**CITATION:** Carter v. LifeLabs Inc., 2023 ONSC 6104
**COURT FILE NO.:** CV-20-00636642-00CP
**DATE:** 20231027

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



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| **BETWEEN:** | |
| **ALITA MARIE CARTER, ANNA BELLE THARANI, and ALBERT OTOTÉ**<br>Plaintiffs | *Bryan C. McPhadden* and *Andrew Stein* for the Plaintiffs |
| **- and -** | |
| **LIFELABS INC., LIFELABS BC INC., LIFELABS BC LP, and LIFELABS LP**<br>Defendants | *Dana M. Peebles* and *Amanda D. Iarusso* for the Defendants<br><br>*Andrew Eckart* for the objectors Debra Kestenberg and David Haines<br><br>**HEARD**: October 25, 2023 |

**PERELL, J.**

**REASONS FOR DECISION**

## A. Introduction

[1] This is a privacy law class action under the *Class Proceedings Act, 1992*.[1] It was certified for settlement purposes in July of this year.[2]

[2] The Plaintiffs Alita Marie Carter, Anna Belle Tharani, and Albert Ototé sue LifeLabs Inc., LifeLabs BC Inc., LifeLabs BC LP, and LifeLabs LP (collectively "LifeLabs") with respect to a data breach that "potentially" affected the personal information of 8.6 million customers. After four years of litigation, there is no evidence that the personal information was "actually" affected.

[3] The parties have agreed to settle the action subject to court approval. This is a motion for approval of the settlement and for Class Counsel's fee. The Plaintiffs seek Orders:

> a. approving the Settlement Agreement as fair and reasonable and in the best interests of the Settlement Class;
>
> b. approving the Plan of Distribution of the Settlement Payment Benefits, as set out in the Settlement Agreement;

[1] S.O. 1992, c. 6.
[2] *Carter v. LifeLabs Inc*., 2023 ONSC 4331.

c. appointing KPMG LLP as Claims Administrator, to administer the Plan of Distribution;

d. protecting the information provided by Settlement Class Members to the Defendants and the Claims Administrator;

e. directing notice of approval of the Settlement Agreement be given in accordance with section 5 of the Settlement Agreement and that such notice shall satisfy any notice requirements under s. 29.4 of the *Class Proceedings Act, 1992*;

f. directing that upon the Effective Date of the Orders sought, the Releasors forever and absolutely release, relinquish and discharge the Releasees from the Released Claims;

g. dismissing the Action and each of the Parallel Ontario Actions upon the Effective Date;

h. approving the Joint Contingency Fee Retainer Agreements with the Plaintiffs;

i. approving Class Counsel fees of 25% plus applicable taxes on the Guaranteed Settlement Funds;

j. approving Class Counsel fees of 25% plus applicable taxes on the Contingent settlement fund, if any; and

k. directing that Class Counsel fees, disbursements and applicable taxes be paid from the Guaranteed Settlement Funds and the Contingent Settlement Funds, if any, pursuant to the terms of the Settlement Agreement with the Defendants, dated July 5, 2023.

[4] For the reasons that follow, save for the request for a $2,500 honorarium for each Representative Plaintiff, the motions and the requested Orders are granted.

## B. Factual Background

[5] The factual background to this motion is as follows.

[6] LifeLabs operates Canada's largest medical laboratory testing and analytic and diagnostic service.

[7] The action followed from a data breach of the LifeLabs' IT systems by cyber-criminals. The cyber-criminals accessed the proposed class members' personal health information for the better part of a year, including provincial health card numbers of approximately 8.6 million customers. On **December 17, 2019**, LifeLabs announced the data breach to its customers.

[8] In order to regain the hacked information, LifeLabs paid a ransom fee and the cyber-attacker returned the stolen data by an encrypted share link.

[9] To respond to the Data Breach, LifeLabs retained cyber-security consultants, including Cytelligence and Crowdstrike. It reported the data breach to the RCMP and to 12 provincial and territorial privacy authorities across Canada. It consulted with the privacy commissioners in Ontario and British Columbia. At a cost of $1.1 million, it gave notice to its customers, including direct notice to over 3 million customers. LifeLabs set up a call centre at a cost of $4.6 million and responded to 65,670 enquiries.

[10] After the data breach, LifeLabs offered one-year free credit monitoring and identity theft

insurance to its clientele. However, the free credit monitoring was only taken out by 44,000 customers (0.003% of the total customer base.)

[11] The Plaintiffs commenced this action by Statement of Claim issued on **February 20, 2020**. The late Justice Belobaba was assigned to case manage the action. After his death, the case was assigned to me.

