative factors are those associated with case theory; namely: (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition; (15) Prospect of Success: (Leave and) Certification; and (16) Prospect of Success against the Defendants.

[85] Not surprisingly, the putative Class Counsel in both actions expressed the view that their case theories and chances for success were overwhelmingly better than their rival’s theory about which they were severely dismissive and critical.

[86] However, I disagree with the Del Giudice Counsel’s three-bears argument that its case theory is just right and the Slapinski Action litigation strategy is too narrow and opens up escape routes for Capital One to avoid liability and behaviour modification to be meted out with righteous fury.

[87] Although I ultimately grant carriage to the Del Giudice Action, there was nothing in the Slapinski approach that is not in the best interests of the class. It is not the case that the Del Giudice Action claim is any better than the Slapinski Action claim. Each approach has its pros and cons, but neither is substantially superior to its rival. One advantage of the Slapinski Action is that it would have been more manageable and is likely to proceed faster than the Del Giudice Action.

[88] The claims and causes of action pleaded in both actions are not fanciful or frivolous and the competing litigation strategies are both reasonable and defensible. Upon analysis, neither case theory would be deficient in achieving substantive and procedural access to justice and genuine behaviour modification, and at the end of the day, each action had its pros and cons in achieving those goals and neither action had disqualifying deficiencies, although I repeat that neither action is a lock for certification.

[89] I will discuss the case theories in more detail next below, but I foreshadow my conclusion that the case theory that will likely emerge from a properly pleaded Statement of Claim is better in the Del Giudice Action than the theory that would emerge from a properly pleaded Statement of Claim in the Slapinski Action.

[90] Insofar as both the Del Giudice Action and the Slapinski Action sue Ms. Thompson and Capital One, notwithstanding the arguments of both parties, the claims and causes of action are not that different.

¹⁴ 2019 ONSC 5766.

[91] It is not the case that the Del Giudice Action will yield larger and more comprehensive damages. Wrongdoing causes damages; causes of action provide remedies for the wrongdoing and there is no double counting where more than one defendant causes or contributes to the harm suffered by the plaintiffs, which is what is alleged to have occurred in the immediate case.

[92] In the immediate case, Capital One, Amazon, and GitHub all have Mariana Trench deep pockets and can each afford to pay compensatory damages. The Class Members' damages are what they are, and Class Members' injuries exist before the causes of action which provide remedies for their injuries. Neither the Del Giudice Action nor the Slapinski Action avails itself of more heads of damages and there would be no double counting of compensation. A claimant does not obtain more compensatory damages for the same injuries simply by joining more defendants.

[93] The major difference between the Del Giudice Action and the Slapinski Action is that the Del Giudice Plaintiffs join GitHub and Amazon as party Defendants. From the perspective of the putative Class Members there are advantages and disadvantages to this joinder.

[94] The major advantage of this joinder is that it is arguable that GitHub and Amazon are wrongdoers that should be held to account.

[95] The major disadvantages are that the claims against GitHub and Amazon are discrete claims that present more extreme litigation risks than the claims against Ms. Thompson and Capital One, and the presence of these claims will mean that the proposed class action will move slower and be more difficult to manage.

[96] In terms of the certification criteria, the claims against GitHub and Amazon will be more challenging than the claims against Capital One. Assuming certification, the claims against GitHub and Amazon are more challenging than the already legally challenged claims against Capital One.

[97] It is a virtual certainty that Capital One, GitHub, and Amazon will each be formidable foes foe. And there is something to Sun Tzu's lesson in the *The Art of War* that "In all history, there is no instance of a country having benefited from prolonged warfare,"¹⁵ which seems the ambition of the Del Giudice's Counsel in its ambitious all-fronts, all theatres of war strategy.

[98] Notwithstanding the arguments of counsel in the Del Giudice Action, it is not the case that the success of the case against Capital One depends upon joining GitHub and Amazon. Capital One is the party that had a contractual and up front and personal relationship with the Class Members and the Slapinski action has advanced an arguable case against Capital One. The duty of care in the relationship between a bank and its customers is developed legal territory. The duty of care of a remote Internet service provider or of an Internet chat room provider to a banker's customer is undeveloped or underdeveloped legal territory.

