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| COURT FILE NUMBER | 1914-00167 |
| COURT | COURT OF KING'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | ST. PAUL |
| PLAINTIFF/APPLICANT | CYNTHIA IRIS YOUNGCHIEF |
| DEFENDANTS/ RESPONDENTS | THE ATTORNEY GENERAL OF CANADA, HIS MAJESTY THE KING IN RIGHT OF ALBERTA, LE DIOCÈSE DE SAINT-PAUL and/or THE DIOCESE OF SAINT-PAUL, ST. LOUIS PARISH, and BOARD OF TRUSTEES OF LAKELAND ROMAN CATHOLIC SEPARATE SCHOOL DIVISION |
| DOCUMENT | **REPLY OF THE APPLICANT/PLAINTIFF IN RESPONSE TO THE BRIEF OF THE BOARD OF TRUSTEES OF LAKELAND ROMAN CATHOLIC SEPARATE SCHOOL DIVISION** |
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**REPLY OF THE APPLICANT/PLAINTIFF IN SUPPORT OF THE APPLICATION FOR CERTIFICATION OF CLASS PROCEEDING**

## TABLE OF CONTENTS

## PART I: OVERVIEW

1. This is in response to the Brief ("**Brief"**) filed by Board of Trustees of Lakeland Roman Catholic Separate School Division **("LRCSSD"**).

2. LRCSSD agrees to certification if the following criteria are met:
    a. The existence of an Ecole Notre Dame High School;
    b. The common issues the Applicant proposes can be answered in common across the entire class; and that
    c. Those proposed issues can be answered in common across the entire class.

3. The Attorney General of Canada, **("Canada")** does not oppose certification based upon a defined class. Canada consents to certification of the claim as a class proceeding pursuant to the provisions of the *Class Proceedings Act, RSA 2003, C-16.5* (the **"*CPA*")**.

4. The group of individuals categorized for the purpose of this class action consists of all Aboriginal persons, wherever they may now reside or be domiciled, who attended Ecole Notre Dame Elementary School and/or Ecole Notre Dame High School in Bonnyville, Alberta, during the Class Period (the **"Survivor Class"** or **"Class Members"**).

5. The Applicant relies on the facts set out in the Amended Application, pleadings and all other documents filed with the Court, including the 63 sworn Affidavits of potential class plaintiffs.

6. The Applicant says that each of the requisite conditions are satisfied, and that Certification must therefore be granted against LRCSSD.

7. The Applicant contends that the negligence of LRCSSD in developing and enforcing policies and procedures to monitor the conduct at Ecole Notre Dame Elementary and High Schools **("Notre Dame Schools")** directly led to the physical harm and emotional trauma experienced by the Survivor Class.

8. The Applicant and the Survivor Class were subjected to such abuse from 1 September 1966 to 28 June 1974 (the **"Class Period"**).

9. The Applicant seeks certification of the Survivor Class to ensure that the Defendants are held jointly and severally liable for the injuries and damages inflicted upon the members of the Survivor Class.

## PART II: ISSUES

10. The following issues will be addressed:

A. Whether the Amended Application satisfies the five preconditions of Rule 5(1) of the *CPA* such that the Action shall be certified as a class proceeding. These five preconditions can be summarized as follows:

i. Do the pleadings disclose a cause of action?

ii. Is there an identifiable class of two or more persons?

iii. Do the claims of the prospective class members raise a common issue? and

iv. Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

v. Is there a person eligible to be appointed as the representative Plaintiff for the Class?

B. Is there sufficient factual evidence to support the certification of the class action?

C. Did LRCSSD owe a Duty of Care, and did its operation and supervision of Ecole Notre Dame Schools establish Vicarious Liability?

## PART III: LEGAL ARGUMENTS

### Existence of an Identifiable Class

11. The test for certification of a class proceeding is well established and requires the Plaintiff to satisfy all five of the said preconditions. This onus is satisfied "if the Plaintiff shows 'some basis in fact' for each of the certification preconditions, other than the cause of action requirement in 5(1)(a), which is decided based on the pleadings alone."[1] If the Plaintiff satisfies these five preconditions, the "the action must be certified".

[1] *VLM v Dominey, 2022 ABQB 299* at para 11.

12. The Supreme Court of Canada (the "SCC") has repeatedly stated that the evidentiary burden of "some basis in fact" is less than a balance of probabilities and stresses "whether the action can properly proceed as a class action".[2]

13. The second precondition for certification is that there be an "identifiable class of 2 or more persons".[3] The SCC has stated that "the class must be capable of clear definition" and "based on objective criteria and bear on a rational connection to the claims, causes of action, and common issues. It must not be overly broad".[4] However, "it is not necessary that every class member be named or known."

14. The Survivor Class has been clearly identified in the pleadings based upon objective criteria, given the precise definitions of each sub-class:

a. Survivor Class: all Aboriginal persons, wherever they may now reside or be domiciled, who attended Ecole Notre Dame Elementary School and/or Ecole Notre Dame High School in Bonnyville, Alberta during the Class period.

**The Pleadings Disclose a Cause of Action**

15. According to the SCC, the test for whether the pleadings disclose a cause of action under section 5(1)(a) of the *CPA* is similar to that for a motion to strike a claim.[5] The claim can be struck if it is evident from the pleadings that it cannot succeed. According to *Knight v Imperial Tobacco Canada Ltd*., the claim must be based on clearly pleaded facts.[6] This principle helps in evaluating whether the Plaintiff's claims, as pleaded, establish a reasonable cause of action, pleaded by raising systemic issues affecting a large class of similarly situated individuals.

16. The Alberta Court of Appeal in *Setoguchi v Uber BV* emphasized that the threshold for meeting section 5(1)(a) of the *CPA* is relatively low and only requires facts establishing the essential elements of each cause of action.[7] The Plaintiff has clearly pleaded sufficient facts and each element of the cause of action has been set forth.

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[2] *Pro-Sys Consultants Ltd. v Microsoft Corporation, 2013 SCC 57* at para 99.
[3] *Class Proceedings Act, SA 2003, c C-16.5*.
[4] *Ibid.*
[5] *R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42* at para 22.
[6] ***Ibid.***
[7] *Setoguchi v Uber BV*, 2023 ABCA 45-1 at para 44

17. LRCSSD challenges the factual basis for the existence of Notre Dame Schools. In Response to paragraph 4 of the LRCSSD Brief, 63 Affidavits of the potential Class Members are filed with the Court, providing a clear description of the class.[8]

18. The existence of this school and its role in the systemic issues alleged has been demonstrated through substantial anecdotal evidence, which collectively constitute reliable data. The Class definition is thus reasonable.

19. Paragraphs 6 and 7 of the LRCSSD Brief describe a consent offer to certification.[9] Schedule A of the Supplementary Brief is a proposal letter that includes without prejudice information. Consequently, Paragraphs 6 and 7 were improperly included and must be wholly disregarded by this Honourable Court.

20. Paragraph 10 of the LRCSSD Brief argues that a class proceeding is not an efficient use of judicial resources.[10] This consideration is irrelevant given that Canada has already consented to class certification based upon the defined class. It would thus be legally inconsistent to have the Court redefine the scope of the class to suit LRCSSD's specifications.

21. In response to Paragraph 5,11 and 13 of the LRCSSD Brief, the best course of action is to grant certification. Section 4 of the CPA states that a person both a member of a class and a member of a subclass is eligible to be appointed as a representative Plaintiff for the class proceeding.

22. Paragraph 40 of the LRCSSD Brief does not deny that abuses occurred at Notre Dame Schools. Their contention rests solely upon imprecision of the stated allegations in the Action.[11]

23. The Notre Dame Schools did not operate separately or autonomously. The elementary and high schools were part of a school district, managed and overseen by LRCSSD. It is therefore clear that LRCSSD bore responsibility for the conduct of employees at Notre Dame Schools, including their proper oversight.

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[8] Supplementary Brief of Law and Argument of The Respondent Board of Trustees of Lakeland Roman Catholic Separate School, Filed August 30, 2024, at paragraph 5.
[9] Supplementary Brief of Law and Argument of The Respondent LRCSSD, Filed August 30, 2024, at paragraph 6 and 7.
[10] Supplementary Brief of Law and Argument of The Respondent LRCSSD, Filed August 30, 2024, at paragraph 10.
[11] Brief of Law and Argument of The Respondent LRCSSD, Filed August 30, 2024, at paragraph 40.

24. Section 160 of the *School Act*, RSA, 1970 states that: A board with the prior approval of the Minister may: (b) enter into an agreement with the Government of Canada or any agency or person having responsibility for the education of Indian children to educate Indian children or children of members of the Canadian Forces or of other persons employed by the Government of Canada in a school or schools of the district or divisions and receive consideration thereafter"[12]

25. LRCSSD was involved in day-to-day operation of the school. It is thus probable that they agreed to take assume responsibility for Indigenous students under s.160 of the former legislation.[13] The Defendants knew or ought to have known of injuries and damages sustained by the Survivor Class which could foreseeably lead to harm.

26. The bar for establishing a reasonable cause of action is set lower at this procedural juncture to ensure that meritorious claims are not prematurely dismissed. Canada consents to certification and is unopposed to certification subject to terms agreed to by counsel for the parties. This illustrates the reasonableness of proceeding to document discovery without imposing the onerous requirement of detailed proof from the Applicant at the certification phase, as LRCSSD now demands.

**Presence of a Common Issue**

27. In response to Paragraph 11 of the LRCSSD brief, the onus is on the Applicant to show "some basis in fact" for the common issue(s) that is "lower than the balance of probabilities threshold" but "more than symbolic".[14] LRCSSD argues that there is a complete absence of evidence to grant certification. The Amended Statement of Claim clearly outlines systemic failures affecting aboriginal students, including allegations of abuse, neglect, and inadequate education. These issues are not isolated but are part of a pattern impacting multiple but related institutions under the same governance and policies. The systemic nature of these claims means that common issues are central to the class action, satisfying the certification criterion for commonality.

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[12] *School Act, RSA 1970, c 329.*
[13] *Ibid*.
[14] *Ibid* at *VLM v Dominey* at para 40.

28. The Notre Dame elementary and high schools were not distinct entities. The evidence shows that there was significant coordination between the schools and operated together under the same governance and assimilation policies. Furthermore, the filed Affidavits of the potential class show that various students attended both Ecole Notre Dame Elementary School and Ecole Notre Dame High School. It would thus be highly prejudicial to not grant certification in relation to students that attended the elementary and high schools.

29. In *Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534* the Supreme Court of Canada held that a class action should be certified if it is the preferable method for resolving the common issues among class members.[15] This supports the Applicant's argument that a class action is the appropriate method for addressing the systemic issues alleged which targeted specifically Indigenous peoples.

**Preferable Method for Resolving the Common Issues**

30. Certification of this class action is the preferable method for resolving the common issues. The alternative individual lawsuits would be inefficient, potentially duplicative, and would fail to address the systemic nature of the claims.[16] As highlighted in *Spring v. Goodyear Canada* evaluating the procedural suitability of the class action is pivotal.[17] This class action meets the procedural requirements by demonstrating a common issue and a preferable method for resolution.

31. A large group was impacted by LRCSSD and by attending Notre Dame Schools. The best use of judicial resources would allow for this widespread systemic issue to be addressed with a class action certification.

**The Defendants Owe a Duty of Care**

32. A duty of care requires that an entity take reasonable steps to prevent harm to others. This includes ensuring that policies and delegated responsibilities to third parties are managed in a way that protects individuals from foreseeable harm.

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[15] *Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46.*
[16] *Ibid.*
[17] *Spring v. Goodyear Canada Inc. 2020 ABQB 252*.

33. The *School Act, RSA, 1970* stipulates that delegated responsibilities are to be carried out in accordance with applicable standards and regulations.

34. The systemic nature of the alleged abuses and the failure of oversight highlight that a duty of care was indeed owed. Oversight responsibilities include ensuring that school boards fulfill their duties in a manner that aligns with the Crown's obligations to Aboriginal peoples. The systemic issues and alleged failures of supervision indicate that LRCSSD failed to provided the requisite duty of care.

35. The systemic nature of the alleged failures, including abuse and neglect, indicate that the LRCSSD duty of care was compromised. The failure to properly oversee and address these issues, constitutes a breach of its duty of care.

**Vicarious Liability**

36. The set criteria for vicarious liability in *B. (K.L.) v. British Columbia 2003 SCC 51, 2003 CSC 51*.[18] For the Applicant to establish vicarious liability, they must first prove that there is a sufficient proximal relationship between the individual who committed the wrongdoing and the party being held responsible. The Applicant must then show that the wrongful act is closely linked to the tasks given to the wrongdoer, to the extent that the act can be seen as a risk that naturally comes with the business or the enterprise's activities.

37. The Affidavit of Homer Edwin Amahoose, filed with the Court on 7 October 2022, describes abuses suffered at Notre Dame, including but not limited to several forms of psychological, physical and sexual abuse.[19] Homer attests to being physically assaulted by a female teacher Mrs. Lapointe. The other 62 affidavits filed also detail many instances of physical, sexual and psychological abuse by school staff.

38. A sufficient proximal relationship exists between staff hired to work at Notre Dame Schools and the individuals who attended these schools, as they had a fiduciary obligation to oversee any potential harms. The abuse Class Members suffered were closely related to the responsibilities given to educators such that the abuse was a

[18] *B. (K.L.) v. British Columbia 2003 SCC 51, 2003 CSC 51.*
[19] Affidavit of Homer Edwin Amahoose Filed October 7, 2022, at paragraph 6.

foreseeable risk. Additionally, the school had a duty to protect from such harm, which they failed to do.

39. The Affidavits of the class action members support a sufficient proximal relationship between the class action members and oversight responsibilities that were linked to the tasks of the wrongdoer.

**REPRESENTATIVE PLAINTIFF**

40. Under Canadian law, the representative plaintiff in a class action does not need to personally suffer all types of harm claimed by the plaintiff class members. The requirement for a representative plaintiff focuses more on their ability to adequately represent the interests of the class rather than having experienced every type of harm claimed:

a. Adequate Representation: The representative plaintiff must be in a position to adequately represent the class members. This means they should have a sufficient understanding of the issues, be able to instruct counsel effectively, and have no conflicts of interest with other class members. However, this does not necessitate that they have suffered every single type of harm that might be claimed by the class.
b. Common Issues: Class actions in Canada require that there be common issues of law or fact among the class members. The representative plaintiff's claim needs to include these common issues, but individual variations in the type or extent of harm suffered do not disqualify them from representing the class.
c. Certification Requirements: Certification criteria generally do not stipulate that the representative plaintiff must have suffered every type of harm. Instead, they focus on whether the claim discloses a cause of action, whether there's an identifiable class, common issues, and whether a class action is the preferable procedure.
d. Practical Considerations: If every type of harm had to be personally experienced by the representative plaintiff, it would severely limit the

scope of class actions, potentially rendering them impractical for many cases where harms vary among individuals but share common causes or legal issues.

e. Legal Precedents and Discussions: While specific legal texts or court decisions directly stating this might not be universally cited, the operational practice and the nature of how class actions are conducted in Canada reflect this understanding. The emphasis is on the representative's capability to represent, not on matching every harm.

41. Therefore, while the representative plaintiff must have suffered harm related to the common issues of the class, they are not required to have experienced every single type of harm that might be claimed by other class members. This approach ensures that class actions can effectively address widespread issues where individual harms might differ in detail but share core legal questions.

42. For the above stated reasons, it is respectfully submitted that the Applicant satisfies all the requirements for class certification in accordance with the CPA.

**PART IV: RELIEF SOUGHT**

43. Based on the foregoing, the Applicant seeks an Order:

a. Certifying this Action as a class proceeding;

b. In the alternative, the Applicant respectfully seeks leave to proceed with Amendments to the Action;

c. Defining the "Survivor Class" as follows:

all Aboriginal persons, wherever they may now reside or be domiciled, who attended Ecole Notre Dame Elementary School and/or Ecole Notre Dame High School in Bonnyville, Alberta (the "**Notre Dame Schools**") during the Class Period;

d. Appointing Cynthia Iris Youngchief as Representative Plaintiff of the proposed Class;

e. Stipulating the following common issues for trial:

i. Whether and to what extent each of the Defendants were involved in the operation and management of the schools;

ii. Whether each of the Defendants owed a duty to the Plaintiff; and

iii. Whether there was a breach of that duty;

f. Approving the proposed Litigation Plan is a workable method of advancing the proceeding on behalf of the Class attached as Appendix "A" to the Application with any modifications, additions, or deletions as required by this Honourable Court;

g. Designating Leighton B.U. Grey, K.C. of Grey Wowk Spencer LLP as exclusive legal counsel for the Survivor Class;

h. Staying any other putative class actions relating to this class proceeding pending further order of this Honourable Court;

i. Granting costs of this Application, payable forthwith, on a scale to be determined by the court after hearing submissions; and

j. For any such further and other relief as counsel may request and this Court may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON THIS 13th day of September 2024.

Leighton Grey (Sep 13, 2024 10:47 MDT)

Leighton B.U. Grey, K.C.
Counsel for the Applicant/Plaintiff

## Part V: INDEX

| Tab | NAME AND CITATION |
|---|---|
| **CASE LAW** | |
| **1.** | *VLM v Dominey, 2022 ABQB 299.* |
| **2.** | *Pro-Sys Consultants Ltd. v Microsoft Corporation, 2013 SCC 57.* |
| **3.** | *R. v. Imperial Tobacco Canada Ltd., 2011 SCC 42.* |
| **4.** | *Setoguchi v Uber B.V., 2021 ABQB 18.* |
| ***5.*** | *Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46.* |
| **6.** | *Spring v. Goodyear Canada Inc. 2020 ABQB 252.* |
| **7.** | *B. (K.L.) v. British Columbia 2003 SCC 51, 2003 CSC 51.* |
| **LEGISLATION AND REGULATIONS** | |
| **8.** | *Class Proceedings Act, SA 2003, c C-16.5.* |
| **9.** | *School Act, RSA 1970, c 329.* |

# TAB 1

# Court of Queen's Bench of Alberta

**Citation: VLM v Dominey, 2022 ABQB 299**

**Date:** 20220425
**Docket:** 1703 18813
**Registry:** Edmonton



Between:

**VLM**

Plaintiff

- and -

**Estate of Gordon William Dominey,
the Synod of the Diocese of Edmonton and
Her Majesty the Queen In Right of Alberta**

Defendants

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**Reasons for Decision
of the
Honourable Mr. Justice John T. Henderson**

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## I. Overview

[1] The Plaintiff VLM (the Plaintiff or VLM) seeks to have this action certified as a class proceeding under the *Class Proceedings Act*, SA 2003, c C-16.5 (the *Act*).

[2] The 5th Amended Statement of Claim alleges that the Plaintiff and several other young persons were sexually assaulted by Gordon William Dominey (Dominey) at various times during the years 1985 to 1989 while they were detained at the Edmonton Youth Development Centre

(EYDC), a correctional facility for young persons operated by Her Majesty the Queen in Right of Alberta (Alberta).

[3] The Plaintiff alleges that Dominey was an Anglican priest who was employed by the Synod of the Diocese of Edmonton (the Synod), a representative body of the Anglican Church in Edmonton and the surrounding area. As part of his work for the Synod, Dominey provided chaplaincy, spiritual, and other services to young persons detained at the EYDC during the relevant time.

[4] It is alleged that while working with young persons at EYDC, Dominey was in a position of authority and control over the Plaintiff and other prospective class members and that his work required that he meet with them in small group or individual settings, often unsupervised. The Plaintiff alleges that he and other prospective class members were highly vulnerable persons. He alleges that Dominey used this position of authority to perpetrate the sexual abuse complained of.

[5] The Plaintiff claims that Alberta and the Synod owed a duty of care to those persons detained at the EYDC and that both Alberta and the Synod breached that duty of care by failing to provide a safe and secure environment, free from sexual abuse. The duty of care was also alleged to have been breached by Alberta and the Synod when they failed to investigate and screen Dominey before he was placed at the EYDC and before he had any contact with young persons at the facility. The Plaintiff further alleges that Alberta and the Synod failed to adequately supervise Dominey and failed to establish, implement, or enforce adequate policies, practices, or procedures to protect against sexual abuse by Dominey while he worked at EYDC.

[6] The Plaintiff alleges that both Alberta and the Synod are vicariously liable for the assaultive behaviour perpetrated by Dominey. It is also alleged that both Alberta and the Synod have direct liability to the Plaintiff and other prospective class members.

[7] It is alleged that, because of the conduct of the Defendants, the Plaintiff and other prospective class members have suffered loss and damage including physical and psychological trauma and financial loss and damage.

[8] Dominey died after being served with the Statement of Claim in this action. He did not defend the action. The Plaintiff amended the Statement of Claim to name the "Estate of Gordon William Dominey" as a defendant in this action. The Plaintiff seeks to note this defendant in default.

[9] Alberta and the Synod deny any vicarious or other liability to the Plaintiff or any prospective class members.

[10] Alberta and the Synod oppose the application for certification, primarily on the basis that the requirement for the identification of common issues has not been met and that, in the circumstances of this case, a class proceeding does not provide a preferable procedure for the fair and efficient resolution of any common issues that do exist.

## II. Certification of Class Proceeding

### a) Test for Certification

[11] The test for certification of a class proceeding was recently discussed by the Court of Appeal in ***Spring v Goodyear Canada Inc***, 2021 ABCA 182 [***Spring***] where the Court explained

that the Plaintiff has the onus to establish all five of the preconditions to certification found in s 5 of the *Class Proceedings Act*. This onus can be met if the Plaintiff shows "some basis in fact" for each of the certification preconditions, other than the cause of action requirement in s 5(1)(a), which is decided based on the pleadings alone: ***Bruno v Samson Cree Nation***, 2021 ABCA 381 at paras 63-64 [***Bruno***]; ***Hollick v Metropolitan Toronto (City of)***, 2001 SCC 68 at para 25 [***Hollick***]. If those five preconditions are met, the action must be certified; if they are not met, the application for certification must be dismissed: ***Spring*** at para 17.