[12] On **May 6, 2020**, Justice Belobaba awarded carriage to the *Carter* action plaintiffs.[3] The court awarded carriage to the *Carter* action because it proposed a single national class action and agreed to a lower fee arrangement than the other proposed class actions. Justice Belobaba's decision indicated that had Counsel formed a consortium a conventional fee of 25% would be reasonable.

[13] Then there was a separate carriage dispute in British Columbia among three groups vying for carriage.

[14] On **December 16, 2020**, the three counsel groups agreed to form a consortium to prosecute the class action as one national class action. The national consortium consists of 11 law firms from Ontario and British Columbia. With the exception of *Holt et al. v. LifeLabs BC Inc. et al.*, (BCSC No. S-201131), the British Columbia actions have been discontinued. The *Holt* action has not been actively prosecuted in favour of the action in Ontario. The agreed terms of the consortium arrangement were set out in a Co-Counsel Agreement. That agreement was contingent on obtaining the Court's approval for Class Counsel to request a 33% contingency fee in advance.

[15] On **December 23, 2020**, Justice Belobaba stated that notwithstanding representations by the group granted carriage, Class Counsel may request fees of up to 33.33% of amounts recovered in the event of a settlement or judgment in this action in favour of the Class, and the Court would determine the appropriate fee.

[16] Following Justice Belobaba's December 23, 2020 decision, the three proposed representative plaintiffs entered into a new Class Action Joint Contingency Fee Retainer Agreement with Co-Counsel. The Representative Plaintiffs entered into Joint Contingency Fee Retainer Agreements with the consortium. They agreed to pay legal fees of up to 33.33%, plus applicable taxes and disbursements. As will be noted below, Class Counsel now request a contingency fee of 25%.

[17] On **February 24, 2021**, Ms. Tharani and Dr. Ototé became co-plaintiffs in an Amended Statement of Claim. The Plaintiffs advance causes of action in negligence, breach of contract, consumer protection remedies, statutory privacy violations, and unjust enrichment, and they seek damages and disgorgement of profits, among remedies.

[18] Class Counsel agreed to indemnify the plaintiffs from adverse costs. No third party funder provided indemnity in this case.

[19] The litigation was hard fought as Class Counsel prepared for a contested certification motion scheduled for **March 2, 2023**. LifeLabs has never admitted liability and asserts that it has a complete defence on the merits.

[20] Class Counsel obtained 23 affidavits, seven of which were expert reports. There were 13 cross-examinations of witnesses. There were pre-certification production motions. The Plaintiffs'

[3] *MacBrayne v. LifeLabs Inc.*, 2020 ONSC 2674.

consolidated Certification Motion Record totalled 1,374 pages. The Defendants' Certification Responding Motion Record totalled 536 pages, with four affidavits, including two expert reports.

[21] Meanwhile in 2023, in a trifecta of decisions and developments in the law undermined the thrust of the Plaintiffs' data breach action. In a series of decisions, the Ontario Court of Appeal ruled that while other causes of action might be available, a cause of action for intrusion upon seclusion was not available against a defendant when there is a hacker breach.[4] The Alberta Court of Appeal subsequently concluded that increased risk of harm from identity theft was not compensable.[5]

[22] The day before the certification motion, the parties requested an adjournment for settlement negotiations. They had reached an agreement in principle.

[23] Following protracted arm's-length settlement negotiations, in **July 2023**, the parties signed a Settlement Agreement.

a. Under the Settlement Agreement, LifeLabs has agreed to pay $4.9 million in guaranteed settlement funds, and $4.9 million in contingent settlement funds.

b. Under the Settlement Agreement, each claimant will be paid a minimum amount of $50 or there will be a *pro rata* distribution.

c. If the total number of claims filed does not equal the $4.9 million in guaranteed funds, the amount paid to each claimant will be increased to $150.

d. If the total number of claims filed exceeds the $4.9 million in guaranteed funds (after taking into account class counsel fees and disbursements approved by the court), the $4.9 million in contingent settlement funds will be used to top-up payments to ensure that claimants are paid a net $50 amount.

e. If the total number of claims for $50 exceeds the total of $4.9 million in guaranteed funds and $4.9 million in contingent funds, class members will be paid on a *pro rata* basis, net of class counsel fees and disbursements.

f. The Settlement Agreement anticipates that each of the Representative Plaintiffs will receive an honorarium of $2,500, if approved by the court.

g. Pursuant to the Settlement Agreement, within five business days of the Effective Date, LifeLabs shall pay to the Claims Administrator the sum of $4.9 million representing the Guaranteed Settlement Funds to be distributed by the Claims Administrator.

h. Pursuant to the Settlement Agreement if any of the $4.9 million in Contingent Settlement Funds is determined to be payable by the Claims Administrator, LifeLabs is to pay that amount.

i. Under the Settlement Agreement, LifeLabs is responsible for all fees and expenses of the Claims Administrator, including notice costs, with the exception of social media and press release costs, which will be requested to be charged as a disbursement to the settlement funds.