[99] The arguable case against Capital One does not depend upon the joinder of GitHub or Amazon. From the procedural perspective of the march to certification, then discoveries, and a trial, the joinder of GitHub and Amazon as parties as opposed to witnesses adds enormous level of complexity to the case.

[100] If the arguable causes of action against Capital One succeed, the causes of action against GitHub and Amazon are, practically speaking, redundant and those cases, which have more litigation risks than the claim against Capital One are unlikely to snatch victory from the jaws of

¹⁵ Sun Tzu, *The Art of War* (edited by James Clavell) (New York: Dell Publishing, 1983)

defeat of the causes of action against Capital One.

[101] I repeat the point made several times above that while the causes of action against Capital One, GitHub, and Amazon have the same labels of negligence, breach of fiduciary duty, breach of confidence, and intrusion on seclusion, the claims are discrete claims. Thus, for instance, the Class Members' negligence claim against GitHub is not the same as the Class Members' negligence claim against Capital One, which is not the same as the Class Members' negligence claim against Amazon.

[102] The same may be said about the other causes of action advanced in the Del Giudice Action. If the Class Members' claims against Capital One fail in the Del Giudice Action, it is highly unlikely that the much more legally difficult claims against GitHub and Amazon will succeed to save the Class Members from a losing war.

[103] Counsel in the Slapinski Action made a reasonable and defensible decision to not join GitHub and Amazon. If it turns out that Amazon was no more than the lessor of computers, which is the understanding of Counsel in the Slapinski Action, then without deciding the point on a carriage motion, it does strike me that it was a reasonable decision to not open up a second theatre of litigation war against a very formidable opponent. Thus, it was not an easy decision to refuse carriage to the Slapinski action.

[104] This all said, it is too early to tell whether GitHub and Amazon perpetrated culpable wrongs and caused or contributed to the injuries suffered by the Class Members. It is too early to tell whether the addition of GitHub and Amazon will present an unmanageable litigation. It is too early to tell whether Capital One will third party and claim contribution and indemnity from GitHub and Amazon or whether the Defendants will join forces and form a defence alliance. GitHub and Amazon will be witnesses in any event, and it is too early to tell whether GitHub and Amazon should or should not be parties to the litigation. I note that Amazon is a party defendant in the Québec litigation.

[105] In terms of the development of the law and the access to justice and behaviour modification purposes of the *Class Proceedings Act, 1992*, it may, in any event, be salutary to include GitHub and Amazon as defendants and not pre-judge their exposure to liability.

[106] I, therefore, chose the Del Giudice Action as the action to have carriage. This is not a flip of the coin decision. It is based on a holistic view that the better action in terms of serving the interests of the Class Members and the goals of the *Class Proceedings Act, 1992* is the Del Giudice Action.

H. Conclusion

[107] For the above reasons, I grant carriage to the Del Giudice Action.

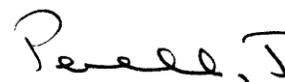
[108] As noted above, although the Del Giudice Action has been granted carriage, I will consider, if requested, costs in whole or in part against counsel personally in the Del Giudice Action (not to be a charged or passed onto the Class Members) for the failure to comply with my case management direction.

[109] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the submissions from counsel in the Slapinski action within twenty days of the release of these Reasons for Decision followed by the submissions of counsel in the Del Giudice

action within a further twenty days.

[110] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[111] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.

A handwritten signature in black ink, appearing to read "Perell, J.", with a stylized flourish at the end.

Perell, J.

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COURT FILE NO.: CV-19-00625030-00CP
COURT FILE NO.: CV-19-00625262-00CP
DATE: 2020/04/30

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

RINA DEL GIUDICE and DANIEL WOOD

Plaintiffs

- and -

**PAIGE A. THOMPSON, CAPITAL ONE
FINANCIAL CORPORATION and CAPITAL ONE
BANK (CANADA BRANCH), CAPITAL ONE
(SERVICES) CANADA INC.,
CAPITAL ONE, N.A., CAPITAL ONE BANK
(USA), N.A., and GITHUB, INC.**

Defendants

AND BETWEEN:

DAVID MARK SLAPINSKI

Plaintiff

- and -

**CAPITAL ONE SERVICES (CANADA) INC.,
CAPITAL ONE FINANCIAL CORPORATION,
CAPITAL ONE, N.A., and CAPITAL ONE BANK
(USA), N.A**

Defendants

REASONS FOR DECISION

PERELL J.