[12] The Court in ***Spring*** also emphasized that the certification process plays a screening role, but it is limited in scope: at para 18. At the certification stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for certification has been granted: ***Spring*** at para 18; ***Hollick*** at para 16.

[13] The proper approach was confirmed in ***Pro-Sys Consultants v Microsoft Corporation***, 2013 SCC 57 [***Microsoft***] at para 105:

> Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[14] Similar guidance was also provided by the Supreme Court in ***AIC Ltd v Fischer***, 2013 SCC 69 at paras 42-43 [**AIC Ltd**].

**b) Relevant Legislative Provisions**

[15] The important sections of the *Class Proceedings Act* that must be considered in the context of this application for certification are the following:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

[26] I am not satisfied that it is plain and obvious that the criteria in ***Elder Advocates*** cannot be met in this case. It is not plain and obvious that when children are removed from their families and taken into custody that no fiduciary duty is owed. That is particularly so where, as here, it is alleged that Alberta assumed responsibility for the spiritual and educational needs of the children in custody. The claim of breach of fiduciary duty may be a novel claim. The claim may or may not succeed. However, at this stage it is not appropriate to undertake any critical analysis of the merit of the cause of action. The cause of action has been pleaded with sufficient particularity. I am satisfied that the pleading meets the low threshold to satisfy the requirements of s 5(1)(a): see ***Bruno*** at para 70.

[27] As a result, the first precondition to certification is met with one qualification. The claims in relation to those instances of sexual abuse that are alleged to have taken place at locations other than at the EYDC are bound to fail to the extent that they are based on the *Occupiers' Liability Act*. Thus, only those claims based on the *Occupiers' Liability Act* that are alleged to have occurred at the EYDC can be certified.

**d) Identifiable Class of 2 or More – s 5(1)(b)**

[28] Section 5(1)(b) of the *Act* requires that there be an identifiable class of two or more persons. The Supreme Court of Canada, in ***Western Canadian Shopping Centres v Dutton***, 2001 SCC 46 [***Dutton***], describes the requirement for an identifiable class as follows:

> ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria...

[29] Thus, the class must be based on objective criteria and bear a rational connection to the claims, causes of action, and common issues. It must not be overly broad: ***Bruno*** at para 86, citing ***Warner v Smith & Nephew Inc***, 2016 ABCA 223, leave to appeal refused, 37229 (February 2, 2017).

[30] Alberta and the Synod concede that the requirements of s 5(1)(b) have been met. However, Alberta seeks to restrict the class definition to those persons who were sexually assaulted while they were in the "maximum security" unit or the "secured unit" at EYDC.

[31] There is no evidence before me that there was actually a "maximum security" unit or a "secured unit" at EYDC during the relevant time. As a result, it would be inappropriate to restrict the class definition on this basis.

[32] Alberta also seeks to refine the class definition by eliminating those persons who may have had a claim but who are now dead or may die before trial. Alberta argues that while the estates of these persons may continue to have a claim, the damages will be limited to "actual financial loss".

[40] The requirement to show "some basis in fact" for one or more common issues can be satisfied by meeting a low standard. This standard is lower than the balance of probabilities threshold applicable in civil cases: ***Microsoft*** at para 102. The standard is low because a certification hearing is not "a determination of the merits of the proceeding". Nevertheless, certification is an important screening device requiring "more than symbolic scrutiny": ***Microsoft*** at para 103; ***Spring*** at para 34.

**ii. Noting In Default**

[41] Dominey failed to file a defence before his death. His Litigation Representative has also refused to file a defence and has advised the Plaintiff that the Estate of Dominey should be noted in default. The Plaintiff seeks the leave of the Court to note the Estate in default.

[42] No defence has been filed despite service of the pleadings. I am satisfied that the Estate of Dominey has no intention to file a defence. The Litigation Representative is an experienced civil litigation lawyer who is fully aware of the consequences of failing to file a defence. He did not appear on this certification application and has never asked the Court for additional time to defend. In these circumstances, the Plaintiff is granted leave to note the Estate of Dominey in default.

[43] The Plaintiff argues that by noting the Estate in default, it is deemed to have admitted the allegations against Dominey, including the allegations of sexual abuse. Quite properly, the Plaintiff acknowledges that deemed admissions arising from the noting in default of Dominey cannot be used to make a finding of liability against Alberta or the Synod. However, the Plaintiff argues that the deemed admissions against Dominey are relevant from a procedural standpoint "to identify common issues regarding the breach of any legal duties that are found to exist in this matter on a class basis". This position is further articulated at para 292 of the Plaintiff's Written Submissions:

> ... The certification application identifies several common issues that concern a breach of the various duties pled in this action and are based on the presumption that Dominey sexually abused the class members. However, at this stage, and if Dominey is noted in default, this is no longer a presumption but rather a factual finding based on a deemed admission. As such, questions regarding breach of the duties the Defendants are alleged to owe the class members can be answered on a class wide basis.

[44] Noting the Estate in default means that the factual allegations in the claim against Dominey are deemed admitted by the Estate: ***Robinson v Fiesta Hotel Group Resorts***, 2008 ABQB 311; ***Toerper v Hoard***, 2011 ABQB 85. But the deemed admissions are not absolute. Despite the deemed admissions, in any hearing to assess damages, the Court retains a residual discretion to direct a further hearing where the Court is not satisfied that the Plaintiff has a cause of action: ***Dyck v Wilkinson***, 2004 ABQB 731; ***Spiller v Brown,*** [1973] 6 WWR 663 (ABCA).

[45] It is important to recognize that the deemed admission arising from a noting in default is only an admission as against the party who has been noted in default. It is not an admission made by, or which can be used against, another defendant who has properly filed a statement of defence. As a result, to establish liability against Alberta or the Synod, or both, the Plaintiff will still need to prove on a balance of probabilities that he was sexually abused by Dominey. The sexual abuse represents an element of virtually all the causes of action pleaded against Alberta

# TAB 2

**Pro-Sys Consultants Ltd. and Neil Godfrey** *Appellants*

*v.*

**Microsoft Corporation and Microsoft Canada Co./Microsoft Canada CIE** *Respondents*

and

**Attorney General of Canada** *Intervener*

**Indexed as: Pro-Sys Consultants Ltd. *v.* Microsoft Corporation**

**2013 SCC 57**

File No.: 34282.

2012: October 17; 2013: October 31.

Present: McLachlin C.J. and LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Civil procedure — Class actions — Certification — Indirect purchasers — Plaintiffs suing defendants for unlawful conduct in overcharging for its PC operating systems and PC applications software — Plaintiffs seeking certification of action as class proceeding under provincial class action legislation — Whether indirect purchaser actions are available as a matter of law in Canada — Whether certification requirements are met — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4(1).*

P brought a class action against M, alleging that beginning in 1988, M engaged in unlawful conduct by overcharging for its Intel-compatible PC operating systems and Intel-compatible PC applications software. P sought certification of the action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"). The proposed class is made up of ultimate consumers, known as "indirect purchasers", who acquired M's products from re-sellers.

**Pro-Sys Consultants Ltd. et Neil Godfrey** *Appelants*

*c.*

**Microsoft Corporation et Microsoft Canada Co./Microsoft Canada CIE** *Intimées*

et

**Procureur général du Canada** *Intervenant*

**Répertorié : Pro-Sys Consultants Ltd. *c.* Microsoft Corporation**

**2013 CSC 57**

N° du greffe : 34282.

2012 : 17 octobre; 2013 : 31 octobre.

Présents : La juge en chef McLachlin et les juges LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Procédure civile — Recours collectifs — Certification — Acheteurs indirects — Action intentée contre les défenderesses au motif qu'elles auraient agi illégalement en majorant le prix de leurs systèmes d'exploitation et de leurs logiciels d'application pour ordinateur personnel — Demande de certification d'une action à titre de recours collectif en application des dispositions provinciales sur les recours collectifs — L'acheteur indirect dispose-t-il d'un recours en droit canadien? — Respect des conditions de certification — Class Proceedings Act, R.S.B.C. 1996, ch. 50, art. 4(1).*

P a intenté contre M un recours collectif dans lequel elle allègue que, à compter de 1988, M a agi illégalement en majorant le prix de ses systèmes d'exploitation et de ses logiciels d'application pour ordinateur personnel compatibles avec le processeur Intel. P a demandé la certification de son action à titre de recours collectif en application de la *Class Proceedings Act*, R.S.B.C. 1996, ch. 50 (« *CPA* »). Le groupe proposé se compose des consommateurs finaux, appelés « acheteurs indirects », qui ont acheté des produits de M à des revendeurs.

[97] Epstein J. ultimately concluded that, given this contradictory law, "[c]learly, 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 exist here, involv[e] matters of policy that should not be determined at the pleadings stage" (*Serhan*, at para. 68). I agree. In my view, this appeal is 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 cannot say that it is plain and obvious that a cause of action in waiver of tort would not succeed.

[97] La juge Epstein conclut au final que, vu l'état contradictoire du droit, [TRADUCTION] « [o]n ne saurait affirmer, de toute évidence, que le demandeur qui fonde son action sur la renonciation au recours délictuel sera assurément débouté »; elle ajoute que le débat « sur les conséquences de la reconnaissance de la renonciation au recours délictuel comme cause d'action indépendante dans des circonstances comme celles de l'espèce fait intervenir des principes sur lesquels il ne convient pas de prononcer à l'étape de l'examen des allégations » (*Serhan*, par. 68). Je suis d'accord. À mon avis, il ne convient pas de statuer plus avant, dans le cadre du pourvoi, sur le droit applicable en matière de renonciation au recours délictuel, ni sur le contexte particulier dans lequel on peut invoquer celle-ci. Je ne peux affirmer que le demandeur qui fonde son action sur la renonciation au recours délictuel sera manifestement débouté.

### (3) The Remaining Certification Requirements

[98] The causes of action under s. 36 of the *Competition Act*, in tort and in restitution (except for constructive trust) have met the first certification requirement that the pleadings disclose a cause of action. I now turn to Microsoft's argument that the claims should nevertheless be rejected because they do not meet two of the remaining certification requirements: that the claims of the class members raise common issues and that a class action is the preferable procedure in this case.

### (3) Les autres conditions présidant à la certification

[98] Les causes d'action que confère l'art. 36 de la *Loi sur la concurrence*, en responsabilité délictuelle et en restitution (sauf sur le fondement de la fiducie par interprétation) remplissent la première condition de certification voulant que les actes de procédure révèlent une cause d'action. Je me penche maintenant sur la prétention de Microsoft selon laquelle les demandes des membres du groupe doivent néanmoins être rejetées parce qu'elles ne satisfont pas à deux des autres conditions, à savoir qu'une question commune soit soulevée et que le recours collectif constitue la meilleure procédure pour régler cette question.

#### (a) *Standard of Proof*

[99] The starting point in determining the standard of proof to be applied to the remaining certification requirements is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a

#### a) *Norme de preuve*

[99] Le point de départ pour déterminer la norme de preuve applicable aux autres conditions de certification réside dans l'arrêt de principe *Hollick* où la juge en chef McLachlin énonce succinctement cette norme : « . . . le représentant du groupe doit établir un certain fondement factuel pour chacune des conditions énumérées [dans] la Loi, autre que l'exigence que les actes de procédure révèlent une cause d'action » (par. 25 (je souligne)). La Juge

cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).

[100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).

[101] Microsoft, while accepting the "some basis in fact" standard, argues that "in order for the Plaintiffs to meet the standard of proof, the evidence must establish that the proposed class action raises common issues and is the preferable procedure *on a balance of probabilities*" (R.F., at para. 41 (emphasis in original)). Microsoft relies on the academic writings of Justice Cullity of the Ontario Superior Court of Justice. Cullity J. expressed the view that "[t]o the extent that some basis in fact reflects a concern that certification motions are procedural and should not be concerned with the merits of the claims asserted, there seems no justification for applying the lesser standard to essential preconditions for certification that will not be within the jurisdiction of the court at trial" ("Certification in Class Proceedings — The Curious Requirement of 'Some Basis in Fact'" (2011), 51 *Can. Bus. L.J.* 407, at p. 422). In other words, Cullity J. suggests that because certification requirements are procedural, they will not be revisited at a trial of the common issues. As such, there is no reason to assess them on a

en chef signale que « [l]a Loi écarte carrément un examen au fond à l'étape de la certification » (par. 16). Cette étape intéresse plutôt la forme et le caractère approprié de la poursuite par voie de recours collectif (voir *Hollick*, par. 16; *Pro-Sys Consultants Ltd. c. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 (« *Infineon* »), par. 65; *Cloud c. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), par. 50).

[100] Suivant la norme de preuve issue de l'arrêt *Hollick*, la question n'est pas celle de savoir si la demande a un certain fondement factuel, mais plutôt si un certain fondement factuel établit chacune des conditions de certification. La juge en chef McLachlin signale cependant que la preuve importe aux fins de la certification. Elle fait remarquer que « le rapport [. . .] du comité consultatif du procureur général [sur la réforme du recours collectif] envisageait manifestement que le représentant du groupe serait tenu d'étayer sa demande de certification » (par. 25).

[101] Bien qu'elle souscrive à la norme fondée sur l'existence d'« un certain fondement factuel », Microsoft fait valoir que [TRADUCTION] « pour respecter la norme de preuve, les demandeurs doivent établir *selon la prépondérance des probabilités* que le recours collectif proposé soulève une question commune et qu'il constitue la meilleure procédure pour régler cette question » (m.i., par. 41 (en italique dans l'original)). Elle invoque à l'appui les propos du juge Cullity, de la Cour supérieure de justice de l'Ontario, selon lesquels, [TRADUCTION] « [d]ans la mesure où l'exigence d'un certain fondement factuel est liée au fait que la demande de certification revêt un caractère procédural et que son examen ne doit pas porter sur le fond des allégations, rien ne paraît justifier l'application d'une norme moins stricte aux conditions essentielles qui président à la certification et qui échapperont à la compétence du tribunal lors du procès » (« Certification in Class Proceedings — The Curious Requirement of "Some Basis in Fact" » (2011), 51 *Rev. can. dr. comm.* 407, p. 422). En d'autres termes, le juge Cullity indique qu'en

# TAB 3

**Her Majesty The Queen in Right of Canada** *Appellant/Respondent on cross-appeal*

*v.*

**Imperial Tobacco Canada Limited** *Respondent/Appellant on cross-appeal*

and

**Attorney General of Ontario and Attorney General of British Columbia** *Interveners*

- and -

**Attorney General of Canada** *Appellant/ Respondent on cross-appeal*

*v.*

**Her Majesty The Queen in Right of British Columbia** *Respondent*

and

**Imperial Tobacco Canada Limited, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. and Philip Morris International Inc.** *Respondents/Appellants on cross-appeal*

and

**Attorney General of Ontario, Attorney General of British Columbia and Her Majesty The Queen in Right of the Province of New Brunswick** *Interveners*

**Sa Majesté la Reine du chef du Canada** *Appelante/intimée au pourvoi incident*

*c.*

**Imperial Tobacco Canada Limitée** *Intimée/appelante au pourvoi incident*

et

**Procureur général de l'Ontario et procureur général de la Colombie-Britannique** *Intervenants*

- et -

**Procureur général du Canada** *Appelant/ intimé au pourvoi incident*

*c.*

**Sa Majesté la Reine du chef de la Colombie-Britannique** *Intimée*

et

**Imperial Tobacco Canada Limitée, Rothmans, Benson & Hedges Inc., Rothmans Inc., JTI-MacDonald Corp., R.J. Reynolds Tobacco Company, R.J. Reynolds Tobacco International Inc., B.A.T. Industries p.l.c., British American Tobacco (Investments) Limited, Carreras Rothmans Limited, Philip Morris USA Inc. et Philip Morris International Inc.** *Intimées/appelantes au pourvoi incident*

et

**Procureur général de l'Ontario, procureur général de la Colombie-Britannique et Sa Majesté la Reine du chef de la province du Nouveau-Brunswick** *Intervenants*

on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[22] A motion to strike for failure to disclose a reasonable cause of action proceeds on the basis that the facts pleaded are true, unless they are manifestly incapable of being proven: *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, at p. 455. No evidence is admissible on such a motion: r. 19(27) of the *Supreme Court Rules* (now r. 9-5(2) of the *Supreme Court Civil Rules*). It is incumbent on the claimant to clearly plead the facts upon which it relies in making its claim. A claimant is not entitled to rely on the possibility that new facts may turn up as the case progresses. The claimant may not be in a position to prove the facts pleaded at the time of the motion. It may only hope to be able to prove them. But plead them it must. The facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated. If they are not pleaded, the exercise cannot be properly conducted.

soit reconnue dans l'arrêt *Donoghue c. Stevenson*, [1932] A.C. 562 (H.L.), peu de gens auraient pu prévoir qu'une entreprise d'embouteillage puisse être tenue responsable, en l'absence de tout lien contractuel, du préjudice corporel et du traumatisme émotionnel causé par la découverte d'un escargot dans une bouteille de bière de gingembre. Avant l'arrêt *Hedley Byrne & Co. c. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), l'action en responsabilité délictuelle pour déclarations inexactes faites par négligence aurait paru vouée à l'échec. L'histoire de notre droit nous apprend que souvent, des requêtes en radiation ou des requêtes préliminaires semblables, à l'instar de celle présentée dans *Donoghue c. Stevenson*, amorcent une évolution du droit. Par conséquent, le fait qu'une action en particulier n'a pas encore été reconnue en droit n'est pas déterminant pour la requête en radiation. Le tribunal doit plutôt se demander si, dans l'hypothèse où les faits allégués seraient avérés, il est raisonnablement possible que l'action soit accueillie. L'approche doit être généreuse et permettre, dans la mesure du possible, l'instruction de toute demande inédite, mais soutenable.

[22] Une requête en radiation pour absence de cause d'action raisonnable repose sur le principe que les faits allégués sont vrais, sauf s'ils ne peuvent manifestement pas être prouvés : *Operation Dismantle Inc. c. La Reine*, [1985] 1 R.C.S. 441, p. 455. Aucune preuve n'est admissible à l'égard d'une telle requête : par. 19(27) des *Supreme Court Rules* de la Colombie-Britannique (maintenant le par. 9-5(2) des *Supreme Court Civil Rules*). Il incombe au demandeur de plaider clairement les faits sur lesquels il fonde sa demande. Un demandeur ne peut compter sur la possibilité que de nouveaux faits apparaissent au fur et à mesure que l'instruction progresse. Il peut arriver que le demandeur ne soit pas en mesure de prouver les faits plaidés au moment de la requête. Il peut seulement espérer qu'il sera en mesure de les prouver. Il doit cependant les plaider. Les faits allégués sont le fondement solide en fonction duquel doit être évaluée la possibilité que la demande soit accueillie. S'ils ne sont pas allégués, l'exercice ne peut pas être exécuté adéquatement.

# TAB 4

# In the Court of Appeal of Alberta

**Citation: Setoguchi v Uber BV, 2023 ABCA 45**

**Date:** 20230207
**Docket:** 2101-0025AC
**Registry:** Calgary



**Between:**

**Dione Setoguchi**

Appellant
(Plaintiff)

- and -

**Uber B.V., Raiser Operations B.V., Uber Canada Inc. and Uber Technologies Inc.**

Respondents
(Defendants)

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**The Court:**

**The Honourable Justice Thomas W. Wakeling**
**The Honourable Justice Dawn Pentelechuk**
**The Honourable Justice Bernette Ho**

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**Memorandum of Judgment**

Appeal from the Decision by
The Honourable Associate Chief Justice J.D. Rooke
Dated the 8th day of January, 2021
Filed on the 17th day of May, 2021
(2021 ABQB 18, Docket: 1701 16003)

## Memorandum of Judgment

**The Court:**

### Introduction

[1] The representative plaintiff, Dione Setoguchi, appeals the decision of the certification judge dismissing her motion to certify a class proceeding against the respondents (Uber): ***Setoguchi v Uber BV***, 2021 ABQB 18 (Decision). The proceeding arises from a 2016 data breach involving the theft of personal information – names, phone numbers and email addresses – Uber had gathered from its drivers and users.

[2] The appellant alleges that Uber failed to protect its collection of personal information; as a result, hackers were able to access and download the information. The certification judge found there was no "evidence or basis in fact in support of real (not *de minimis*) compensable harm or loss" to the putative class resulting from the data breach, as there was no evidence the stolen data had been used for any improper purpose.

[3] The appellant argues the certification judge erred in his approach to damages and over-stepped his gatekeeping role by assessing the merits of the action and viewing the certification application through the lens of summary judgment, concluding that there can be no cause of action where there is a data breach but no evidence of compensable harm. She further argues that given the increasingly common occurrence of data breaches, the law must evolve to recognize that personal information has *inherent* value such that its loss should be treated as compensable harm *per se*. The certification judge therefore erred, on this view, in refusing to certify this admittedly novel claim and precluding her from testing this theory of liability through a merits trial.

[4] Despite musing on his role as gatekeeper and the need to screen out unmeritorious claims, the certification judge did not dismiss the action for failing to meet the s 5(1)(a) of the *Class Proceedings Act*, SA 2003, c C-16.5 [*CPA*] criterion that "the pleadings disclose a cause of action", but instead because a class proceeding would not be "the preferable procedure for the fair and efficient resolution of the common issues" (*CPA*, s 5(1)(d)).