[4] *Owsianik v. Equifax Canada Co*., 2022 ONCA 813; *Obodo v. Trans Union of Canada, Inc.*, 2022 ONCA 814, *Winder v. Marriott International, Inc.*, 2022 ONCA 815.
[5] *Setoguchi v. Uber BV*, 2023 ABCA 45.

[24] Under the settlement, the Plaintiffs are advancing only their claim in negligence.

[25] The parties have agreed on the following class definition:

> any person living as of the date of Settlement Approval who is a current or former user of LifeLabs' services whose Personal Information is known to have been exfiltrated as part of the Data Breach, excluding any officer, director, or executive-level employee of the Defendants.

[26] The common issue for settlement purposes is: "Did the Defendants owe the Plaintiffs and Class Members a duty of care in respect of the Data Breach?"

[27] On **July 25, 2023**, I certified the action as a class action for settlement purposes.[6]

[28] Notice of the right to opt out and notice of the fairness hearing were distributed.

[29] Almost four years after the data breach, there have been no reliable reports of misuse of the data. In the absence of proof of actual damages, it appears that the negligence claim would have failed.

[30] Notwithstanding the unlikeliness of any success had the action gone to trial, the settlement provides compensation to the Class Members.

[31] It is the unanimous view of the consortium of Class Counsel that the settlement is in the best interests of the Class. This is especially so given the state of data breach law in Canada and the lack of evidence of actual damages suffered by Class Members. Had the Action continued to be prosecuted, final determination would take another year or two before appeals were exhausted and could have resulted in the action not being certified, with substantial costs awarded to the Defendants.

[32] If the settlement is approved, it will resolve the Ontario action and the British Columbia action without any admission of liability and without any admission by the Defendants that Class Members are entitled at law to compensation or payment for any of the losses and damages allegedly suffered.

[33] The Representative Plaintiffs have instructed Class Counsel to negotiate the settlement and the Representative Plaintiffs are satisfied that the settlement is fair, reasonable, and in the best interests of the Class Members.

[34] It is anticipated based upon the very low take up of LifeLabs' original offer of free credit monitoring that Class Members will likely receive between $50 to $150 after Counsel's legal fees and disbursements. This compensation is over and above the compensation already provided by the Defendants, which included free credit monitoring and identity theft insurance, and their ongoing dark web monitoring at a cost of $5.6 million.

[35] Class Counsel are collectively requesting a 25% fee of the $4.9 million Guaranteed Settlement Fund, an amount equal to $1,225,000 plus $159,250 HST for legal fees and $224,418.29 for disbursements; and a counsel fee of 25% plus applicable tax and disbursements relating to the Contingent Settlement Funds, if any.

[36] The proposed fee of 25%, even if it were to include the full $9.8 million, (the guaranteed $4.9 million plus the contingent $4.9 million), would result in Class Counsel being undercompensated for their work which had a value of approximately $4.7 million. Even 25% on

[6] *Carter v. LifeLabs Inc*., 2023 ONSC 4331

the full $9.8 million, class counsel's fee would only total $2.8 million, inclusive of HST.

[37] As of **October 6, 2023**, 1,760 putative Class Members have opted out. There are no tip-over rights in the Settlement Agreement and the settlement is not contingent on the number of opt-outs.

[38] As of **October 20, 2023**, there were 157 objectors to the settlement. The objections were of three types; visualize: (a) the fee is unreasonable based on settlement achieved; (b) the settlement was fee-driven by the lawyers and not based on actual work; and (c) there was collusion in the settlement and negotiations with LifeLabs.

[39] Class counsel sent a letter by an e-mail to all persons who registered an objection. The letter explained the rationale for the settlement based on the current state of the law and the risks of going to trial. The letter explained the basis for Class Counsel's proposed fee of 25%.

## C. Analysis: Settlement Approval

[40] Section 27.1 (1) of the *Class Proceedings Act*, *1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[7]

[41] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.[8]

[42] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[9] An objective and rational assessment of the pros and cons of the settlement is required.[10]

[43] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for

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[7] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

[8] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

[9] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

[10] *Al-Harazi v. Quizno's Canada Restaurant Corp*. (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

which the settlement is to provide compensation.[11] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[12]

[44] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the scheme of distribution under the proposed settlement.