[5] The central issues on this appeal relate to the certification judge's approach to ss 5(1)(a) and (d) of the *CPA* in light of this novel claim. First, this appeal examines whether the negligence claim, as pleaded, discloses a cause of action recognized in law (s 5(1)(a)), and whether the motion for certification should be dismissed on this basis. Next, to the extent that a cause of action exists and exhibits one or more issues common to the class members, the question is whether a class proceeding is the preferable means to resolve those common issues (s 5(1)(d)).

[6] For the reasons that follow, the appeal is dismissed.

**Background**

[7] In October 2016, external hackers illegally accessed electronic data that Uber collected from its drivers and users and stored in a third-party cloud-based service. According to Uber, this consisted of the personal information – names, phone numbers and email addresses – of 57 million Uber drivers and users worldwide, and the names and driver's licence numbers of approximately 600,000 drivers in the United States. Uber received a ransom demand and paid the hackers $100,000 USD in return for an assurance that they "would destroy and not disseminate" the data.

[8] Uber revealed this incident through a press release issued in November of the following year, indicating it would monitor all affected accounts for fraud protection and provide drivers with free credit monitoring and identity theft protection. It reported the incident to regulatory authorities and has since been subjected to investigations and penalties worldwide that include $194 million CAD in fines and an order from authorities in the United States that Uber implement and maintain a robust privacy protection program for 20 years.

[9] The appellant was an Uber user at the time of the data breach. She commenced a claim against Uber and applied to certify a class proceeding on behalf of "all persons in Canada whose Personal Information was recorded and/or stored by Uber, including but not limited to Uber Users and Uber Drivers, as of October 1, 2016, and whose Personal Information was accessed by unauthorized individuals in or around October 2016". However, the claim was eventually clarified as excluding residents of Quebec, and a separate class action, based partly on legislation unique to that province, has been brought and certified there: see ***Fortier c Uber Canada inc.***, 2021 QCCS 4053.

[10] The appellant's claim revolves around two aspects of this incident. First, Uber's storage of user data on a third-party cloud-based service – claimed to be more vulnerable to unauthorized access – without the users' consent. Second, Uber's "concealment" of the data breach from users and authorities. The appellant contends that users and drivers had a contractual relationship with Uber under the Uber user agreement and its applicable privacy policies, both of which included provisions as to Uber's obligations with respect to collecting, storing and protecting user data. The claim is said to involve roughly 800,000 Canadians.

[11] The appellant initially pleaded numerous causes of action but now only seeks to certify claims in breach of contract and negligence. Causes of action for breach of statutory duties were abandoned at the certification application hearing, while breach of confidence and intrusion upon seclusion were not pursued on appeal.

[12] The appellant claims that Uber breached its contractual obligations to the class members to protect their information under its user and privacy agreements by transferring the class members' information to a third-party cloud-based service and doing so without the class members' consent, and by concealing the data breach from users and authorities.

[13] She also claims that Uber breached its duty of care to the class members in relation to collecting, storing, disclosing and using class members' information by disclosing the information to the third-party and authorizing its storage on a cloud-based service, failing to use adequate security measures to protect that information, and concealing the data breach.

[14] As far as damages are concerned, no claim is advanced for psychological damages, and while it is anticipated that individual class members may, in the future, lead evidence of pecuniary loss, this type of damage is not being pursued on a class-wide basis. As Uber points out, in the intervening six years since the data breach, there is no suggestion that any of the class members have suffered fraud or identity theft.



**Grounds of Appeal and Standard of Review**

[15] The appellant submits that the certification judge made the following errors:

(a) In law:

(i) in the characterization and consideration of the elements of the causes of action asserted;

(ii) by engaging in an impermissible review and weighing of evidence relating to the merits of the action in the consideration of the certification requirements;

(iii) in impermissibly assessing the merits of the action in the consideration of the certification requirements;

(b) In mixed fact and law:

(i) by failing to recognize that there was evidence of class-wide harm;

(ii) in concluding that a class proceeding is not the preferable procedure for the prosecution of the claims of proposed class members; and

(c) In fact:

(i) by palpably misconstruing the evidence.

[16] Most aspects of a decision regarding the certification of a class action are entitled to deference. Whether the pleadings disclose a cause of action is a question of law reviewed for correctness. Otherwise, certifying a class action is a discretionary decision, which will not be overturned on appeal unless it reflects an error of principle or it is unreasonable: ***Spring v Goodyear Canada Inc***, 2021 ABCA 182 [***Spring***] at para 16.

**Analysis**

*A. Certification of Class Proceedings*

[17] To obtain certification, an applicant must establish the five statutory requirements set out in s 5(1) of the *CPA*: 1) the pleadings disclose a cause of action; 2) there is an identifiable class of two or more persons; 3) the claims of the prospective class members raise a common issue; 4) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and 5) the proposed representative plaintiff is adequate.

[18] If all five requirements are met, the action must be certified; if they are not met, the application for certification must be dismissed: *CPA*, ss 5(3) and 5(4); ***Spring*** at para 17; ***Fisher v Richardson GMP Limited***, 2022 ABCA 123 [***Fisher***] at para 34.

[19] The first requirement – that the pleadings disclose a cause of action – is satisfied through review of the pleadings; the other four require an adequate evidentiary record, establishing "some basis in fact" for the certification order: ***Pro-Sys Consultants Ltd. v Microsoft Corporation***, 2013 SCC 57 [***Microsoft***] at para 99; ***Fisher*** at para 35. Evidence is not admissible to assist a court in making a s 5(1)(a) determination as to whether the pleadings disclose a cause of action: ***Bruno v Samson Cree Nation***, 2021 ABCA 381 [***Bruno***] at para 64.

[20] The test under s 5(1)(a) of the *CPA* is the same as on an application to strike a statement of claim for failing to disclose a cause of action, namely, whether taking the facts pleaded as true, it is plain and obvious the pleadings do not disclose a cause of action: ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19 [***Atlantic Lottery***] at para 14; ***Bruno*** at para 63; ***Flesch v Apache Corporation***, 2022 ABCA 374 [***Flesch***] at para 36. This requirement will be met unless it is plain and obvious the plaintiff's claim cannot succeed: ***Microsoft*** at para 63. The only difference is that, whereas on an application to strike a claim the onus is on the defendant to show there is no cause of action, on certification "the onus to show the existence of a cause of action falls upon the party bringing the class action": Ward K. Branch & Mathew P. Good, *Class Actions in Canada*, 2d ed, loose-leaf updated to December 2022 (Vancouver, Western Legal Publications, 2000) at § 4:3.

*B. The Cause of Action Requirement – s 5(1)(a)*

<u>The Approach Below</u>

[21] The appellant focused at the certification hearing on the proposed class having suffered a so-called "first loss", this being simply "the loss of the information to criminals who have accessed and downloaded the information": Transcript 4/40-41. But while the certification judge accepted that the hackers accessed and stole the personal information, he found the appellant had provided no evidence of actual harm or loss. There was no evidence the information compromised in the hack was released to anyone other than the hackers in the four years since the hack: Decision at para 34. Moreover, at the time of the application, there was no evidence of any confirmed case of

fraud, identity theft or other illegal activity, or other economic loss to any class member as a result: para 7. Ultimately, he found that "not only is there *no evidence of harm or loss*, there is *evidence that there is no harm or loss*": para 10, emphasis in original.

[22] This prompted the certification judge to advocate for a more robust screening or gatekeeping role when assessing whether the pleadings disclose a cause of action. In his view, "[o]ne should not be able to obtain certification only on speculation as to possible evidence of harm or loss and a carefully worded pleading": para 43.

[23] He described the court's gatekeeping role to include putting a stop to claims where it is "plain and obvious" they will not succeed and for which there is no evidence or basis in fact to support a compensable harm or loss above a *de minimis* level: paras 35, 37. An evidentiary foundation for an actual loss is accordingly needed in cases where liability may move forward (paras 46-47), there having to be "some evidence or basis in fact for loss or damage" if the "screening process" is to be "meaningful": para 33.

[24] Having found that the proposed class had not suffered any actual harm or damage as a result of the hack, the certification judge was clearly troubled by his perceived inability to deny certification under s 5(1)(a). He expressed his concern this way at para 43 of the Decision:

> ... Does this mean that absolutely no evidence of loss or harm is required? It seems that Setoguchi's Counsel believes so, on the basis of the current law. That concept, I believe, is too open and the subject of potential abuse, in the absence of some gate keeping function, especially in the context of certification of a class action. One should not be able to obtain certification only on speculation as to possible evidence of harm or loss and a carefully worded pleading. If that is not the principle that can now be carried forward based on this case, perhaps it will be in future cases.

[25] The certification judge was of the view that where there is a breach but no compensable harm, there can be no cause of action. Nevertheless, he concluded as follows at para 58 of the Decision:

> However, notwithstanding my belief that the certification application must present a way for the Court to exercise a gate keeping function in cases like this, and that *there must be some evidence of harm or loss to support certification, it appears clear that the "some basis in fact" test has not yet been applicable to causes of action that are fully and completely pleaded*, including that there is harm and loss even where is evidence that there actually isn't. Thus, with regret, I must find that Uber is not successful in having certification denied on the basis that the pleadings fail to disclose a cause of action, except in so far as I may use it as gate keeping function. [Emphasis added]

Reading the Amended Statement of Claim generously, the certification judge appeared to accept that the appellant had met the requirement in s 5(1)(a) of the *CPA*, having "fully and completely" pleaded causes of actions in breach of contract and negligence merely by reference to harm or loss.

[26] As we explain below, the certification judge was too quick to accept the claims in negligence had been "fully and completely" pleaded, thus meeting the s 5(1)(a) requirement. While he desired to import the "some basis in fact" standard into the cause of action requirement by requiring evidence of loss or harm, it was, in fact, open to him to determine whether the facts as pleaded disclosed a cause of action in negligence. This would have prompted an assessment of whether the appellant's novel claim for damages is (or should be) recognized in law, and whether certification of the negligence claim could have been accordingly dismissed at the s 5(1)(a) stage. This approach does not depend on evidence of harm or loss and is entirely consistent with the well-known test under s 5(1)(a).

No Requirement of "Some Basis in Fact" and Evidence of Loss or Harm under s 5(1)(a)

[27] A number of recent certification decisions, including the Decision under appeal, have been criticized for inserting an additional requirement into the statutory test in the form of evidence of loss or harm, ostensibly as part of a certification application needing to constitute a "meaningful screening device": see Mohsen Seddigh, "Class Action Certification: 'meaningful screening device' and the 'compensable loss' theory" (2021) 17:1 Can Class Action Rev 193. Uber, for its part, argued before the certification judge that where there is a lack of evidence of actual loss or harm, the court should deny certification on the basis that it must remain a "meaningful screening device": Decision at para 5; Transcript 83/11-84/5.

[28] In ***Flesch***, the appellant embraced the certification judge's approach, suggesting that a court in its gatekeeping function must identify a positive evidentiary element in determining whether the pleading sets out a cause of action, relying upon the Decision and ***Engen v Hyundai Auto Canada Corp***, 2021 ABQB 740. However, this Court in ***Flesch*** rejected that approach, stating at para 37: "There is no reason to depart from the long-established and well-settled test for assessing whether pleadings disclose a cause of action for certification purposes. No substantive evidence is required to prove a cause of action...". Simply put, evidence is not admissible to assist a court in making a s 5(1)(a) determination as to whether the pleadings disclose a cause of action: ***Bruno*** at para 64; ***Flesch*** at paras 34-35.

[29] Accordingly, we reject any suggestion by the certification judge in this case that a plaintiff should be required to provide some evidence of loss or harm in order to meet the threshold under s 5(1)(a) of the *CPA*.

[30] It does not follow, however, that the claim in negligence, as pleaded, met the test under s 5(1)(a).

The Proposed Causes of Action

[31] As noted, the appellant is pursuing the certification of claims in breach of contract and negligence.

[32] A breach of contract claim does not require proof of loss as an element of the cause of action: ***Atlantic Lottery*** at paras 49, 104. However, negligence does. The elements of the tort of negligence are well known: "(1) that the defendant owed the plaintiff a duty of care; (2) that the defendant's conduct breached the standard of care; (3) *that the plaintiff sustained damage*; and (4) that the damage was caused, in fact and in law, by the defendant's breach": ***1688782 Ontario Inc. v Maple Leaf Foods Inc.***, 2020 SCC 35 at para 18, emphasis added.

[33] The certification judge appeared to think he was required to find that a cause of action in negligence was properly pleaded simply by virtue of the pleadings having included vague references to damages. For instance, the Amended Statement of Claim referred to the proposed class having "suffered significant loss and damages including harm and injury to their interests" and "harm for which they claim damages", such "injuries" including "the unauthorized release, disclosure and use of their personal information": Appeal Record (AR) at 21. As he put it: "all that Setoguchi is required to do at the certification stage is to allege a complete cause or causes of action, including alleged harm or loss resulting, as she has done": Decision at para 13, emphasis in original.

[34] A fundamental purpose of pleadings is to outline the case a defendant must meet. When a cause of action includes damage as one of its requirements, a plaintiff is required to plead facts sufficient to amount *at law* to damage. Pleadings alleging negligence, for instance, "must be supported by facts *capable of sustaining a determination* that a duty was owed, that an act or omission occurred breaching that duty, and *that damages resulted*": ***Tottrup v Lund***, 2000 ABCA 121 at para 11, emphasis added. This means that a negligence claim can be struck where the plaintiff fails to plead an injury that is recognized as being compensable at law: ***Thompson v Webber***, 2010 BCCA 308 at paras 3-4, 30-34, leave to appeal to SCC refused, 33825 (23 December 2010). It is no more sufficient for a plaintiff to plead "damages" or "injury" than it is to plead the existence of a "duty of care"; both are bare legal conclusions that require sufficient facts to sustain them. In this regard, the Amended Statement of Claim is deficient; it fails to particularize the harm or damages suffered as a result of the hack, how such loss or damage was caused by Uber, and the remedies sought for each cause of action. This is essential information for the determination of whether particular causes of action can survive scrutiny under s 5(1)(a).

[35] As the certification judge recognized, pleadings are to be read generously, and in anticipation of what might be remedied through an amendment. We therefore focus on the appellant's theory of damages as articulated in her factum and during the appeal hearing.

[36] It is true that some of the "injuries" pleaded have been recognized as potentially compensable at law in negligence. For instance, the Amended Statement of Claim provides: "The

Plaintiff and Class Members will incur expenses for credit reporting, credit monitoring services, credit counselling, identity theft monitoring services, identity theft protective services and additional services": AR at 21-22. These kinds of out-of-pocket expenses incurred by customers in order to mitigate against the increased risk of harm following a data hack have been considered compensable damages, at least for purposes of passing the s 5(1)(a) threshold: see ***Campbell v Capital One Financial Corporation***, 2022 BCSC 928 [***Campbell***] at paras 53-54; ***Kaplan v Casino Rama***, 2019 ONSC 2025 [***Kaplan***] at para 22; ***Obodo v Trans Union of Canada, Inc.***, 2021 ONSC 7297 at paras 124, 160, var'd on other grounds in 2022 ONCA 81. And as the Federal Court of Appeal noted in ***Condon v Canada***, 2015 FCA 159 [***Condon CA***] at paras 18, 22, a certification judge should assume such expenses have been incurred, if pleaded, rather than seeking out evidence from the parties.

[37] For certification purposes, however, the appellant focuses on the "first loss"; the theory of liability being that Uber breached its contract with its drivers and users and was negligent in failing to protect the personal information it collected, allowing hackers to access and download the information. As argued, because personal information has inherent value, the theft of personal information, common to all class members, is the compensable loss and, if liability is established, a minimum amount of damages, or "baseline damages" would be determined at the merits trial. This, she argues, is a sufficient "basis in fact" to support certification.

[38] This is the only aspect of the negligence claim said to constitute "class-wide harm" so as to meet the commonality requirement in s 5(1)(c) of the *CPA*. Stated otherwise, issues relating to the appellant's negligence claim are only capable of being certified to the extent that they involve a loss common to all members of the proposed class. In this case, the appellant is not claiming pecuniary loss on a class-wide basis, meaning that the only issue in damages capable of being certified is the novel claim for "first loss" damages that do not depend on any actual harm or loss.

[39] In determining whether the appellant's novel claim discloses a cause of action, there is no need to consider any facts other than the text of the pleading. It is not in dispute that the hack and subsequent "first loss" *occurred*. What *is* in dispute, however, is whether such a loss constitutes compensable harm at law, and whether the requirements of s 5(1)(a) are met. As part of the determination of whether "the pleadings disclose a cause of action", the appellant must establish that the remedies she seeks are available to her, assuming the truth of the facts as pleaded for the specific cause of action: ***Atlantic Lottery*** at para 49.

[40] The appellant concedes her theory of compensable harm is novel (as well as her theory of liability, for that matter), and she can point to no authority that supports it, but states that no court has ever said, after a full merits trial, that loss of personal information *per se* is *not* compensable loss and argues she should be allowed to pursue her claim.

[41] We disagree. The absence of a precedent ruling that a particular claim is not a recognized cause of action does not mean that it is a recognized cause of action. As noted in ***Hobbs v Tinling (C.T.) & Co.***, [1929] 2 KB 1 at 21 (CA), per Scrutton LJ, "by destroying ... evidence you do not

prove its opposite". If there is no precedent, a court must turn to first principles for guidance: ***Thorson v Attorney General of Canada*** (1974), [1975] 1 SCR 138 at 152, per Laskin J ("Counsel for the respondents contended that a provincial Attorney General could take declaratory proceedings, but he could cite no authority for this proposition nor could I find any. However, want of authority is not an answer if principle supports the submission"). It does not automatically follow that because a court has never ruled on a particular "novel" cause of action or theory of damages, it should be certified. Undoubtedly, the certification stage is not the time to be overly restrictive in the interpretation of the pleadings. To do so may well inhibit development of the law, to which class proceedings have surely contributed. But neither can novelty insulate a claim that plainly and obviously cannot succeed. It is plain and obvious that a claim does not disclose a cause of action if there is a "very high degree of certainty" that it does not: ***Bruno*** at para 65. This is such a case; it is plain and obvious that the loss in question is not a compensable harm recognized in law. Whatever the likelihood is that the law would change in the future, it is so low as not to pass the threshold test.

[42] In ***Atlantic Lottery***, the Supreme Court of Canada tackled questions of law at the pleadings stage in the context of certification of class actions, ultimately finding that certain causes of action did not exist. In particular, the case demonstrated the application of the plain and obvious threshold in the context of a novel claim, namely the doctrine of waiver of tort. Observing that uncertainty in the law had existed for 16 years, and that no court had recognized the doctrine of waiver of tort, Brown J at para 21 concluded: "Nothing is gained and much court time and considerable litigant resources are lost, by leaving this issue unresolved". In settling the question and determining that no independent cause of action for waiver of tort exists in law, the Court had determined the availability of this cause of action raised a pure question of law that could not be affected by any evidence that might be adduced at trial.

[43] Emboldened by the approach in ***Atlantic Lottery***, other appellate courts have followed suit: see ***Sharp v Royal Mutual Funds Inc.***, 2021 BCCA 307 [***Sharp***], leave to appeal to SCC refused, 39882 (17 March 2022); ***Owsianik v Equifax Canada Co***, 2022 ONCA 813 [***Equifax***]. In ***Equifax***, the Ontario Court of Appeal heard a trilogy of class action appeals where the plaintiffs had (largely unsuccessfully) argued that the tort of intrusion upon seclusion, first recognized in ***Jones v Tsige***, 2012 ONCA 32, should be expanded in data breach cases beyond the hackers, to find liable "Database Defendants" – those who collect and store the personal information of others for commercial purposes. The Court of Appeal declined to do so. Relying heavily on ***Atlantic Lottery***, the court in ***Equifax*** found it appropriate to resolve the pure question of law presented, as "[t]here is no reason to think evidence adduced at the trial would have any effect on the determination of whether, as a matter of law, the tort could apply to Database Defendants whose failure to properly protect the data permits independent hackers to access the data": para 40. The court further found that where the validity of a claim turns entirely on a legal question, the court can determine the law and apply it to the facts as pleaded to decide whether the claim is "plainly doomed to fail and should be struck": para 42, citing ***Atlantic Lottery*** at para 19. That the legal question is complex, policy-laden or open to debate is not necessarily a barrier.

[44] Although the s 5(1)(a) test is a low bar, it should not be treated as a perfunctory exercise. "Courts have no justification to ignore the plain text of an enactment and make this criterion completely disappear": ***Bruno*** at para 68. There are compelling reasons for a court to carefully consider whether the pleadings pass the plain and obvious test, by carefully scrutinizing whether the facts as pleaded establish the requisite elements of each cause of action. When a novel claim is presented, that may involve an assessment of whether each element of the cause of action as pleaded is (or should be) recognized in law.

[45] In ***Atlantic Lottery*** at para 21, Brown J noted the deleterious consequences that can flow from courts permitting class actions to be certified and allowing them to proceed, not on the basis the claim can be made out, but rather that it is not "plain and obvious" the claim cannot succeed. A similar observation was made in ***Equifax*** at para 49 as follows:

> Not only did allowing these cases to proceed to trial result in uncertainty, that uncertainty arguably resulted in unfairness to Database Defendants. The certification of intrusion upon seclusion claims without a determination that the claim was viable in law gave a plaintiff an advantage in certification proceedings. Because damages for intrusion upon seclusion do not require proof of any actual pecuniary loss, but are instead awarded on a "symbolic" or "moral" basis, damages are well suited to an award on a class-wide basis. The nature of the damages to be awarded offered support for the plaintiff's argument that a class proceeding was the preferable proceeding for the resolution of common issues: *Class Proceedings Act, 1992*, s. 5(1)(d). Consequently, the presence of an intrusion upon seclusion claim, despite the uncertainty as to its legal viability, gave plaintiffs a leg up in the certification process and, as a result, in any settlement negotiations: see *Winder*, at para. 16; *Babstock*, at para. 21.

This concern is apposite here. While the appellant specifically declined to pursue a claim for intrusion upon seclusion, her theory of compensable harm and damages is the other side of the same coin. By avoiding any proof of pecuniary damages or actual loss, the "baseline" damages are well suited to an award on a class-wide basis, which bolsters her argument for certification, which in turn fuels a settlement.

[46] Aside from creating or perpetuating legal uncertainty, failing to determine a question of law at the pleadings stage, when appropriate to do so, is antithetical to the call in ***Hryniak v Mauldin***, 2014 SCC 7 for affordable, timely and just resolution of disputes. In the boundless landscape of scarce judicial resources, there is nothing to be gained by certifying suspect novel claims, the validity of which will only be determined at a merits trial that may never occur. As noted by Stratas JA in ***Coote v Lawyers' Professional Indemnity Company***, 2013 FCA 143 at para 13: "[d]evoting resources to one case for no good reason deprives the others for no good reason", cited in ***Mohr v National Hockey League***, 2022 FCA 145 at para 50.

[47] The next question is whether it is appropriate for this Court to determine whether it is plain and obvious that the appellant's theory of compensable loss and damage cannot succeed because it is not (or should not be) recognized in law. Since ***Equifax*** was released after the appeal hearing, we invited further submissions from the parties on this issue.

[48] The appellant says the answer to this inquiry is "No". She says the question of whether loss of personal information to hackers is compensable loss depends on a properly developed record followed by argument on the record. She points to the extant dispute as to exactly what information was taken and how sensitive that information might be. She argues that this factual determination informs whether the loss of information to the hackers is compensable loss, an issue that would benefit from expert evidence.

[49] Uber argues that this question falls to be answered on the facts as pleaded, and points to the appellant's theory that all that must be pleaded is that her personal information was the subject of a data breach. The data breach itself is the harm and no consequential loss or damage is required. Therefore, the evidence the appellant says is necessary to determine this question is irrelevant to the claim in negligence as framed and can be decided solely on the pleading itself.

[50] We are not persuaded by the appellant's arguments. On her theory, determining the exact nature of the information taken arguably may affect the quantum of baseline damages, but does not change her fundamental argument that the hack itself, without any consequential loss or harm, is *per se* compensable. Further, we are confident that the nuances of the appellant's theory were thoroughly argued on appeal and below. Expert evidence would perhaps be relevant on the issue of quantum, but its admissibility on the ultimate legal question is far from clear.

[51] In her supplemental submissions, the appellant states that the claim is not for "future harm"; rather, the hackers' theft of personal information, without proof of actual loss or damage, is compensable harm. Because the Amended Statement of Claim pleads that the class members are "continuously exposed to ongoing risk of identity theft and economic loss" (AR at 21) and this aspect of the claim was argued at some length during the appeal hearing, we will address the concept of damages for risk of future harm.

[52] While the appellant asks the court to recognize the value of the information lost, ultimately her focus is not only the information itself but rather on the *consequences* of criminals being in the possession of the names, phone numbers and email addresses of the proposed class members. It is not the viewing or access to the information by others that is said to be harmful; the appellant herself recognizes that though the information is personal, it is not necessarily private. Rather, the first loss is said to be harmful insofar as the information in the hands of criminals, particularly when aggregated with other personal information, will make the proposed class members more susceptible to fraud, particularly phishing scams.

[53] It is trite that in order to prove negligence, some harm, loss or injury – sometimes referred to as "compensable damage" – must result from the defendant's wrongful act. Conduct is negligent

where it creates an unreasonable risk of harm: ***Mustapha v Culligan of Canada Ltd***, 2008 SCC 27 [***Mustapha***] at para 7. However, proof of negligent conduct without consequences will not ground a claim in negligence. For that reason, "negligence 'in the air' — the mere creation of risk — is not wrongful conduct": ***Atlantic Lottery*** at para 33; see also ***Spring*** at para 46.

[54] Damages claimed for the *risk of future harm* or the *increased risk of harm* have generally not been recognized in Canadian tort law: ***Kaissieh v Done***, 2022 ONSC 425 at paras 85-87; ***Palmer v Teva Canada Ltd.***, 2022 ONSC 4690 at paras 165, 167, 174, 177, 186, 206. This principle has also been applied in the data breach context to deny certification of negligence claims[1] related to such harm: ***Del Giudice v Thompson***, 2021 ONSC 5379 at paras 222-233; ***Kaplan*** at para 21 ("the possibility that class members may experience identity theft or fraud in the future does not give rise to compensable damages").

[55] We recognize that courts have at times allowed damage claims to proceed where there is alleged to be a *substantial* risk of future identity theft: ***Tucci v Peoples Trust Company***, 2017 BCSC 1525 [***Tucci SC***] at paras 175, 181, 201, var'd on other grounds in 2020 BCCA 246 [***Tucci CA***]; see also ***Campbell*** at para 126. As noted in ***Tucci SC*** at para 201, "[g]iven that the information is said to have been stolen by cybercriminals, it is certainly not plain and obvious that this risk will not be proven to be a sufficiently significant risk to be compensable in some manner". This risk of future fraud created by a data hack is sometimes analogized (as it was in ***Tucci SC***) to medical monitoring costs associated with negligence that puts people at an ongoing heightened risk of developing a harmful condition that has not yet occurred. On this view, the negligence does not exist "in the air" because, unlike the negligent driver who fails to cause an injury (the example provided by Uber in this case), the increased risk of future harm continues to exist after the negligent act has passed: see, for example, Daniel J. Solove & Danielle Keats Citron, "Risk and Anxiety: A Theory of Data-Breach Harms" (2018) 96:4 Tex L Rev 737 [Solove & Citron] at 760-763.

[56] However, even in the United States, where a number of federal circuit appeal courts have held that an increased risk of future identity theft stemming from a data breach can constitute an "injury", there must still be, at minimum, a *substantial risk* that harm will occur: see, for example, ***Galaria v Nationwide Mut. Ins. Co***, 663 Fed.Appx. 384 at 388 (6th Cir 2016). This means that an injury will often be found in data breach cases only where there has been at least some attempted or actual misuse of the stolen information: Solove & Citron at 751-752, citing ***Krottner v Starbucks Corp***, 628 F.3d 1139 (9th Cir 2010) and ***Remijas v Neiman Marcus Grp***, 794 F.3d 688 (7th Cir 2015). These courts have also looked at the *type of data* stolen, noting that "less sensitive data, such as basic publicly available information ... does not pose the same risk of future identity

[1] The idea that risk of future harm is not itself compensable is particularly prevalent in Quebec law: see, for example, ***Li c Equifax inc.***, 2019 QCCS 4340 at para 29. Some caution is warranted when relying on Quebec case law, however, as it relies on the *Code civil du Québec*, RLRQ c CCQ-1991, which in article 1611 explicitly precludes hypothetical damage ("Les dommages-intérêts dus au créancier compensent la perte qu'il subit et le gain dont il est privé. On tient compte, pour les déterminer, du préjudice futur lorsqu'il est certain et qu'il est susceptible d'être évalué").

theft or fraud to plaintiffs if exposed": ***McMorris v Carlos Lopez & Associates, LLC***, 995 F.3d 295 at 302 (2nd Cir 2021).

[57] Applied to the present case, the appellant has no hope of establishing that the simple loss of publicly available information like names, phone numbers and email addresses amounts, without more, to compensable injury or loss.

[58] Even if the proposed class members might all be marginally "worse off" than they would have been absent the alleged negligence by Uber, damage in tort law must be "real" as opposed to merely "negligible" or "trivial" in order to be actionable: ***Greenway v Johnson Matthey plc***, [2018] UKSC 18 at paras 25-26. This point was illustrated by the Supreme Court of Canada in ***Mustapha*** at para 9:

> ... I would not purport to define compensable injury exhaustively, except to say that it must be serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept. The need to accept such upsets rather than seek redress in tort is what I take the Court of Appeal to be expressing in its quote from *Vanek v. Great Atlantic & Pacific Co. of Canada* (1999), 48 O.R. (3d) 228 (C.A.): "Life goes on" (para. 60). Quite simply, minor and transient upsets do not constitute personal *injury*, and hence do not amount to damage. [Italics in original; underline added]

Any damage suffered by the proposed class members from the "first loss" in the form of increased risk of fraud or identity theft, if recoverable at all, is similarly negligible or trivial, and therefore not compensable at law. In this sense, the certification judge was right to look for "real (not *de minimis*) compensable harm or loss".

[59] When pressed at the appeal hearing, the appellant said she was not seeking to have a new tort recognized; her cause of action is in negligence. This requires proof of harm or loss. A claim for either nominal or symbolic damages cannot ground a claim in negligence. We do not agree that the facts pleaded "cry out for a remedy". The appellant is attempting to maneuver around her inability to demonstrate actual harm or loss from the data breach, by advancing a theory of damages not recognized in law. If accepted, this would be no mere incremental development of the law; rather, a "giant step in a very different direction": ***Equifax*** at para 63.

Conclusion

[60] The appellant's novel "first loss" claim in negligence does not disclose a cause of action under s 5(1)(a) of the *CPA*. It follows that the appellant's negligence claim cannot be certified, any common issues amenable to certification being limited to breach of contract, for which no loss or harm is necessary. Accordingly, for the appellant to succeed in having her claim in breach of contract certified, she must establish that the certification judge erred with respect to his preferability analysis under s 5(1)(d) of the *CPA*.

[61] The certification judge held that he would have granted certification of one of the appellant's breach of contract allegations had certification not been denied on the basis a class proceeding was not the preferable procedure.

*C. The Preferability Requirement – s 5(1)(d)*

[62] The certification judge found that all certification requirements had been satisfied, except for preferability: there was an identifiable class of two or more persons (s 5(1)(b)); claims of the class members raised common issues (s 5(1)(c)); and there was a satisfactory representative plaintiff (s 5(1)(e)).

[63] Section 5(1)(d) of the *CPA* requires the court be satisfied that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues". This requirement puts an onus on the appellant to prove some basis in fact for two things: "(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims": ***AIC Limited v Fischer***, 2013 SCC 69 [***AIC***] at para 48.

[64] Preferability involves focusing on the common issues "in the context of the action as a whole and 'must take into account the importance of the common issues in relation to the claims as a whole'": ***AIC*** at para 21, citing ***Hollick*** at para 30. Accordingly, it is important to understand what the certification judge determined with respect to the commonality requirement under s 5(1)(c) of the *CPA*.

[65] Of significance is the common issue found by the certification judge in relation to breach of contract. While denying certification of the breach of contract claim based on Uber's storage of the data in the cloud, the certification judge would have permitted the claim based on Uber's failure to notify its users of the data breach as contrary to an implied term of the contract: Decision at paras 64, 66. The following common issue was accordingly amenable to certification[2]:

> 1. Did the Defendants breach their obligations to protect the Class Members' personal information under the contract with the Class Members?
>
> ...

[2] This is presumably based on the fact that all members of the proposed class action were subject to the same contract. Certification of contract claims for data breaches can falter under the commonality requirement (s 5(1)(c)) where not all class members are subject to the same contract: ***Grossman v Nissan Canada***, 2019 ONSC 6180 at paras 26, 53; ***Kaplan*** at paras 71, 90.

> (b) Did Uber breach the terms of the agreement and its obligations under the privacy policies by concealing the Uber hack and failing to inform Class members that their personal information had been exposed to unauthorized third parties?

The certification judge would also have sent to trial as a common issue the question of nominal damages and their compatibility with other types of damages.

[66] As noted, breach of contract is actionable without a party having to suffer a loss. Where there is a breach but no damage or loss flowing from that breach, nominal damages are available: ***Atlantic Lottery*** at paras 67, 105; ***RINC Consulting Inc. (Roustan Capital) v Grant Thornton LLP***, 2020 ONCA 182 at para 52. The amount awarded in nominal damages is usually trivial, though such an award is to be distinguished from compensatory damages in a small amount: ***Tucci CA*** at para 121. Compensatory damages require proof of loss because without a loss there is nothing to compensate: ***Sharp*** at para 113. Conversely, nominal damages are received to vindicate a right while having lost nothing; they are sometimes described as symbolic in nature.

[67] The question, then, is whether a class proceeding is the preferable procedure for resolving the proposed class members' claims in breach of contract for nominal damages in light of the action as a whole.

[68] The certification judge determined that a class proceeding would not be the preferable procedure in this case: there would be no benefit to judicial economy given that it is not clear that class-wide harm can be established, determining damages might require individual assessments for each class member, and there is no evidence of actual loss or harm so it is difficult to say whether resolving the common issues would significantly advance the action: Decision at paras 103-104. Moreover, it would not improve access to justice because damages are at best nominal (para 105), and while there may be some small benefit with respect to behavioural modification, that alone does not "bootstrap" to certification a case that seems "hopeless for recovery of actual losses" (paras 109, 115).

[69] A certification judge's decision on preferability is entitled to particular deference because it involves weighing and balancing a number of factors: ***AIC*** at para 65. In our view, the appellant has failed to demonstrate any error in principle by the certification judge or that his decision was clearly wrong.

[70] Preferability should consider "all reasonably available means of resolving the class members' claims' including avenues of redress other than court actions": ***AIC*** at para 19, citing ***Hollick*** at para 31. Such an inquiry has to be conducted through the lens of the three principal goals of class actions: judicial economy, behaviour modification and access to justice: ***AIC*** at para 22; ***Hollick*** at para 27. This is a *comparative* exercise, however, since the ultimate question is not whether a class proceeding will meet these goals, but rather "whether other available means of resolving the claim are preferable": ***AIC*** at para 23. Accordingly, the focus is "not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action

suit over whatever other forms of litigation [and, I would add, dispute resolution] might be realistically available to the plaintiffs": *ibid*, citing ***Klay v Humana, Inc.***, 382 F.3d 1241 at 1269 (11th Cir 2004) (emphasis added).



[71] It is clear that the certification judge used his "gatekeeping function" under s 5(1)(d) to deny certification because the claim did not have what he considered to be sufficient merit in the form of some evidence or "some basis in fact" for "real" harm or loss. This was identified at the outset as the "real issue".

[72] While the certification judge acknowledged that nominal damages can be claimed in breach of contract, the implication in his reasons is that nominal damages should not be certified in a class action. To be sure, breach of contract claims have been certified in data breach class actions notwithstanding a lack of damage or loss, thereby contemplating nominal damages: ***Condon v Canada***, 2014 FC 250 [***Condon FC***] at paras 49-51, var'd on other grounds in ***Condon CA***; ***Tucci SC*** at paras 110-111, 195, aff'd ***Tucci CA***; ***Agnew-Americano v Equifax Canada Co.***, 2019 ONSC 7110 at paras 295-301, var'd on other grounds in ***Equifax***. This has led authors in the area to remark, in response to ***Condon FC*** in particular, that "[i]t follows that allegations of breach of contract, even when the damages claims are nominal rather than real, can justify certification of a privacy or data-protection class action": Shaun E. Finn & Danielle Miller Olofsson, *Privacy and Data-Protection Class Actions in Canada: A Practical Handbook* (Toronto: Thomson Reuters, 2020) at 104.

[73] Certification of claims for nominal damages in breach of contract are usually made in the context of other causes of action also being certified. When the entirety of the class action is for nominal damages, the court can properly ask what purpose the action serves in the context of the objectives of class proceedings: ***Flesch*** at para 89.

[74] Determining the common issues related to breach of contract and nominal damages in a class proceeding is clearly preferable to each class member bringing an individual suit, which would number in the thousands and, as the certification judge himself recognized, would be economically unfeasible. This is inevitably the case when class actions are compared to traditional litigation, but in a case limited to nominal damages, the issue is less straightforward. Since a claim for nominal damages can be as low as $1, and is not compensatory in nature, it is difficult to imagine many individuals being motivated to expend the time or energy to advance a suit, even if the economics of pursuing a claim was not an issue. In this regard, it was open to the certification judge to conclude that access to justice issues did not prevail.

[75] Further, in considering judicial economy, it was open to the certification judge to weigh the considerable judicial resources to be expended, against the nature of the claim and its impact on class members: ***Hollick*** at para 29; ***AIC*** at para 21. This is not an impermissible assessment of the merits of the action, it is a critical look at the entirety of the action and what it hopes to achieve.

[76] Finally, on the issue of behaviour modification, the appellant emphasized the deleterious effect of allowing corporations like Uber to gather personal information with virtual impunity, arguing that the goal of behaviour modification would be achieved here, where a nominal damage award of $100 to each of the roughly 800,000 class members would result in a sizable judgment. The certification judge concluded that certification may have some incremental merit on the facts of this case but was not necessary to achieve the goal of behaviour modification.

[77] Even accepting the nominal damage award that the appellant suggests – amounting to 80 million dollars for the whole class – we are not persuaded that this has any additional behaviour modification benefit in this case. We are satisfied that the significant regulatory penalties already imposed – including approximately 194 million dollars in fines in the United States, United Kingdom and the Netherlands and an order from United States authorities that Uber maintain a robust privacy protection program for twenty years – suffice to alter the behaviour of both Uber and others in its position. Any incremental behavioural modification benefit of a damage award is negligible – certainly not enough to warrant a class proceeding: see ***Fisher*** at paras 16, 77. These regulatory sanctions, together with the negative press coverage, ostensibly have an appreciable deterrent effect on other potential wrongdoers: see ***Pro-Sys Consultants Ltd v Infineon Technologies AG***, 2009 BCCA 503 at para 73, leave to appeal to SCC refused, 33522 (3 June 2010).

**Conclusion**

[78] The appeal is dismissed.

Appeal heard on April 7, 2022

Memorandum filed at Calgary, Alberta
this 7th day of February, 2023

Wakeling J.A.

Pentelechuk J.A.

Authorized to sign for: Ho J.A.

**Appearances:**

C.G. Jensen, K.C.
K. Ervin
S.A. Carrie
L. Brasil
for the Appellant

D.M. Peebles
K.L. Smyth
C.H. Thomson
for the Respondents

# TAB 5

**Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, The Royal Trust Company, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill**
*Appellants/Respondents on cross-appeal*

*v.*

**Western Canadian Shopping Centres Inc. and Muh-Min Lin and Hoi-Wah Wu, representatives of all holders of Class "A", Class "E" and Class "F" Debentures issued by Western Canadian Shopping Centres Inc.** *Respondents/Appellants on cross-appeal*

**Bennett Jones Verchere, Garnet Schulhauser, Arthur Andersen & Co., Ernst & Young, Alan Lundell, La Compagnie Trust Royal, William R. MacNeill, R. Byron Henderson, C. Michael Ryer, Gary L. Billingsley, Peter K. Gummer, James G. Engdahl, Jon R. MacNeill** *Appelants/Intimés au pourvoi incident*

*c.*

**Western Canadian Shopping Centres Inc. et Muh-Min Lin et Hoi-Wah Wu, représentants de tous les porteurs de débentures de catégories « A », « E » et « F » émises par Western Canadian Shopping Centres Inc.** *Intimés/Appelants au pourvoi incident*

**INDEXED AS: WESTERN CANADIAN SHOPPING CENTRES INC. *v.* DUTTON**

**Neutral citation: 2001 SCC 46.**

File No.: 27138.

Hearing and judgment: December 13, 2000.

Reasons delivered: July 13, 2001.

Present: McLachlin C.J. and L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour and LeBel JJ.

**RÉPERTORIÉ : WESTERN CANADIAN SHOPPING CENTRES INC. *c.* DUTTON**

**Référence neutre : 2001 CSC 46.**

N° du greffe : 27138.

Audition et jugement : 13 décembre 2000.

Motifs déposés : 13 juillet 2001.

Présents : Le juge en chef McLachlin et les juges L'Heureux-Dubé, Gonthier, Iacobucci, Binnie, Arbour et LeBel.

ON APPEAL FROM THE COURT OF APPEAL FOR ALBERTA

EN APPEL DE LA COUR D'APPEL DE L'ALBERTA

*Practice — Class actions — Plaintiffs suing defendants for breach of fiduciary duties and mismanagement of funds — Defendants applying for order to strike plaintiffs' claim to sue in representative capacity — Whether requirements for class action met — If so, whether class action should be allowed — Whether defendants entitled to examination and discovery of each class member — Alberta Rules of Court, Alta. Reg. 390/68, Rule 42.*

*Pratique — Recours collectifs — Action intentée pour manquement à des obligations fiduciaires et mauvaise gestion de fonds — Requête en radiation d'une demande visant à poursuivre en qualité de représentants — Les conditions du recours collectif sont-elles réunies? — Le recours collectif doit-il être autorisé? — Les défendeurs peuvent-ils procéder à l'examen et à l'interrogatoire préalable de chaque membre du groupe? — Alberta Rules of Court, Alta. Reg. 390/68, règle 42.*

L and W, together with 229 other investors, became participants in the federal government's Business Immigration Program by purchasing debentures in WCSC,

L et W, ainsi que 229 autres investisseurs, ont participé au Programme fédéral d'immigration des gens d'affaires en achetant des débentures de WCSC qui

which was incorporated by D, its sole shareholder, for the purpose of helping investor-class immigrants qualify as permanent residents in Canada. WCSC solicited funds through two offerings to invest in income-producing properties. After the investors' funds were deposited, WCSC purchased from CRI, for $5,550,000, the rights to a Crown surface lease and also agreed to commit a further $16.5 million for surface improvements. To finance WCSC's obligations to CRI, D directed that the Series A debentures be issued in an aggregate principal amount of $22,050,000 to some of the investors. D advanced more funds to CRI and corresponding debentures were issued, in particular the Series E and F debentures. Eventually, the debentures were pooled. When CRI announced that it could not pay the interest due on the debentures, L and W, the representative plaintiffs, commenced a class action complaining that D and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging their funds. The defendants applied to the Court of Queen's Bench for a declaration and order striking that portion of the claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge denied the application. The majority of the Court of Appeal upheld that decision but granted the defendants the right to discovery from each of the 231 plaintiffs. The defendants appealed to this Court, and the plaintiffs cross-appealed taking issue with the Court of Appeal's allowance of individualized discovery from each class member.