[45] There is no doubt that the settlement is in the best interests of the class members and ought to be approved. There is no better alternative. The alternative of proceeding to a certification motion and then proceeding to a decision on the merits (assuming certification was granted) would achieve none of the objectives of the *Class Proceedings Act, 1992*. There is no prospect of success. The Defendant does not require behaviour modification and LifeLabs appears to have acted as a responsible and honourable business enterprise. A settlement achieves maximum efficiency for the court.

[46] I approve the settlement and the ancillary relief.

## D. Analysis: Fee Approval

[47] Section 32 (2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court.

[48] The fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the lawyer in conducting the litigation and the degree of success or result achieved.[13] The actual take-up rate as a measure of the success of the settlement is a relevant factor in determining an appropriate counsel fee.[14]

[49] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the

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[11] *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).
[12] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).
[13] *Smith v. National Money Mart*, 2010 ONSC 1334 at paras. 19-20, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 25 (S.C.J.); *Parsons v. Canadian Red Cross Society*, [2000] O.J. No. 2374 at para. 13 (S.C.J.).
[14] *Lavier v. MyTravel Canada Holidays Inc*., 2013 ONCA 92.

opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.[15]

[50] The risks of a class proceeding include all of liability risk, recovery risk, and the risk that the action will not be certified as a class proceeding.[16]

[51] Fair and reasonable compensation must be sufficient to provide a real economic incentive to lawyers to take on a class proceeding and to do it well.[17]

[52] Accepting that Class Counsel should be rewarded for taking on the risk of achieving access to justice for the Class Members, they are not to be rewarded simply for taking on risk divorced of what they actually achieved.[18] Placing importance on providing fair and reasonable compensation to Class Counsel and providing incentives to lawyers to undertake class actions does not mean that the court should ignore the other factors that are relevant to the determination of a reasonable fee.[19] The court must consider all the factors and then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession.[20]

[53] I am satisfied that in all of the circumstances of the immediate case that the contingency fee agreement should be approved and Class Counsel's fee should also be approved. The contingency fee does not cover the hard legal work over the past four years. Class Counsel did not sell the class out by recommending a settlement. The settlement was the best that could be achieved for the class and the Class Members should have no complaints that there was profiteering in the immediate case or that their interests were being sacrificed.

[54] The motion for approval of Class Counsel's fee is approved.

## E. The Request for Honorarium

[55] Where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by a modest honorarium.[21] However, the court should only rarely approve this award of compensation to the representative plaintiff.[22] Compensation to the representative plaintiff should not be routine, and

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[15] *Smith v. National Money Mart*, 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).
[16] *Endean v. Canadian Red Cross Society*, 2000 BCSC 971 at paras. 28 and 35; *Gagne v. Silcorp Ltd.*, [1998] O.J. No. 4182 t para. 17 (C.A.).
[17] *Sayers v. Shaw Cablesystems Ltd.*, 2011 ONSC 962 at para. 37; *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1117 at paras. 59-61(S.C.J.); *Parsons v. Canadian Red Cross Society* (2000), 49 O.R. (3d) 281 (S.C.J.); *Gagne v. Silcorp Ltd*. (1998), 41 O.R. (3d) 417 (C.A.).
[18] *Welsh v. Ontario*, 2018 ONSC 3217 at para. 103.
[19] *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at para. 92.
[20] *Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 at para. 47 (C.A.).
[21] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721; *Houle v. St. Jude Medical Inc.*, 2019 ONSC 4560; *Dolmage v. HMQ*, 2013 ONSC 6686; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26–43; *Smith Estate v. National Money Mart Co*., 2011 ONCA 233 at paras. 133–136; *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Windisman v. Toronto College Park Ltd*., [1996] O.J. No. 2897 at para. 28 (Gen. Div.).
[22] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Sutherland v. Boots Pharmaceutical plc*, *supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

an honorarium should be awarded only in exceptional cases. Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.[23]

[56] Under the current law about honorarium, in determining whether the circumstances are exceptional, the court may consider among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.[24]

[57] I mean no disrespect to the valuable contribution made by the three Representative Plaintiffs in the immediate case, but their contribution was typical of the good work done by representative plaintiffs, and this is not an exceptional case that would justify an honorarium.

## F. Conclusion

[58] For the above reasons, the motions are granted save for the request for honorarium.

Perell, J.

Released: October 27, 2023



[23] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.
[24] *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

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**ANNA BELLE THARANI, and ALBERT OTOTÉ**

Plaintiffs

**- and -**

**LIFELABS INC., LIFELABS BC INC., LIFELABS BC LP, and LIFELABS LP**

Defendants

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**REASONS FOR DECISION**

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PERELL J.

**Released:** October 27, 2023