*Held*: The appeal should be dismissed and the cross-appeal allowed.

In Alberta, class-action practice is governed by Rule 42 of the *Alberta Rules of Court* but, in the absence of comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them. Class actions should be allowed to proceed under Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of law or fact common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh

avait été constituée en société par D, son unique actionnaire, dans le but de faciliter à des immigrants investisseurs l'obtention du statut de résident permanent au Canada. WCSC a sollicité des fonds dans deux offres d'investissement dans des propriétés de rapport. Après le dépôt des fonds des investisseurs, WCSC a acheté à CRI, pour la somme de 5 550 000 $, les droits sur un bail de surface visant des terres publiques et s'est engagé à verser 16,5 millions de dollars supplémentaires pour des améliorations de surface. Pour financer les obligations de WCSC envers CRI, D a demandé l'émission des débentures de la série A pour un montant total en principal de 22 050 000 $ à certains investisseurs. D a avancé des fonds additionnels à CRI et des débentures correspondantes ont été émises, notamment les débentures des séries E et F. Les débentures ont été regroupées par la suite. Quand CRI a annoncé qu'elle ne pouvait pas payer les intérêts sur les débentures, L et W, les représentants des demandeurs, ont intenté un recours collectif alléguant que D et divers associés et sociétés apparentées de WCSC avaient manqué à leurs obligations fiduciaires envers les investisseurs par une mauvaise gestion de leurs fonds. Les défendeurs ont demandé à la Cour du Banc de la Reine un jugement déclaratoire et une ordonnance radiant la partie de la déclaration dans laquelle les demandeurs disaient représenter, en vertu de la règle 42 des *Alberta Rules of Court* un groupe de 231 investisseurs. Le juge en chambre a rejeté la demande. La majorité en Cour d'appel a maintenu sa décision mais a accordé aux défendeurs le droit de faire l'interrogatoire préalable de chacun des 231 demandeurs. Les défendeurs ont fait appel devant notre Cour et les demandeurs ont fait un appel incident contre la décision de la cour d'appel d'autoriser l'interrogatoire individuel de chaque membre du groupe.

*Arrêt* : L'appel est rejeté et le pourvoi incident est accueilli.

En Alberta, la procédure des recours collectifs est régie par la règle 42 des *Alberta Rules of Court*, mais en l'absence de législation complète, les tribunaux doivent combler les lacunes en exerçant leur pouvoir inhérent d'établir les règles de pratique et de procédure applicables aux litiges dont ils sont saisis. Les recours collectifs devraient être autorisés en vertu de la règle 42 lorsque les conditions suivantes sont réunies : (1) le groupe peut être clairement défini; (2) des questions de droit ou de fait sont communes à tous les membres du groupe; (3) le succès d'un membre du groupe signifie le succès de tous; et (4) le représentant proposé représente adéquatement les intérêts du groupe. Si ces conditions sont réunies, le tribunal doit également être convaincu, dans

the benefits of allowing the class action to proceed. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness. The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious". On procedural matters, all potential class members should be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out. This should be done before any decision is made that purports to prejudice or otherwise affect the interests of class members. The court also retains discretion to determine how the individual issues should be addressed, once common issues have been resolved. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis in a flexible and liberal manner, seeking a balance between efficiency and fairness.

l'exercice de son pouvoir discrétionnaire, qu'il n'existe pas de considérations défavorables qui l'emportent sur les avantages que comporte l'autorisation d'un recours collectif. Le tribunal devrait prendre en considération les avantages que le recours collectif offre dans les circonstances de l'affaire ainsi que les injustices qu'il peut provoquer. En fin de compte, le tribunal doit concilier efficacité et équité. La nécessité de concilier efficacité et équité démentit l'idée qu'un recours collectif ne devrait être radié que lorsque le vice est « évident et manifeste ». En matière de procédure, tous les participants possibles devraient être informés de l'existence de la poursuite, des questions communes que la poursuite cherche à résoudre ainsi que du droit de chaque membre du groupe de se retirer, et ce avant que ne soit rendue une décision pouvant avoir une incidence, défavorable ou non, sur les intérêts des membres du groupe. Le tribunal conserve le pouvoir discrétionnaire de déterminer comment les questions individuelles devraient être abordées, une fois que les questions communes ont été résolues. Sans législation complète en matière de recours collectif, les tribunaux doivent régler les complications procédurales cas par cas, de manière souple et libérale, en cherchant à concilier efficacité et équité.

In this case, the basic conditions for a class action are met and efficiency and fairness favour permitting it to proceed. The defendants' contentions against the suit were unpersuasive. While differences exist among investors, the fact remains that the investors raise essentially the same claims requiring resolution of the same facts. If material differences emerge, the court can deal with them when the time comes. Further, a class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance to establish breach of fiduciary duty, the court may then consider whether the class action should continue. The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

En l'espèce, les conditions essentielles à l'exercice d'un recours collectif sont réunies et l'efficacité et l'équité militent en faveur de son autorisation. Les arguments des défendeurs contre le recours ne sont pas convaincants. Si des différences existent entre les investisseurs, le fait est qu'ils ont essentiellement les mêmes revendications qui exigent la résolution des mêmes faits. Si des différences importantes surviennent, le tribunal peut régler la question le moment venu. De plus, on ne devrait pas interdire un recours collectif en raison de l'incertitude relative à la résolution de questions communes à tous les membres du groupe. Si on juge que les investisseurs doivent faire la preuve d'un lien de confiance individuel pour établir le manquement aux obligations fiduciaires, le tribunal peut alors décider si le recours collectif doit ou non se poursuivre. Cela s'applique aussi à l'argument selon lequel des défenses différentes seront invoquées envers différents membres du groupe. Cette simple possibilité n'interdit pas le recours collectif. Si différentes défenses sont invoquées, le tribunal peut alors résoudre le problème ou retirer l'autorisation du recours collectif.

Finally, to allow individualized discovery at this stage of the proceedings would be premature. The defendants should be allowed to examine the representative plaintiffs as of right but examination of other class members

Enfin, il serait prématuré d'autoriser l'interrogatoire préalable individuel à cette étape-ci. Les défendeurs devraient être autorisés à interroger les représentants des demandeurs comme ils en ont le droit, mais l'interroga-

should be available only by order of the court, upon the defendants showing reasonable necessity.

toire des autres membres du groupe ne devrait être autorisé que par ordonnance de la cour, si les défendeurs prouvent que cela est raisonnablement nécessaire.



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*Code of Civil Procedure*, R.S.Q., c. C-25, Book IX, arts. 1003, 1039.
*Federal Rules of Civil Procedure*, 28 U.S.C.A. § 23.
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APPEAL and CROSS-APPEAL from a judgment of the Alberta Court of Appeal (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No.1364 (QL), 1998 ABCA 392, dismissing an appeal from a decision of the Court of Queen's Bench (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Appeal dismissed and cross-appeal allowed.

*Barry R. Crump*, *Brian Beck* and *David C. Bishop*, for the appellants/respondents on cross-appeal.

*Hervé H. Durocher* and *Eugene J. Erler*, for the respondents/appellants on cross-appeal.

The judgment of the Court was delivered by

THE CHIEF JUSTICE — This appeal requires us to decide when a class action may be brought. While the class action has existed in one form or another for hundreds of years, its importance has increased of late. Particularly in complicated cases implicating the interests of many people, the class action may provide the best means of fair and efficient resolution. Yet absent legislative direction, there remains considerable uncertainty as to the conditions under which a court should permit a class action to be maintained.

POURVOI et POURVOI INCIDENT contre un arrêt de la Cour d'appel de l'Alberta (1998), 73 Alta. L.R. (3d) 227, 228 A.R. 188, 188 W.A.C. 188, 30 C.P.C. (4th) 1, [1998] A.J. No. 1364 (QL), 1998 ABCA 392, qui a rejeté un appel d'une décision de la Cour du Banc de la Reine (1996), 41 Alta. L.R. (3d) 412, 191 A.R. 265, 3 C.P.C. (4th) 329, [1996] A.J. No. 1165 (QL). Pourvoi rejeté et pourvoi incident accueilli.

*Barry R. Crump*, *Brian Beck* et *David C. Bishop*, pour les appelants/intimés au pourvoi incident.

*Hervé H. Durocher* et *Eugene J. Erler*, pour les intimés/appelants au pourvoi incident.

Version française du jugement de la Cour rendu par

LE JUGE EN CHEF — Nous sommes appelés en l'espèce à décider dans quels cas un recours collectif peut être exercé. Le recours collectif existe sous une forme ou une autre depuis des siècles, mais son importance s'est accrue récemment. Il peut fournir le meilleur moyen d'aboutir à une solution juste et efficace, en particulier dans des affaires complexes mettant en jeu les intérêts d'un grand nombre de personnes. Cependant, en l'absence de disposition législative, beaucoup d'incertitude demeure quant aux conditions dans lesquelles un tribunal devrait autoriser l'exercice d'un recours collectif. 1

2 The claimants wanted to immigrate to Canada. To qualify, they invested money in Western Canadian Shopping Centres Inc. ("WCSC"), under the Canadian government's Business Immigration Program. They lost money and brought a class action. The defendants (appellants) claim the class action is inappropriate and ask the Court to strike it out. For the following reasons, I conclude that the claimants may proceed as a class.

I. Facts

3 The representative plaintiffs Muh-Min Lin and Hoi-Wah Wu, together with 229 other investors, became participants in the government's Business Immigration Program of Employment and Immigration Canada by purchasing debentures in WCSC. WCSC was incorporated by Joseph Dutton, its sole shareholder, for the purpose of "facilitat[ing] the qualification of the Investors, their spouses, and their never-married children as Canadian permanent residents."

4 WCSC solicited funds through two offerings "to invest in land located in the Province of Saskatchewan for the purpose of developing commercial, non-residential, income-producing properties". The offering memoranda provided that the subscription proceeds would be deposited with an escrow agent, later designated as The Royal Trust Company ("Royal Trust"), and would be released to WCSC upon conditions, subsequently amended.

5 The dispute arises from events after the investors' funds had been deposited with Royal Trust. In May 1990, WCSC entered into a Purchase and Development Agreement ("PDA") with Claude Resources Inc. ("Claude") under which WCSC purchased from Claude, for $5,550,000, the rights to a Crown surface lease adjacent to Claude's "Seabee" gold deposits in northern Saskatchewan. WCSC also agreed to commit a further $16.5 million for surface improvements and for the construction of a gold mill, which would be owned by WCSC. A lease agreement executed in tandem with the PDA leased the not-yet-constructed gold

Les demandeurs souhaitaient immigrer au Canada. Pour être admissibles, dans le cadre du Programme d'immigration des gens d'affaires établi par le gouvernement canadien, ils ont investi dans la société Western Canadian Shopping Centres Inc. (« WCSC »). Ils ont perdu de l'argent et ont intenté un recours collectif. Les défendeurs (appelants) contestent l'opportunité du recours collectif et demandent à la Cour de le radier. Pour les motifs qui suivent, je conclus que les demandeurs peuvent exercer un recours collectif.

I. Les faits

Les demandeurs Muh-Min Lin et Hoi-Wah Wu, ainsi que 229 autres investisseurs, ont participé au Programme d'immigration des gens d'affaires d'Emploi et Immigration Canada en achetant des débentures de WCSC. WCSC a été constituée en société par Joseph Dutton, son unique actionnaire, dans le but de [TRADUCTION] « faciliter pour les investisseurs, leurs conjoints et leurs enfants jamais mariés l'obtention du statut de résident permanent au Canada ».

WCSC sollicite des fonds dans deux offres [TRADUCTION] « d'investissement dans des terrains situés dans la province de la Saskatchewan en vue de développer des biens productifs à usage commercial, non résidentiel ». Les notices d'offre prévoient que les produits de la souscription seront déposés auprès d'un dépositaire légal, plus tard désigné comme La Compagnie Trust Royal (« Trust Royal »), et seront remis à WCSC sous certaines conditions, modifiées par la suite.

Le litige découle d'événements survenus après le dépôt des fonds des investisseurs auprès de Trust Royal. En mai 1990, WCSC conclut une convention d'achat et de développement (« CAD ») avec Claude Resources Inc. (« CRI »), aux termes de laquelle WCSC achète à CRI, pour la somme de 5 550 000 $, les droits sur un bail de surface visant des terres publiques adjacentes aux gisements d'or « Seabee » de CRI dans le Nord de la Saskatchewan. WCSC accepte également de s'engager à verser 16,5 millions de dollars supplémentaires pour des améliorations de surface et pour la construction d'une usine de traitement de l'or, qui appar-

mill and related facilities, together with the surface lands, back to Claude. The payments required of Claude under that lease agreement matched the semi-annual interest payments required of WCSC with respect to the investors.

tiendra à WCSC. Une convention de bail, signée en même temps que la CAD, prévoit la location à CRI de l'usine de traitement de l'or et des installations connexes qui ne sont pas encore construites, avec les terrains de surface. Les paiements que CRI doit effectuer en vertu de cette convention de bail équivalent aux versements d'intérêts semestriels exigés de WCSC relativement aux investisseurs.

To finance WCSC's obligations under the PDA with Claude, Dutton directed Royal Trust to issue debentures in an aggregate principal amount of $22,050,000 to a subset of the investors who had subscribed by that point. Royal Trust did so by issuing "Series A" debentures to 142 investors. After the debentures were issued, WCSC distributed an update letter to its investors, describing the investment in Claude.

6 Pour financer les obligations de WCSC selon la CAD conclue avec CRI, Dutton demande à Trust Royal d'émettre des débentures pour un montant total en principal de 22 050 000 $ à un sous-ensemble d'investisseurs qui ont déjà contribué à cette étape. Trust Royal émet donc des débentures de « série A » à 142 investisseurs. Après l'émission des débentures, WCSC distribue une lettre d'information à ses investisseurs qui décrit l'investissement dans CRI.

In a separate series of transactions executed around the same time, Dutton and Claude entered into an agreement by which (1) Dutton effectively conveyed to Claude 49 percent of his shares in WCSC; (2) Claude paid Dutton $1.6 million in cash; (3) Claude advanced Dutton a $1.6 million non-recourse loan; (4) Dutton entered into an employment contract with Claude for a salary of $50,000 per year; and (5) Claude and Dutton's management company, J.M.D. Management Ltd., entered into a management contract for $200,000 per year. It appears that WCSC did not distribute an update letter to its investors describing this series of transactions.

7 Dans une série distincte d'opérations effectuées vers la même époque, Dutton et CRI concluent une entente aux termes de laquelle (1) Dutton transfère dans les faits à CRI 49 pour 100 de ses actions dans WCSC; (2) CRI verse à Dutton 1,6 million de dollars comptant; (3) CRI consent à Dutton un prêt sans recours de 1,6 million de dollars; (4) Dutton conclut un contrat de travail avec CRI pour un salaire annuel de 50 000 $; et (5) CRI et la société de gestion de Dutton, J.M.D. Management Ltd., signe un contrat de gestion de 200 000 $ par an. Il semble que WCSC n'ait pas envoyé à ses investisseurs de lettre décrivant cette série d'opérations.

Over the next months, Dutton advanced more funds to Claude and directed Royal Trust to issue corresponding debentures. Of particular relevance to the instant dispute are the Series E debentures issued in December 1990 (aggregate principal of $2.56 million), and the Series F debentures issued in May 1991 (aggregate principal of $9.45 million). When the Series E debentures were issued, the Series A and E debentures were pooled, so that investors in those series became entitled to a *pro rata* claim on the total security pledged with respect to the two series. When the Series F debentures were issued, the security for that series was

8 Au cours des mois suivants, Dutton avance des fonds additionnels à CRI et demande à Trust Royal d'émettre des débentures correspondantes. Les débentures de série E émises en décembre1990 (montant total en principal de 2,56 millions de dollars), et les débentures de série F émises en mai 1991 (montant total en principal de 9,45 millions de dollars) sont particulièrement importantes dans le litige. Quand les débentures de série E sont émises, les débentures de séries A et E sont regroupées, de sorte que les investisseurs de ces séries ont acquis un droit au prorata sur la garantie totale engagée relativement aux deux séries. Quand les

pooled with the security that had been pledged with respect to the Series A and E debentures. WCSC apparently distributed investor update letters after the issuance of the Series E and F debentures, just as it had done after the issuance of the Series A debentures.

9 In December 1991, Claude announced that it could not pay the interest due on the Series A, E, and F debentures and Muh-Min Lin and Hoi-Wah Wu commenced this action. The gravamen of the complaint is that Dutton and various affiliates and advisors of WCSC breached fiduciary duties to the investors by mismanaging or misdirecting their funds.

## II. Statutory Provisions

10 *Alberta Rules of Court*, Alta. Reg. 390/68

**42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

**129**(1) The court may at any stage of the proceedings order to be struck out or amended any pleading in the action, on the ground that

(a) it discloses no cause of action or defence, as the case may be, or

(b) it is scandalous, frivolous or vexatious, or

(c) it may prejudice, embarrass or delay the fair trial of the action, or

(d) it is otherwise an abuse of the process of the court,

and may order the action to be stayed or dismissed or judgment to be entered accordingly.

(2) No evidence shall be admissible on an application under clause (a) of subrule (1).

(3) This Rule, so far as applicable, applies to an originating notice and a petition.

débentures de série F sont émises, la garantie pour cette série est regroupée avec la garantie qui a été engagée relativement aux débentures de séries A et E. Il semble qu'après l'émission des séries E et F, WCSC ait distribué aux investisseurs des lettres les en informant, comme elle l'avait fait après l'émission des débentures de série A.

En décembre 1991, CRI annonce qu'elle ne peut pas payer les intérêts échus pour les débentures de séries A, E et F et Muh-Min Lin et Hoi-Wah Wu intentent la présente action. Le fondement de la plainte est que Dutton et divers conseillers et sociétés apparentées de WCSC ont manqué à leurs obligations fiduciaires envers les investisseurs par leur mauvaise gestion et le mauvais placement de leurs fonds.

## II. Dispositions législatives

*Alberta Rules of Court*, Alta. Reg. 390/68

[TRADUCTION]

**42** Lorsque de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée, une ou plusieurs d'entre elles peuvent poursuivre, être poursuivies ou être autorisées par la cour à agir en défense au nom ou pour le compte de toutes.

**129**(1) À toute étape des procédures, la cour peut ordonner que soit radié ou modifié un acte de procédure dans une action pour le motif

a) qu'il ne révèle aucune cause d'action ou de défense, selon le cas,

b) qu'il est scandaleux, frivole ou vexatoire,

c) qu'il peut nuire à l'instruction équitable de l'action, ou encore la gêner ou la retarder,

d) qu'il constitue par ailleurs un abus de procédure

et elle peut ordonner la suspension ou le rejet de l'action ou rendre un jugement en conséquence.

(2) Aucune preuve n'est admissible à l'égard d'une demande présentée en vertu de l'alinéa (a) du paragraphe (1).

(3) La présente règle, dans la mesure où elle est applicable, s'applique à un avis introductif d'instance et à une requête.

**187** A person for whose benefit an action is prosecuted or defended or the assignor of a chose in action upon which the action is brought, shall be regarded as a party thereto for the purposes of discovery of documents.

**201** A member of a firm which is a party and a person for whose benefit an action is prosecuted or defended shall be regarded as a party for the purposes of examination.

III. Decisions

The appellants applied to the Court of Queen's Bench of Alberta (1996), 41 Alta. L.R. (3d) 412 for a declaration and order striking that portion of the Amended Statement of Claim in which the individual plaintiffs purport, pursuant to Rule 42 of the *Alberta Rules of Court*, to represent a class of 231 investors. The chambers judge identified four issues: (1) whether the court had the power under Rule 42 to strike the investors' claim to sue in a representative capacity; (2) whether the court was restricted to considering only the Amended Statement of Claim filed; (3) the standard of proof required to compel the court to exercise its discretion to strike the representative claim; and (4) whether, in this case, this standard was met.

On the first issue, the chambers judge relied on the decision of Master Funduk in *353850 Alberta Ltd. v. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL), to conclude that the court has the power, under Rule 42, to strike a claim made by plaintiffs to sue in a representative capacity.

On the second issue, the chambers judge held that the court need not limit its inquiry to the pleadings, relying on *353850 Alberta*, *supra*, and on the decision of the British Columbia Supreme Court in *Shaw v. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774. He concluded, however, that resolution of the case before him did not require resort to the affidavit evidence.

On the third issue, the chambers judge concluded that the court should strike a representative claim under Rule 42 only if it is "entirely clear" or

**187** La personne pour le compte de qui une action est intentée ou contestée ou le cédant d'un droit d'action qui a donné lieu à l'action sont considérés comme partie à l'action aux fins de la communication de documents.

**201** Le membre d'une entreprise qui est une partie et la personne pour le compte de qui une action est intentée ou contestée sont considérés comme partie à l'action aux fins de l'interrogatoire.

III. Décisions

11 Les appelants demandent à la Cour du Banc de la Reine de l'Alberta (1996), 41 Alta. L.R. (3d) 412, un jugement déclaratoire et une ordonnance radiant la partie de la déclaration modifiée dans laquelle les particuliers demandeurs disent représenter un groupe de 231 investisseurs, en vertu de la règle 42 des *Alberta Rules of Court*. Le juge en chambre formule quatre questions : (1) La cour a-t-elle le pouvoir en vertu de la règle 42 de radier la demande des investisseurs d'intenter une action en qualité de représentants? (2) La cour doit-elle tenir seulement compte de la déclaration modifiée? (3) Quelle est la norme de preuve exigée pour que la cour exerce son pouvoir discrétionnaire de radier la demande de recours collectif? (4) Cette norme est-elle respectée en l'espèce?

12 Sur la première question, le juge en chambre, citant la décision du protonotaire Funduk dans *353850 Alberta Ltd. c. Horne & Pitfield Foods Ltd.*, [1989] A.J. No. 652 (QL), juge que la règle 42 donne à la cour le pouvoir de radier une demande visant à intenter une action en qualité de représentant.

13 Sur la deuxième question, le juge en chambre conclut que la cour n'est pas tenue de limiter son examen aux actes de procédure, se fondant sur la décision *353850 Alberta*, précitée, et sur la décision de la Cour suprême de la Colombie-Britannique dans *Shaw c. Real Estate Board of Greater Vancouver* (1972), 29 D.L.R. (3d) 774. Il conclut toutefois que la résolution du litige dont il est saisi n'exige pas de recourir à la preuve par affidavit.

14 Sur la troisième question, le juge en chambre est d'avis que la cour ne devrait radier un recours collectif aux termes de la règle 42 que s'il est [TRA-

"beyond doubt" or "plain and obvious" that the claim is deficient — the standard applied to applications to strike pleadings for disclosing no reasonable claim: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959.

15 On the final issue, the chambers judge, applying the "plain and obvious" rule, concluded that the Amended Statement of Claim was not deficient under Rule 42 and met the requirements set out in *Korte v. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (C.A.): (1) that the class be capable of clear and definite definition; (2) that the principal issues of law and fact be the same; (3) that one plaintiff's success would necessarily mean success for all members of the plaintiff class; and (4) that the resolution of the dispute not require any individual assessment of the claims of individual class members. However, he left the matter open to review by the trial judge.

16 The Alberta Court of Appeal, *per* Russell J.A. (for the majority), dismissed the appeal, Picard J.A., dissenting: (1998), 73 Alta. L.R. (3d) 227. The majority rejected the argument that the chambers judge should have conclusively resolved the Rule 42 issue rather than left it open to the trial judge, citing *Oregon Jack Creek Indian Band v. Canadian National Railway Co.*, [1989] 2 S.C.R. 1069, in which this Court left to the trial judge the issue of whether the plaintiffs were authorized to sue on behalf of a broader class. The majority also rejected the argument that the investors must show individual reliance to succeed. However, it granted the defendants the right to discovery from each of the 231 plaintiffs on the grounds that Rule 201, read with Rule 187, allows discovery from any person for whose benefit an action is prosecuted or defended and that the defendants should not be barred from developing an argument based on actual reliance merely because it was speculative.

DUCTION] « tout à fait clair », « hors de tout doute » ou « évident et manifeste » que la demande est viciée — critère appliqué aux demandes de radiation d'actes de procédure ne révélant aucune demande raisonnable : *Hunt c. Carey Canada Inc.*, [1990] 2 R.C.S. 959.

Sur la dernière question, le juge en chambre, appliquant le critère du caractère « évident et manifeste », conclut que la déclaration modifiée n'est pas viciée en regard de la règle 42 et satisfait aux exigences énoncées dans *Korte c. Deloitte, Haskins & Sells* (1993), 8 Alta. L.R. (3d) 337 (C.A.) : (1) le groupe peut être défini clairement et précisément; (2) les principales questions de droit et de fait doivent être les mêmes; (3) une issue favorable à un demandeur signifie nécessairement une issue favorable à tous les membres du groupe de demandeurs; et (4) le règlement du litige ne doit pas exiger l'examen individuel des revendications de chaque membre du groupe. Cependant, il laisse au juge de première instance le soin de réexaminer la question.

Le juge Russell au nom de la majorité de la Cour d'appel de l'Alberta rejette l'appel, le juge Picard étant dissidente : (1998), 73 Alta. L.R. (3d) 227. La majorité rejette l'argument selon lequel le juge en chambre aurait dû régler de façon définitive la question de la règle 42 plutôt que d'en laisser décider le juge de première instance, en citant l'arrêt *Bande indienne Oregon Jack Creek c. Compagnie des chemins de fer nationaux du Canada*, [1989] 2 R.C.S. 1069, dans lequel notre Cour a laissé le juge de première instance décider si les demandeurs étaient autorisés à poursuivre pour le compte d'un groupe plus important. La majorité rejette également l'argument selon lequel les investisseurs doivent faire la preuve d'un lien de confiance individuel pour obtenir gain de cause. Elle accorde toutefois aux défendeurs le droit à l'interrogatoire préalable de chacun des 231 demandeurs au motif que la règle 201, interprétée de concert avec la règle 187, autorise l'interrogatoire préalable de toute personne pour le compte de qui l'action est intentée ou contestée et qu'il ne devrait pas être interdit aux défendeurs d'élaborer un argument fondé sur le véritable lien de confiance simplement parce qu'il est spéculatif.

Picard J.A., would have allowed the appeal. In her view, the Chambers judge erred in deferring the matter to the trial judge because, unlike *Oregon Jack Creek*, the case was narrow and "a great deal of relevant evidence was available to the court to allow it to make a decision" (p. 235). The need to show individual reliance was only one of many problems that the investors would face if allowed to proceed as a class. Citing this Court's decisions in *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, and *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, she concluded that "[t]he extent of fiduciary duties in a particular case requires a meticulous examination of the facts, particularly of any contract between the parties" (p. 237). She concluded that "[t]his responsibility of proof by the [investors] cannot possibly be met by a representative action nor by giving a right of discovery of the 229 other parties to the action" (p. 237).

17 Le juge Picard aurait accueilli l'appel. À son avis, le juge en chambre a eu tort de renvoyer la question au juge de première instance parce que, contrairement à *Oregon Jack Creek*, l'affaire est limitée et que [TRADUCTION] « la cour disposait d'une preuve importante qui lui permettait de prendre une décision » (p. 235). Le besoin de faire la preuve d'un lien de confiance individuel est simplement l'un des nombreux problèmes auxquels les investisseurs auront à faire face s'ils sont autorisés à intenter un recours collectif. Citant les arrêts de notre Cour *Lac Minerals Ltd. c. International Corona Resources Ltd.*, [1989] 2 R.C.S. 574, et *Hodgkinson c. Simms*, [1994] 3 R.C.S. 377, elle conclut que [TRADUCTION] « [l']étendue de l'obligation fiduciaire dans une affaire donnée exige l'examen rigoureux des faits, en particulier de tout contrat entre les parties » (p. 237). Elle juge que [TRADUCTION] « [l]a responsabilité de la preuve incombant aux investisseurs ne peut pas être assumée par un recours collectif, ni par l'attribution d'un droit à l'interrogatoire préalable des 229 autres parties à l'action » (p. 237).

## IV. Issues

1. Did the courts below apply the proper standard in determining whether the investors had satisfied the requirements for a class action under Rule 42?
2. Did the courts below err in denying defendants' motion to strike under Rule 42?
3. If the class action is allowed, should the defendants have the right to full oral and documentary discovery of all class members?

## IV. Questions en litige

18
1. Les tribunaux d'instance inférieure ont-ils appliqué le bon critère pour décider si les investisseurs satisfaisaient aux exigences du recours collectif en vertu de la règle 42?
2. Les tribunaux d'instance inférieure ont-ils fait erreur en rejetant la requête en radiation en vertu de la règle 42?
3. Si le recours collectif est autorisé, les défendeurs devraient-ils avoir droit à l'interrogatoire préalable et à la communication des documents de tous les membres du groupe?

## V. Analysis

### A. *The History and Functions of Class Actions*

The class action originated in the English courts of equity in the late seventeenth and early eighteenth centuries. The courts of law focussed on individual questions between the plaintiff and the defendant. The courts of equity, by contrast, applied a rule of compulsory joinder, requiring all those interested in the subject matter of the dispute

## V. Analyse

### A. *L'historique et le rôle des recours collectifs*

19 Le recours collectif a pris naissance devant les tribunaux anglais d'equity à la fin du XVII^e^ siècle et au début du XVIII^e^. Les cours de common law s'intéressaient principalement aux litiges individuels entre demandeurs et défendeurs. En revanche, les cours d'equity appliquaient la règle de la jonction obligatoire d'instances qui exigeait que

to be made parties. The aim of the courts of equity was to render "complete justice" — that is, to "arrang[e] all the rights, which the decision immediately affects": F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2nd ed. 1847), at p. 3; see also C. A. Wright, A. R. Miller and M. K. Kane, *Federal Practice and Procedure* (2nd ed. 1986), at § 1751; J. Story, *Equity Pleadings* (10th ed. 1892), at § 76*a*. The compulsory-joinder rule "allowed the Court to examine every facet of the dispute and thereby ensure that no one was adversely affected by its decision without first having had an opportunity to be heard": J. A. Kazanjian, "Class Actions in Canada" (1973), 11 *Osgoode Hall L.J.* 397, at p. 400. The rule possessed the additional advantage of preventing a multiplicity of duplicative proceedings.

toute personne ayant un intérêt dans l'affaire devienne partie au litige. Le but des cours d'equity était de rendre [TRADUCTION] « justice intégralement » — c'est-à-dire de « statuer sur tous les droits que la décision touche directement » : F. Calvert, *A Treatise Upon the Law Respecting Parties to Suits in Equity* (2e éd. 1847), p. 3; voir également C. A. Wright, A. R. Miller et M. K. Kane, *Federal Practice and Procedure* (2e éd. 1986), par. 1751; J. Story, *Equity Pleadings* (10e éd. 1892), par. 76*a*. La règle de la jonction obligatoire d'instances [TRADUCTION] « permettait à la cour d'examiner tous les aspects du litige et donc de s'assurer que nul ne serait lésé par sa décision sans avoir eu la possibilité de se faire entendre » : J. A. Kazanjian, « Class Actions in Canada » (1973), 11 *Osgoode Hall L.J.* 397, p. 400. La règle avait également l'avantage d'éviter la multiplication des procédures.

20 The compulsory-joinder rule eventually proved inadequate. Applied to conflicts between tenants and manorial lords or between parsons and parishioners, it closed the door to the courts where interested parties in such cases were too numerous to be joined. The courts of equity responded by relaxing the compulsory-joinder rule where strict adherence would work injustice. The result was the representative action. For example, in *Chancey v. May* (1722), Prec. Ch. 592, 24 E.R. 265, members of a partnership were permitted to sue on behalf of themselves and some 800 other partners for misapplication and embezzlement of funds by the partnership's former treasurer and manager. The court allowed the action because "it was in behalf of themselves, and all others the proprietors of the same undertaking, except the defendants, and so all the rest were in effect parties," and because "it would be impracticable to make them all parties by name, and there would be continual abatements by death and otherwise, and no coming at justice, if all were to be made parties" (p. 265); see also Kazanjian, *supra*, at p. 401; G. T. Bispham, *The Principles of Equity* (9th ed. 1916), at para. 415; S. C. Yeazell, "Group Litigation and Social Context: Toward a History of the Class Action" (1977), 77 *Colum. L. Rev.* 866, at pp. 867 and 872; J. K. Bankier, "Class Actions for Mone-

La règle de la jonction obligatoire d'instances s'est finalement avérée inadéquate. Appliquée aux conflits entre tenants et propriétaires terriens ou entre pasteurs et paroissiens, elle fermait la porte des tribunaux à des parties intéressées mais trop nombreuses pour être jointes. Les tribunaux d'equity ont réagi en assouplissant la règle de la jonction obligatoire d'instances lorsque son respect strict donnerait lieu à une injustice. Il en a résulté le recours collectif. Par exemple, dans *Chancey c. May* (1722), Prec. Ch. 592, 24 E.R. 265, des associés ont été autorisés à intenter une action en leur propre nom et au nom de 800 autres associés pour détournement de fonds par d'anciens trésoriers et gestionnaires de la société. La cour a autorisé l'action parce qu'[TRADUCTION] « elle était présentée en leur propre nom, et aux noms de tous les autres propriétaires de la même entreprise, sauf les défendeurs, et donc tous les autres étaient en réalité des parties », et parce qu'« il serait impossible qu'ils soient tous nommément parties, et il y aurait constamment des annulations pour cause de décès ou autres raisons, et que justice ne serait pas rendue si tous étaient parties à l'action » (p. 265); voir également Kazanjian, *loc. cit.*, p. 401; G. T. Bispham, *The Principles of Equity* (9e éd. 1916), par. 415; S. C. Yeazell, « Group Litigation and Social Context : Toward a History of the Class

tary Relief in Canada: Formalism or Function?" (1984), 4 *Windsor Y.B. Access Just.* 229, at p. 236.

Action » (1977), 77 *Colum. L. Rev.* 866, p. 867 et 872; J. K. Bankier, « Les recours collectifs au Canada pour obtenir le dégrèvement financier : formalisme ou fonction? » (1984), 4 *Windsor Y.B. Access Just.* 229, p. 236.



The representative or class action proved useful in pre-industrial English commercial litigation. The modern limited-liability company had yet to develop, and collectives of business people had no independent legal existence. Satisfying the compulsory-joinder rule would have required a complainant to bring before the court each member of the collective. The representative action provided the solution to this difficulty: see Kazanjian, *supra*, at p. 401; Yeazell, *supra*, at p. 867; *City of London v. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (allowing the plaintiff to sue trustees for rent owed, though the beneficiaries of the trust were not joined).

21 Le recours collectif s'est révélé utile dans les litiges commerciaux de l'Angleterre préindustrielle. La société à responsabilité limitée moderne n'existait pas, et les groupes de gens d'affaires n'avaient aucune existence juridique indépendante. Pour satisfaire à la règle de la jonction obligatoire d'instances, il aurait fallu qu'un plaignant traduise devant la cour chaque membre du groupe. Le recours collectif a réglé cette difficulté : voir Kazanjian, *loc. cit.*, p. 401; Yeazell, *loc. cit.*, p. 867; *City of London c. Richmond* (1701), 2 Vern. 421, 23 E.R. 870 (qui a autorisé le demandeur à intenter une action contre des fiduciaires pour des arriérés de loyer sans que les bénéficiaires de la fiducie soient joints comme parties à l'action).

The class action required a common interest between the class members. Many of the early representative actions were brought in the form of "bills of peace", which could be maintained where the interested individuals were numerous, all members of the group possessed a common interest in the question to be adjudicated, and the representatives could be expected fairly to advocate the interests of all members of the group: see Wright, Miller and Kane, *supra*, at § 1751; Z. Chafee, *Some Problems of Equity* (1950), at p. 201, T. A. Roberts, *The Principles of Equity* (3rd ed. 1877), at pp. 389-92; Bispham, *supra*, at para. 417.

22 Le recours collectif exigeait que les membres du groupe aient un intérêt commun. Une grande partie des premiers recours collectifs ont pris la forme d'« actes de conciliation » (*bills of peace*), qui pouvaient être exercés quand les particuliers intéressés étaient nombreux, quand tous les membres du groupe avaient un intérêt commun dans la question à trancher et quand les représentants pouvaient défendre équitablement les intérêts de tous les membres du groupe : voir Wright, Miller et Kane, *op. cit.*, par. 1751; Z. Chafee, *Some Problems of Equity* (1950), p. 201; T. A. Roberts, *The Principles of Equity* (3e éd. 1877), p. 389-392; Bispham, *op. cit.*, par. 417.

The courts of equity applied a liberal and flexible approach to whether a class action could proceed. They "continually sought a proper balance between the interests of fairness and efficiency": Kazanjian, *supra*, at p. 411. As stated in *Wallworth v. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, at p. 244, "it [is] the duty of this Court to adapt its practice and course of proceeding to the existing state of society, and not by too strict an adherence to forms and rules, established under different cir-

23 Les tribunaux d'equity ont adopté une démarche libérale et souple pour décider si un recours collectif pouvait être exercé. Ils ont [TRADUCTION] « toujours recherché un bon équilibre entre équité et efficacité » : Kazanjian, *loc. cit.*, p. 411. Comme le dit *Wallworth c. Holt* (1841), 4 My. & Cr. 619, 41 E.R. 238, p. 244, [TRADUCTION] « la cour a le devoir d'adapter sa pratique et sa procédure à l'état actuel de la société, et non pas, en raison d'un respect trop strict de règles et formalités, adoptées

cumstances, to decline to administer justice, and to enforce rights for which there is no other remedy".

dans d'autres circonstances, de refuser de rendre justice, et d'appliquer des droits pour lesquels il n'existe pas d'autres recours ».

24 This flexible and generous approach to class actions prevailed until the fusion of law and equity under the *Supreme Court of Judicature Act, 1873* (U.K.), 36 & 37 Vict., c. 66, and the adoption of Rule 10 of the *Rules of Procedure*:

La démarche souple et libérale envers les recours collectifs a régné jusqu'à la fusion de la common law et de l'equity par la *Supreme Court of Judicature Act, 1873* (R.-U.), 36 & 37 Vict., ch. 66, et l'adoption de la règle 10 des *Rules of Procedure* :

[TRADUCTION]

10. Where there are numerous parties having the same interest in one action, one or more of such parties may sue or be sued, or may be authorised by the Court to defend in such action, on behalf or for the benefit of all parties so interested.

10. Lorsque de nombreuses parties ont le même intérêt dans une action, l'une ou plusieurs de ces parties peuvent poursuivre ou être poursuivies en justice, ou peuvent être autorisées par la cour à contester une telle action au nom ou pour le compte de toutes les parties ayant cet intérêt.

While early cases under the new rules maintained a liberal approach to class actions (see, e.g., *Duke of Bedford v. Ellis*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.)), later cases sometimes took a restrictive approach (see, e.g., *Markt & Co. v. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.)). This, combined with the widespread use of limited-liability companies, resulted in fewer class actions being brought.

Quoique les premières décisions après l'adoption des nouvelles règles aient maintenu cette démarche libérale envers les recours collectifs (voir, par ex., *Duke of Bedford c. Ellis*, [1901] A.C. 1 (H.L.); *Taff Vale Railway Co. c. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (H.L.)), des décisions postérieures ont parfois suivi une démarche restrictive (voir, par ex., *Markt & Co. c. Knight Steamship Co.*, [1910] 2 K.B. 1021 (C.A.)). Ce fait ajouté à l'usage répandu de la société à responsabilité limitée a eu pour conséquence de faire diminuer le nombre de recours collectifs.

25 The class action did not forever languish, however. Conditions emerged in the latter part of the twentieth century that once again invoked its utility. Mass production and consumption revived the problem that had motivated the development of the class action in the eighteenth century — the problem of many suitors with the same grievance. As in the eighteenth century, insistence on individual representation would often have precluded effective litigation. And, as in the eighteenth century, the class action provided the solution.

Le recours collectif n'a toutefois pas été oublié pour toujours. De nouvelles conditions apparues dans la deuxième moitié du XX$^{e}$ siècle ont une nouvelle fois prouvé son utilité. La production et la consommation de masse ont ravivé le problème qui avait motivé la création du recours collectif au XVIII$^{e}$ siècle — le problème de nombreux poursuivants ayant la même réclamation. Comme au XVIII$^{e}$ siècle, l'exigence d'une représentation individuelle aurait souvent fait obstacle à des poursuites. Et, comme au XVIII$^{e}$ siècle, le recours collectif a fourni la solution.

26 The class action plays an important role in today's world. The rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs have all contributed to its

Le recours collectif joue un rôle important dans le monde d'aujourd'hui. La montée de la production de masse, la diversification de la propriété commerciale, la venue des conglomérats, et la prise de conscience des fautes environnementales

growth. A faulty product may be sold to numerous consumers. Corporate mismanagement may bring loss to a large number of shareholders. Discriminatory policies may affect entire categories of employees. Environmental pollution may have consequences for citizens all over the country. Conflicts like these pit a large group of complainants against the alleged wrongdoer. Sometimes, the complainants are identically situated *vis-à-vis* the defendants. In other cases, an important aspect of their claim is common to all complainants. The class action offers a means of efficiently resolving such disputes in a manner that is fair to all parties.

ont tous contribué à sa croissance. Un produit défectueux peut être vendu à de nombreux consommateurs. Une mauvaise gestion de société peut occasionner des pertes à d'innombrables actionnaires. Des politiques discriminatoires peuvent toucher des catégories entières d'employés. La pollution peut affecter des citoyens à travers tout le pays. Des conflits comme ceux-ci opposent un important groupe de plaignants à l'auteur présumé du méfait. Il arrive que des plaignants se trouvent dans une situation identique par rapport aux défendeurs. Dans d'autres cas, un aspect important de leur revendication est commun à toutes les plaintes. Le recours collectif fournit un moyen de résoudre efficacement de tels litiges d'une manière équitable pour toutes les parties.

Class actions offer three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. The efficiencies thus generated free judicial resources that can be directed at resolving other conflicts, and can also reduce the costs of litigation both for plaintiffs (who can share litigation costs) and for defendants (who need litigate the disputed issue only once, rather than numerous times): see W. K. Branch, *Class Actions in Canada* (1998), at para. 3.30; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (1999), at §1.6; Bankier, *supra*, at pp. 230-31; Ontario Law Reform Commission, *Report on Class Actions* (1982), at pp. 118-19.

27 Les recours collectifs procurent trois avantages importants sur une multiplicité de poursuites individuelles. Premièrement, par le regroupement d'actions individuelles semblables, les recours collectifs permettent de faire des économies au plan judiciaire en évitant la duplication inutile de l'appréciation des faits et de l'analyse du droit. Les gains en efficacité ainsi réalisés libèrent des ressources judiciaires qui peuvent être affectées à la résolution d'autres conflits, et peuvent également réduire le coût du litige à la fois pour les demandeurs (qui peuvent partager les frais) et pour les défendeurs (qui contestent les poursuites une seule fois) : voir W. K. Branch, *Class Actions in Canada* (1998), par. 3.30; M. A. Eizenga, M. J. Peerless et C. M. Wright, *Class Actions Law and Practice* (1999), par. 1.6; Bankier, *loc. cit.*, p. 230-231; Commission de réforme du droit de l'Ontario, *Report on Class Actions* (1982), p. 118-119.

Second, by allowing fixed litigation costs to be divided over a large number of plaintiffs, class actions improve access to justice by making economical the prosecution of claims that would otherwise be too costly to prosecute individually. Without class actions, the doors of justice remain closed to some plaintiffs, however strong their legal claims. Sharing costs ensures that injuries are not left unremedied: see Branch, *supra*, at para. 3.40; Eizenga, Peerless and Wright, *supra*, at §1.7;

28 Deuxièmement, comme les frais fixes peuvent être divisés entre un grand nombre de demandeurs, les recours collectifs donnent un meilleur accès à la justice en rendant économiques des poursuites qui auraient été trop coûteuses pour être intentées individuellement. Sans les recours collectifs, la justice n'est pas accessible à certains demandeurs, même pour des réclamations solidement fondées. Le partage des frais permet de ne pas laisser certains préjudices sans recours : voir Branch, *op. cit.*,

Bankier, *supra*, at pp. 231-32; Ontario Law Reform Commission, *supra*, at pp. 119-22.

29 Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public. Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation: see "Developments in the Law — The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiatives" (2000), 113 *Harv. L. Rev.* 1806, at pp. 1809-10; see Branch, *supra*, at para. 3.50; Eizenga, Peerless and Wright, *supra*, at §1.8; Bankier, *supra*, at p. 232; Ontario Law Reform Commission, *supra*, at pp. 11 and 140-46.

B. *The Test for Class Actions*

30 In recognition of the modern importance of representative litigation, many jurisdictions have enacted comprehensive class action legislation. In the United States, *Federal Rules of Civil Procedure*, 28 U.S.C.A. § 23 (introduced in 1938 and substantially amended in 1966) addressed aspects of class action practice, including certification of litigant classes, notice, and settlement. The English procedural rules of 1999 include detailed provisions governing "Group Litigation": United Kingdom, *Civil Procedure Rules 1998*, SI 1998/3132, rr. 19.10-19.15. And in Canada, the provinces of British Columbia, Ontario, and Quebec have enacted comprehensive statutory schemes to govern class action practice: see British Columbia *Class Proceedings Act*, R.S.B.C. 1996, c. 50; Ontario *Class Proceedings Act, 1992*, S.O. 1992, c. 6; Quebec *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX. Yet other Canadian provinces, including Alberta and Manitoba, are considering enacting

par. 3.40; Eizenga, Peerless et Wright, *op. cit.*, par. 1.7; Bankier, *loc. cit.*, p. 231-232; Commission de réforme du droit de l'Ontario, *op. cit.*, p. 119-122.

Troisièmement, les recours collectifs servent l'efficacité et la justice en empêchant des malfaisants éventuels de méconnaître leurs obligations envers le public. Sans recours collectifs, des personnes qui causent des préjudices individuels mineurs mais répandus pourraient négliger le coût total de leur conduite, sachant que, pour un demandeur, les frais d'une poursuite dépasseraient largement la réparation probable. Le partage des frais diminue le coût des recours en justice et dissuade donc les défendeurs éventuels qui pourraient autrement présumer que de petits méfaits ne donneraient pas lieu à un litige : voir « Developments in the Law — The Paths of Civil Litigation : IV. Class Action Reform : An Assessment of Recent Judicial Decisions and Legislative Initiatives » (2000), 113 *Harv. L. Rev.* 1806, p. 1809-1810; voir Branch, *op. cit.*, par. 3.50; Eizenga, Peerless et Wright, *op. cit.*, par. 1.8; Bankier, *loc. cit.*, p. 232; Commission de réforme du droit de l'Ontario, *op. cit.*, p. 11 et 140-146.

B. *Le critère applicable aux recours collectifs*

En reconnaissance de l'importance moderne du recours collectif, nombre d'autorités législatives ont adopté une législation complète en cette matière. Aux États-Unis, la *Federal Rules of Civil Procedure*, 28 U.S.C.A. § 23 (adoptée en 1938 et modifiée de façon importante en 1966), porte sur des aspects de la pratique du recours collectif, y compris l'accréditation des groupes, les avis et les règlements. Les règles de procédure anglaises de 1999 contiennent des dispositions détaillées régissant les litiges de groupe : Royaume-Uni, *Civil Procedure Rules 1998*, SI 1998/3132, règles 19.10-19.15. Au Canada, les provinces du Québec, de l'Ontario et de la Colombie-Britannique ont adopté des régimes législatifs complets sur la pratique du recours collectif : voir pour le Québec, *Code de procédure civile*, L.R.Q., ch. C-25, livre IX; pour l'Ontario, *Loi de 1992 sur les recours collectifs*, L.O. 1992, ch. 6; pour la Colombie-Britannique, *Class Proceedings Act*, R.S.B.C. 1996, ch. 50.

such legislation: see Manitoba Law Reform Commission, Report #100, *Class Proceedings* (January 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (December 2000); see also R. Rogers, "A Uniform Class Actions Statute", Appendix O to the Proceedings of the 1995 Meeting of The Uniform Law Conference of Canada.

D'autres provinces canadiennes, dont l'Alberta et le Manitoba, envisagent le même type de lois : voir Commission de réforme du droit du Manitoba, Rapport #100, *Class Proceedings* (janvier 1999); Alberta Law Reform Institute, Final Report No. 85, *Class Actions* (décembre 2000); voir aussi R. Rogers, « Vers une loi uniforme sur le recours collectif », Annexe O du Compte-rendu de la réunion de 1995 de la Conférence pour l'harmonisation des lois au Canada.

Absent comprehensive codes of class action procedure, provincial rules based on Rule 10, Schedule, of the English *Supreme Court of Judicature Act, 1873* govern. This is the case in Alberta, where class action practice is governed by Rule 42 of the *Alberta Rules of Court*:

31 En l'absence de règles de procédure complètes en matière de recours collectif, les règles provinciales fondées sur la règle 10 (annexe) de la *Supreme Court of Judicature Act, 1873* s'appliquent. C'est le cas en Alberta, où la procédure en matière de recours collectif est régie par la règle 42 des *Alberta Rules of Court* :

**42** Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

[TRADUCTION]

**42** Lorsque de nombreuses personnes ont un intérêt commun dans l'objet de l'action projetée, une ou plusieurs d'entre elles peuvent poursuivre, être poursuivies ou être autorisées par la cour à agir en défense au nom ou pour le compte de toutes.

The intention of the Alberta legislature is clear. Class actions may be brought. Details of class action practice, however, are largely left to the courts.

L'intention du législateur albertain est claire. On peut intenter des recours collectifs mais les modalités de leur exercice sont en grande partie déterminées par les tribunaux.

Alberta's Rule 42 does not specify what is meant by "numerous" or by "common interest". It does not say when discovery may be made of class members other than the representative. Nor does it specify how notice of the suit should be conveyed to potential class members, or how a court should deal with the possibility that some potential class members may desire to "opt out" of the class. And it does not provide for costs, or for the distribution of the fund should an action for money damages be successful.

32 La règle 42 de l'Alberta ne précise pas ce qu'on entend par « nombreuses » ni par « intérêt commun ». Elle n'indique pas quand les membres du groupe autres que les représentants peuvent subir un interrogatoire préalable. Elle ne précise pas non plus comment les membres éventuels du groupe sont avisés de l'action ni comment un tribunal devrait réagir à la possibilité que certains membres éventuels du groupe choisissent de s'en exclure. Elle ne prévoit pas non plus les frais ni la répartition des montants accordés en dommages-intérêts s'ils ont gain de cause.

Clearly, it would be advantageous if there existed a legislative framework addressing these issues. The absence of comprehensive legislation means that courts are forced to rely heavily on individual case management to structure class proceedings. This taxes judicial resources and denies

33 Il serait clairement préférable de disposer d'un cadre législatif sur ces questions. En l'absence de législation complète, les tribunaux sont contraints de s'en remettre en grande partie à la gestion de dossiers judiciaires individuels pour structurer le recours collectif, ce qui est coûteux en termes de

the parties *ex ante* certainty as to their procedural rights. One of the main weaknesses of the current Alberta regime is the absence of a threshold "certification" provision. In British Columbia, Ontario, and Quebec, a class action may proceed only after the court certifies that the class and representative meet certain requirements. In Alberta, by contrast, courts effectively certify *ex post*, only after the opposing party files a motion to strike. It would be preferable if the appropriateness of the class action could be determined at the outset by certification.

ressources judiciaires et ce qui prive les parties de toute certitude avant l'instance quant à leurs droits procéduraux. L'une des plus importantes lacunes du régime albertain actuel est l'absence de disposition d'accréditation préalable. En Colombie-Britannique, en Ontario et au Québec, un recours collectif ne peut être intenté que si le tribunal certifie que le groupe et le représentant satisfont à certaines exigences. En Alberta, par contre, les tribunaux certifient en réalité a posteriori, et seulement après que la partie adverse dépose une requête en annulation. Il serait préférable que l'opportunité d'un recours collectif puisse être déterminée dès le début par des modalités d'accréditation.

34 Absent comprehensive legislation, the courts must fill the void under their inherent power to settle the rules of practice and procedure as to disputes brought before them: *Bell v. Wood*, [1927] 1 W.W.R. 580 (B.C.S.C.), at pp. 581-82; *Langley v. North West Water Authority*, [1991] 3 All E.R. 610 (C.A.), leave denied [1991] 1 W.L.R. 711n (H.L.); *Newfoundland Association of Public Employees v. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (Nfld. S.C.T.D.); W. A. Stevenson and J. E. Côté, *Civil Procedure Guide, 1996*, at p. 4. However desirable comprehensive legislation on class action practice may be, if such legislation has not been enacted, the courts must determine the availability of the class action and the mechanics of class action practice.

En l'absence de législation complète, les tribunaux doivent combler ces lacunes en exerçant leur pouvoir inhérent d'établir les règles de pratique et de procédure applicables aux litiges dont ils sont saisis : *Bell c. Wood*, [1927] 1 W.W.R. 580 (C.S.C.-B.), p. 581-582; *Langley c. North West Water Authority*, [1991] 3 All E.R. 610 (C.A.), autorisation d'appel rejetée [1991] 1 W.L.R. 711n (H.L.); *Newfoundland Association of Public Employees c. Newfoundland* (1995), 132 Nfld. & P.E.I.R. 205 (C.S. 1ère inst. T.N.) W. A. Stevenson et J. E. Côté, *Civil Procedure Guide, 1996*, p. 4. Si souhaitable soit-il d'avoir une législation complète en matière d'exercice des recours collectifs, quand cette législation n'existe pas, les tribunaux doivent décider de l'opportunité du recours collectif et des modalités de son exercice.

35 Alberta courts moved to fill the procedural vacuum in *Korte*, *supra*. *Korte* prescribed four conditions for a class action: (1) the class must be capable of clear and definite definition; (2) the principal issues of fact and law must be the same; (3) success for one of the plaintiffs must mean success for all; and (4) no individual assessment of the claims of individual plaintiffs need be made.

Les tribunaux albertains ont entrepris de parer aux lacunes procédurales dans l'arrêt *Korte*, précité, qui prescrit quatre conditions d'exercice du recours collectif : (1) le groupe peut être défini clairement et précisément; (2) les principales questions de fait et de droit doivent être les mêmes; (3) une issue favorable à un demandeur signifie nécessairement une issue favorable à tous; et (4) il n'est pas nécessaire d'examiner individuellement les revendications de chaque demandeur.

36 The *Korte* criteria loosely parallel the criteria applied in other Canadian jurisdictions in which comprehensive class-action legislation has yet to be enacted: see, e.g., *Ranjoy Sales and Leasing Ltd. v. Deloitte, Haskins and Sells*, [1984]

Les critères de l'arrêt *Korte* sont, dans les grandes lignes, assez similaires à ceux qui sont appliqués dans d'autres ressorts canadiens ne disposant pas de législation complète sur les recours collectifs : voir, par ex., *Ranjoy Sales and Leasing*

4 W.W.R. 706 (Man. Q.B.); *International Capital Corp. v. Schafer* (1995), 130 Sask. R. 23 (Q.B.); *Guarantee Co. of North America v. Caisse populaire de Shippagan Ltée* (1988), 86 N.B.R. (2d) 342 (Q.B.); *Lee v. OCCO Developments Ltd.* (1994), 148 N.B.R. (2d) 321 (Q.B.); *Van Audenhove v. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (S.C.), at para. 7; *Horne v. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R. 109 (P.E.I.S.C.), at para. 24.

The *Korte* criteria also bear resemblance to the class-certification criteria in the British Columbia, Ontario, and Quebec class action statutes. Under the British Columbia and Ontario statutes, an action will be certified as a class proceeding if (1) the pleadings or the notice of application disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the class representative; (3) the claims or defences of the class members raise common issues (in British Columbia, "whether or not those common issues predominate over issues affecting only individual members"); (4) a class proceeding would be the preferable procedure for the resolution of common issues; and (5) the class representative would fairly represent the interests of the class, has advanced a workable method of advancing the proceeding and notifying class members, and does not have, on the common issues for the class, an interest in conflict with other class members: see Ontario *Class Proceedings Act, 1992*, s. 5(1); British Columbia *Class Proceedings Act*, s. 4(1). Under the Quebec statute, an action will be certified as a class proceeding if (1) the recourses of the class members raise identical, similar, or related questions of law or fact; (2) the alleged facts appear to warrant the conclusions sought; (3) the composition of the group makes joinder impracticable; and (4) the representative is in a position to adequately represent the interests of the class members: see Quebec *Code of Civil Procedure*, art. 1003.

*Ltd. c. Deloitte, Haskins and Sells*, [1984] 4 W.W.R. 706 (B.R. Man.); *International Capital Corp. c. Schafer* (1995), 130 Sask. R. 23 (B.R.); *Guarantee Co. of North America c. Caisse populaire de Shippagan Ltée* (1988), 86 R.N.-B. (2e) 342 (B.R.); *Lee c. OCCO Developments Ltd.* (1994), 148 R.N.-B. (2e) 321 (B.R.); *Van Audenhove c. Nova Scotia (Attorney General)* (1994), 134 N.S.R. (2d) 294 (C.S.), par. 7; *Horne c. Canada (Attorney General)* (1995), 129 Nfld. & P.E.I.R.109 (C.S.Î.-P.-É), par. 24.

37 Les critères de l'arrêt *Korte* ressemblent également aux critères d'accréditation de groupes prévus dans les lois sur les recours collectifs de la Colombie-Britannique, de l'Ontario et du Québec. Aux termes des lois de la Colombie-Britannique et de l'Ontario, une action sera certifiée comme un recours collectif si (1) les actes de procédure ou l'avis de requête révèlent une cause d'action; (2) il existe un groupe identifiable d'au moins deux personnes qui seraient représentées par le représentant du groupe; (3) les demandes ou les défenses des membres du groupe soulèvent des questions communes (en Colombie-Britannique, [TRADUCTION] « que ces questions communes l'emportent ou non sur des questions touchant seulement certains membres du groupe »; (4) le recours collectif est le meilleur moyen de régler les questions communes; et (5) le représentant du groupe représente équitablement les intérêts du groupe, présente une méthode efficace de faire avancer l'instance et d'aviser les membres du groupe, et n'a pas de conflit d'intérêts avec d'autres membres du groupe en ce qui concerne les questions communes : voir pour l'Ontario, *Loi de 1992 sur les recours collectifs*, par. 5(1), et pour la Colombie-Britannique, *Class Proceedings Act*, par. 4(1). Au Québec, l'exercice d'un recours collectif est autorisé si (1) les recours des membres du groupe soulèvent des questions de droit ou de fait identiques, similaires ou connexes; (2) les faits allégués paraissent justifier les conclusions recherchées; (3) la composition du groupe rend peu pratique la jonction des parties; et (4) le représentant est en mesure d'assurer une représentation adéquate des intérêts des membres du groupe : voir *Code de procédure civile*, art. 1003.

38 While there are differences between the tests, four conditions emerge as necessary to a class action. First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria: see Branch, *supra*, at paras. 4.190-4.207; Friedenthal, Kane and Miller, *Civil Procedure* (2nd ed. 1993), at pp. 726-27; *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), at paras. 10-11.

Bien qu'il existe des différences entre les critères, il se dégage quatre conditions nécessaires au recours collectif. Premièrement, le groupe doit pouvoir être clairement défini. La définition du groupe est essentielle parce qu'elle précise qui a droit aux avis, qui a droit à la réparation (si une réparation est accordée), et qui est lié par le jugement. Il est donc primordial que le groupe puisse être clairement défini au début du litige. La définition devrait énoncer des critères objectifs permettant d'identifier les membres du groupe. Les critères devraient avoir un rapport rationnel avec les revendications communes à tous les membres du groupe mais ne devraient pas dépendre de l'issue du litige. Il n'est pas nécessaire que tous les membres du groupe soient nommés ou connus. Il est toutefois nécessaire que l'appartenance d'une personne au groupe puisse être déterminée sur des critères explicites et objectifs : voir Branch, *op. cit.*, par. 4.190-4.207; Friedenthal, Kane et Miller, *Civil Procedure* (2e éd. 1993), p. 726-727; *Bywater c. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (C. Ont. (Div. gén.)), par. 10-11.

39 Second, there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus 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 or that the resolution of the common issues would be determinative of each class member's claim. 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. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of

Deuxièmement, il faut des questions de fait ou de droit communes à tous les membres du groupe. Les critères de communauté ont toujours été une source de confusion pour les tribunaux. Il faut aborder le sujet de la communauté en fonction de l'objet. La question sous-jacente est de savoir si le fait d'autoriser le recours collectif permettra d'éviter la répétition de l'appréciation des faits ou de l'analyse juridique. Une question ne sera donc « commune » que lorsque sa résolution est nécessaire pour le règlement des demandes de chaque membre du groupe. Il n'est pas essentiel que les membres du groupe soient dans une situation identique par rapport à la partie adverse. Il n'est pas nécessaire non plus que les questions communes prédominent sur les questions non communes ni que leur résolution règle les demandes de chaque membre du groupe. Les demandes des membres du groupe doivent toutefois partager un élément commun important afin de justifier le recours collectif. Pour décider si des questions communes motivent un recours collectif, le tribunal peut avoir à évaluer l'importance des questions communes par rapport

each class member with the same particularity as would be required in an individual suit.

Third, with regard to the common 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. A class action should not be allowed if class members have conflicting interests.

Fourth, the class representative must adequately represent the class. In assessing whether the proposed representative is adequate, the court may look to the motivation of the representative, the competence of the representative's counsel, and the capacity of the representative to bear any costs that may be incurred by the representative in particular (as opposed to by counsel or by the class members generally). The proposed representative need not be "typical" of the class, nor the "best" possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class: see Branch, *supra*, at paras. 4.210-4.490; Friedenthal, Kane and Miller, *supra*, at pp. 729-32.

While the four factors outlined must be met for a class action to proceed, their satisfaction does not mean that the court must allow the action to proceed. Other factors may weigh against allowing the action to proceed in representative form. The defendant may wish to raise different defences with respect to different groups of plaintiffs. It may be necessary to examine each class member in discovery. Class members may raise important issues not shared by all members of the class. Or the proposed class may be so small that joinder would be a better solution. Where such countervailing factors exist, the court has discretion to decide whether the class action should be permitted to proceed, notwithstanding that the essential conditions are met.

aux questions individuelles. Dans ce cas, le tribunal doit se rappeler qu'il n'est pas toujours possible pour le représentant de plaider les demandes de chaque membre du groupe avec un degré de spécificité équivalant à ce qui est exigé dans une poursuite individuelle.

40 Troisièmement, en ce qui concerne les questions communes, le succès d'un membre du groupe signifie nécessairement le succès de tous. Tous les membres du groupe doivent profiter du succès de l'action, quoique pas nécessairement dans la même mesure. Le recours collectif ne doit pas être autorisé quand des membres du groupe sont en conflit d'intérêts.

41 Quatrièmement, le représentant du groupe doit adéquatement représenter le groupe. Quand le tribunal évalue si le représentant proposé est adéquat, il peut tenir compte de sa motivation, de la compétence de son avocat et de sa capacité d'assumer les frais qu'il peut avoir à engager personnellement (par opposition à son avocat ou aux membres du groupe en général). Il n'est pas nécessaire que le représentant proposé soit un modèle type du groupe, ni qu'il soit le meilleur représentant possible. Le tribunal devrait toutefois être convaincu que le représentant proposé défendra avec vigueur et compétence les intérêts du groupe : voir Branch, *op. cit.*, par. 4.210-4.490; Friedenthal, Kane et Miller, *op. cit.*, p. 729-732.

42 Même si les quatre facteurs mentionnés doivent être présents pour autoriser un recours collectif, le fait qu'ils le soient ne signifie pas que le tribunal doit l'autoriser. D'autres facteurs peuvent militer contre l'autorisation de poursuivre par recours collectif. Le défendeur peut souhaiter soulever différentes défenses relativement à différents groupes de demandeurs. Il peut s'avérer nécessaire d'interroger au préalable chaque membre du groupe. Certains membres peuvent soulever des questions importantes qui ne sont pas partagées par tous les membres du groupe. Ou le groupe proposé peut être si petit que la jonction serait une meilleure solution. Lorsqu'il existe de tels facteurs défavorables, le tribunal a le pouvoir discrétionnaire de

tions for the maintenance of a class action have been satisfied.

43 The class action codes that have been adopted by British Columbia and Ontario offer some guidance as to factors that would generally not constitute arguments against allowing an action to proceed as a representative one. Both state that certification should not be denied on the grounds that: (1) the relief claimed includes a demand for money damages that would require individual assessment after determination of the common issues; (2) the relief claimed relates to separate contracts involving different members of the class; (3) different class members seek different remedies; (4) the number of class members or the identity of every class member is unknown; or (5) the class includes subgroups that have claims or defences that raise common issues not shared by all members of the class: see Ontario *Class Proceedings Act, 1992*, s. 6; British Columbia *Class Proceedings Act*, s. 7; see also Alberta Law Reform Institute, *supra*, at pp. 75-76. Common sense suggests that these factors should no more bar a class action suit in Alberta than in Ontario or British Columbia.

44 Where the conditions for a class action are met, the court should exercise its discretion to disallow it for negative reasons in a liberal and flexible manner, like the courts of equity of old. The court should take into account the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.

45 The need to strike a balance between efficiency and fairness belies the suggestion that a class action should be struck only where the deficiency is "plain and obvious", as the Chambers judge held. Unlike Rule 129, which is directed at the question of whether the claim should be prosedécider si le recours collectif devrait être autorisé, malgré le fait que les conditions essentielles à l'exercice du recours collectif sont remplies.

Les règles en matière de recours collectifs qui ont été adoptées par la Colombie-Britannique et par l'Ontario peuvent aider à déterminer les facteurs qui en général ne constitueraient pas des arguments défavorables à l'autorisation d'un recours collectif. Les deux régimes prévoient que l'autorisation ne devrait pas être refusée parce que, selon le cas, (1) la réparation demandée comporte une demande de dommages-intérêts qui exigerait une évaluation individuelle après le règlement des questions communes; (2) la réparation demandée porte sur des contrats distincts concernant différents membres du groupe; (3) différents membres du groupe cherchent à obtenir des réparations différentes; (4) le nombre de membres du groupe ou l'identité de chacun d'eux ne sont pas connus; (5) le groupe comprend des sous-groupes qui ont des demandes ou des défenses qui soulèvent des questions communes que ne partagent pas tous les membres du groupe : voir pour l'Ontario, *Loi de 1992 sur les recours collectifs*, art. 6; pour la Colombie-Britannique, *Class Proceedings Act*, art. 7; voir également Alberta Law Reform Institute, *op. cit.*, p. 75-76. Le bon sens recommande que ces facteurs ne fassent pas plus obstacle à un recours collectif en Alberta qu'en Ontario ou en Colombie-Britannique.

Quand les conditions nécessaires à un recours collectif sont remplies, le tribunal devrait exercer son pouvoir discrétionnaire de l'interdire pour des raisons défavorables de manière libérale et souple, comme les anciens tribunaux d'equity. Le tribunal devrait prendre en considération les avantages que le recours collectif offre dans les circonstances de l'affaire ainsi que des injustices qu'il peut provoquer. En fin de compte, le tribunal doit concilier efficacité et équité.

La nécessité de concilier efficacité et équité dément l'idée exprimée par le juge en chambre qu'un recours collectif ne devrait être radié que lorsque le vice est « évident et manifeste ». Contrairement à la règle 129, qui pose la question de savoir s'il y a lieu de poursuivre l'action, la règle

cuted at all, Rule 42 is directed at the question of how the claim should be prosecuted. The "plain and obvious" standard is appropriate where the result of striking is to forever end the action. It recognizes that a plaintiff "should not be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success": *Drummond-Jackson v. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.), at p. 1102 (quoted in *Hunt*, *supra*, at pp. 974-75). Denial of class status under Rule 42, by contrast, does not defeat the claim. It merely places the plaintiffs in the position of any litigant who comes before the court in his or her individual capacity. Moreover, nothing in Alberta's rules suggests that class actions should be disallowed only where it is plain and obvious that the action should not proceed as a representative one. Rule 42 and the analogous rules in other provinces merely state that a representative may maintain a class action if certain conditions are met.

42 pose la question de savoir comment la poursuivre. Le critère du caractère « évident et manifeste » est correct quand la radiation entraîne la fin permanente de l'action. Il exprime l'idée qu'un demandeur [TRADUCTION] « ne devrait pas être 'privé d'un jugement' à cette toute première étape à moins qu'il ne soit très clair que la cause d'action qu'il invoque n'a aucune chance de succès » : *Drummond-Jackson c. British Medical Association*, [1970] 1 All E.R. 1094 (C.A.), p. 1102 (cité dans *Hunt*, précité, p. 975). Le refus d'un recours collectif en vertu de la règle 42, à l'opposé, ne met pas fin à la demande. Il place seulement les demandeurs dans la situation de toute autre partie qui se présente devant le tribunal à titre individuel. En outre, rien dans les règles de l'Alberta n'indique que les recours collectifs ne devraient être refusés que lorsqu'il est évident et manifeste que l'action ne devrait pas être intentée comme un recours collectif. La règle 42 et les règles analogues dans d'autres provinces ne font qu'énoncer qu'un représentant peut exercer un recours collectif si certaines conditions sont remplies.

The need to strike a balance between efficiency and fairness also belies the suggestion that class actions should be approached restrictively. The defendants argue that *General Motors of Canada Ltd. v. Naken*, [1983] 1 S.C.R. 72, precludes a generous approach to class actions. I respectfully disagree. First, when *Naken* was decided, the modern class action was very much an untested procedure in Canada. In the intervening years, the importance of the class action as a procedural tool in modern litigation has become manifest. Indeed, the reform that has been effected since *Naken* has been motivated in large part by the recognition of the benefits that class actions can offer the parties, the court system, and society: see, e.g., Ontario Law Reform Commission, *supra*, at pp. 3-4.

46 La nécessité de concilier efficacité et équité dément aussi l'idée que les recours collectifs devraient être abordés de façon restrictive. Les défendeurs soutiennent que l'arrêt *General Motors of Canada Ltd. c. Naken*, [1983] 1 R.C.S. 72, empêche d'aborder de manière libérale les recours collectifs. Avec égards, je ne suis pas d'accord. Premièrement, à l'époque de l'arrêt *Naken*, le recours collectif moderne n'était pas une procédure bien établie au Canada. Depuis lors, l'importance du recours collectif comme instrument de procédure dans les litiges modernes est devenue évidente. En fait, la réforme mise en œuvre depuis *Naken* est attribuable pour une large part à la reconnaissance des avantages que les recours collectifs offrent aux parties, à l'organisation judiciaire et à la société : voir, par ex., Commission de réforme du droit de l'Ontario, *op. cit.*, p. 3-4.

Second, *Naken* on its facts invited caution. The action was brought on behalf of all persons who purchased new 1971 or 1972 Firenza motor vehicles in Ontario. The complaint was that General

47 Deuxièmement, les faits de l'arrêt *Naken* invitent à la prudence. L'action était intentée pour le compte de toutes les personnes qui avaient acheté une voiture neuve de marque Firenza, modèle 1971

Motors had misrepresented the quality of the vehicles and that the vehicles "were not reasonably fit for use" (p. 76). The statement of claim alleged breach of warranty and breach of representation, and sought $1,000 in damages for each of approximately 4,600 plaintiffs. Estey J., writing for a unanimous Court, disallowed the class action. While each plaintiff raised the same claims against the defendant, the resolution of those claims would have required particularized evidence and fact-finding at both the liability and damages stages of the litigation. Far from avoiding needless duplication, a class action would have unnecessarily complicated the resolution of what amounted to 4,600 individual claims.

ou 1972, en Ontario. La plainte disait que General Motors avait présenté de manière inexacte la qualité des voitures et que les voitures [TRADUCTION] « n'étaient pas raisonnablement propres à être utilisé[es] » (p. 76). La déclaration alléguait l'inobservation de la garantie et de la représentation, et sollicitait 1 000 $ en dommages-intérêts pour chacun des quelque 4 600 demandeurs. Le juge Estey, auteur des motifs unanimes de la Cour, a rejeté le recours collectif. Même si tous les défendeurs avaient les mêmes demandes contre le défendeur, le règlement de ces demandes aurait exigé la présentation d'une preuve et une appréciation des faits individualisées pour établir tant la responsabilité que les dommages-intérêts. Loin d'éviter une duplication inutile, un recours collectif aurait inutilement compliqué le règlement de ce qui s'élevait à 4 600 demandes individuelles.

48 To summarize, class actions should be allowed to proceed under Alberta's Rule 42 where the following conditions are met: (1) the class is capable of clear definition; (2) there are issues of fact or law common to all class members; (3) success for one class member means success for all; and (4) the proposed representative adequately represents the interests of the class. If these conditions are met the court must also be satisfied, in the exercise of its discretion, that there are no countervailing considerations that outweigh the benefits of allowing the class action to proceed.

En résumé, les recours collectifs devraient être autorisés aux termes de la règle 42 de l'Alberta lorsque les conditions suivantes sont remplies : (1) le groupe peut être défini clairement; (2) des questions de droit ou de fait sont communes à tous les membres du groupe; (3) le succès d'un membre du groupe signifie le succès de tous; et (4) le représentant proposé représente adéquatement les intérêts du groupe. Si ces conditions sont remplies, le tribunal doit également être convaincu, dans l'exercice de son pouvoir discrétionnaire, qu'il n'existe pas de considérations défavorables qui l'emportent sur les avantages que comporte l'autorisation d'un recours collectif.

49 Other procedural issues may arise. One is notice. A judgment is binding on a class member only if the class member is notified of the suit and is given an opportunity to exclude himself or herself from the proceeding. This case does not raise the issue of what constitutes sufficient notice. However, prudence suggests that all potential class members be informed of the existence of the suit, of the common issues that the suit seeks to resolve, and of the right of each class member to opt out, and that this be done before any decision is made that purports to prejudice or otherwise affect the interests of class members.

D'autres questions de procédure peuvent se poser. L'une d'elles concerne l'avis. Un jugement ne lie un membre du groupe que s'il a été avisé de la poursuite et a eu la possibilité de s'exclure de la procédure. En l'espèce, la question de savoir ce qui constitue un avis suffisant ne se pose pas. La prudence recommande cependant que tous les participants possibles soient informés de l'existence de la poursuite, des questions communes que la poursuite cherche à résoudre ainsi que du droit de chaque membre du groupe de se retirer, et ce avant que ne soit rendue une décision pouvant avoir une incidence, défavorable ou non, sur les intérêts des membres du groupe.

Another procedural issue that may arise is how to deal with non-common issues. The court retains discretion to determine how the individual issues should be addressed, once common issues have been resolved: see Branch, *supra*, at para. 18.10. Generally, individual issues will be resolved in individual proceedings. However, as under the legislation of British Columbia, Ontario, and Quebec, a court may specify special procedures that it considers necessary or useful: see Ontario *Class Proceedings Act, 1992*, s. 25; British Columbia *Class Proceedings Act*, s. 27; Quebec *Code of Civil Procedure*, art. 1039.

50 Une autre question de procédure pouvant se poser est la manière d'envisager les questions autres que les questions communes. Le tribunal conserve le pouvoir discrétionnaire de déterminer comment les questions individuelles devraient être abordées, une fois que les questions communes ont été résolues : voir Branch, *op. cit.*, par. 18.10. Les questions individuelles seront généralement tranchées dans des instances individuelles. Toutefois, comme sous le régime des lois de la Colombie-Britannique, de l'Ontario et du Québec, un tribunal peut préciser une procédure spéciale s'il le juge nécessaire ou utile : voir en Ontario, *Loi de 1992 sur les recours collectifs*, art. 25; en Colombie-Britannique, *Class Proceedings Act*, art. 27; au Québec, *Code de procédure civile*, art. 1039.

The diversity of class actions makes it difficult to anticipate all of the procedural complexities that may arise. In the absence of comprehensive class-action legislation, courts must address procedural complexities on a case-by-case basis. Courts should approach these issues as they do the question of whether a class action should be allowed: in a flexible and liberal manner, seeking a balance between efficiency and fairness.

51 La variété des recours collectifs fait qu'il est difficile de prévoir toutes les complications procédurales qui peuvent surgir. Sans législation complète en matière de recours collectif, les tribunaux doivent régler les complications procédurales cas par cas. Ils doivent aborder ces problèmes de la même façon qu'ils décident si un recours collectif doit être autorisé : de manière souple et libérale, en cherchant à concilier efficacité et équité.

### C. *Whether the Investors Have Satisfied Rule 42*

### C. *Les investisseurs ont-ils satisfait à la règle 42?*

The four conditions to the maintenance of a class action are satisfied here. First, the class is clearly defined. The respondents Lin and Wu represent themselves and "[229 other] immigrant investors . . . who each invested at least the sum of $150,000.00 into a fund totalling $34,065,000.00, the said sum to be managed, administered and secured by . . . Western Canadian Shopping Centres Inc.". Who falls within the class can be ascertained on the basis of documentary evidence that the parties have put before the court. Second, common issues of fact and law unite all members of the class. The essence of the investors' complaint is that the defendants owed them fiduciary duties which they breached. While the investors' Amended Statement of Claim alludes to claims in negligence and misrepresentation, counsel for the investors undertook in argument before this Court to abandon all but the fiduciary duty claims. Third, at this stage of the proceedings, it appears that

52 Les quatre conditions nécessaires à l'exercice d'un recours collectif sont remplies en l'espèce. Premièrement, le groupe est clairement défini. Les intimés Lin et Wu se représentent eux-mêmes et 229 autres [TRADUCTION] « immigrants-investisseurs [. . .] qui ont chacun investi 150 000 $ au moins dans un fonds s'élevant au total à 34 065 000 $, cette somme devant être gérée, administrée et garantie par [. . .] Western Canadian Shopping Centres Inc. ». Il est possible de déterminer qui fait partie du groupe grâce à la preuve documentaire que les parties ont déposée devant la cour. Deuxièmement, des questions communes de fait et de droit unissent tous les membres du groupe. La plainte des investisseurs repose essentiellement sur l'allégation que les défendeurs ont manqué aux obligations fiduciaires qu'ils avaient envers eux. Même si la déclaration modifiée des investisseurs fait état de réclamations fondées sur la négligence et sur la fausse déclaration, l'avocat

resolving one class member's breach of fiduciary claim would effectively resolve the claims of every class member. As a result of security-pooling agreements effected by WCSC, each investor now has an interest, proportional to his or her investment, in the same underlying security. Finally, the representative plaintiffs are appropriate.

des investisseurs s'est engagé au cours des débats devant notre Cour à abandonner toutes les réclamations ne visant pas l'obligation fiduciaire. Troisièmement, à la présente étape de la procédure, il semble que le règlement de la revendication d'un seul membre concernant le manquement à l'obligation fiduciaire réglerait de fait les revendications de tous les membres du groupe. En raison d'ententes de regroupement des garanties prises par WCSC, chaque investisseur a maintenant un intérêt, proportionnel à son investissement, dans la même garantie sous-jacente. Enfin, les demandeurs sont des représentants appropriés.

53 The defendants argue that the proposed suit is not amenable to prosecution as a class action because: (1) there are in fact multiple classes of plaintiffs; (2) the defendants will raise multiple defences to different causes of action advanced against different defendants; and (3) in order to prevail, the investors must show actual reliance on the part of each class member. I find these arguments unpersuasive.

Les défendeurs soutiennent que l'action proposée ne peut pas faire l'objet d'un recours collectif parce que : (1) il existe en fait de nombreux groupes de demandeurs; (2) les défendeurs soulèveront plusieurs défenses contre différentes causes d'action intentées par différents défendeurs; et (3) afin de l'emporter, les investisseurs doivent faire la preuve d'un véritable lien de confiance de la part de chaque membre du groupe. Je suis d'avis que ces arguments ne sont pas convaincants.

54 The defendants' contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times, in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess rescissionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

L'argument des défendeurs selon lequel il existe de nombreux groupes de demandeurs n'est pas convaincant. Sans aucun doute, il y a des différences. Des investisseurs différents ont investi à différentes époques, dans des ressorts différents, en se fondant sur des notices d'offre différentes, par le biais de représentants différents, dans différentes séries de débentures, et ont entendu parler des événements sous-jacents par différents documents d'information. Certains investisseurs peuvent disposer de droits de résiliation que d'autres n'ont pas. Il demeure toutefois que les investisseurs soulèvent essentiellement les mêmes revendications qui exigent la résolution des mêmes faits. Il est possible qu'en fin de compte émergent différents sous-groupes d'investisseurs qui auront des droits différents contre les défendeurs, cependant cette possibilité ne retire pas le droit des investisseurs de poursuivre collectivement. Si des différences importantes surviennent, le tribunal réglera la question le moment venu.

55 The defendants' contention that the investors should not be permitted to sue as a class because

L'argument des défendeurs selon lequel les investisseurs ne devraient pas être autorisés à

each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

intenter un recours collectif parce que chacun d'eux doit démontrer un vrai lien de confiance pour établir un manquement à l'obligation fiduciaire n'est pas convaincant non plus. Dans les dernières décennies, les obligations fiduciaires ont été utilisées dans de nouveaux contextes, et toute la portée de leur utilisation reste à définir plus précisément. Les questions relatives aux obligations fiduciaires en l'espèce sont communes à tous les investisseurs. On ne devrait pas interdire un recours collectif en raison de l'incertitude relative à la résolution de questions communes à tous les membres du groupe. Si on juge que les investisseurs doivent faire la preuve d'un lien de confiance individuel, le tribunal peut alors décider si le recours collectif doit ou non se poursuivre.

The same applies to the contention that different defences will be raised with respect to different class members. Simply asserting this possibility does not negate a class action. If and when different defences are asserted, the court may solve the problem or withdraw leave to proceed as a class.

56 Cela s'applique aussi à l'argument selon lequel des défenses différentes seront invoquées envers différents membres du groupe. Cette simple possibilité n'interdit pas le recours collectif. Si différentes défenses sont invoquées, le tribunal peut alors résoudre le problème ou retirer l'autorisation du recours collectif.

I conclude that the basic conditions for a class action are met and that efficiency and fairness favour permitting it to proceed.

57 Je conclus que les conditions essentielles à l'exercice d'un recours collectif sont remplies et que l'efficacité et l'équité militent en faveur de son autorisation.

D. *Cross-Appeal*

D. *Pourvoi incident*

The investors take issue on cross-appeal with the Court of Appeal's allowance of individualized discovery from each class member. The Court of Appeal held that the defendants are entitled, under Rules 187 and 201, to examination and discovery of each member of the class. The investors argue that the question of whether discovery should be allowed from each class member is a question best left to a case management judge appointed pursuant to the Alberta Rules of Court Binder, Practice Note No. 7.

58 Les investisseurs contestent dans le pourvoi incident l'autorisation par la Cour d'appel de l'interrogatoire préalable individuel de chaque membre du groupe. La Cour d'appel a jugé que les défendeurs ont droit, en vertu des règles 187 et 201, à l'interrogatoire et à l'examen de chaque membre du groupe. Les investisseurs soutiennent que la question de savoir si l'interrogatoire préalable de chaque membre du groupe doit être autorisé est une question qui relève du juge responsable de la gestion de l'instance nommé selon l'avis de pratique 7 des règles de procédure de l'Alberta.

I agree that allowing individualized discovery at this stage of the proceedings would be premature. One of the benefits of a class action is that discovery of the class representatives will usually suffice

59 Je conviens qu'il serait prématuré d'accorder l'interrogatoire préalable individuel à cette étape-ci. L'un des avantages du recours collectif est que l'interrogatoire préalable des représentants d'un

and make unnecessary discovery of each individual class member. Cases where individual discovery is required of all class members are the exception rather than the rule. Indeed, the necessity of individual discovery may be a factor weighing against allowing the action to proceed in representative form.

60 I would allow the defendants to examine the representative plaintiffs as of right. Thereafter, examination of other class members should be available only by order of the court, upon the defendants showing reasonable necessity.

VI. Conclusion

61 For the foregoing reasons, I would dismiss the appeal and allow the investors to proceed as a class. I would allow the cross-appeal.

62 Costs of the appeal and cross-appeal are to the respondents.

*Appeal dismissed and cross-appeal allowed with costs.*

*Solicitors for the appellant/respondent on cross-appeal The Royal Trust Company: Burnet, Duckworth & Palmer, Calgary.*

*Solicitors for the appellants/respondents on cross-appeal James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary L. Billingsley, R. Byron Henderson: McLennan Ross, Edmonton.*

*Solicitors for the appellant/respondent on cross-appeal C. Michael Ryer: Peacock Linder & Halt, Calgary.*

*Solicitors for the appellant/respondent on cross-appeal Peter K. Gummer: Brownlee Fryett, Edmonton.*

*Solicitors for the appellants/respondents on cross-appeal Ernst & Young and Alan Lundell: Parlee McLaws, Edmonton.*

groupe sera habituellement suffisant et rendra superflu l'interrogatoire de chaque membre du groupe. Les affaires exigeant l'interrogatoire préalable individuel des membres d'un groupe sont l'exception plutôt que la règle. En fait, le besoin de procéder à des interrogatoires préalables individuels peut être un facteur défavorable à l'autorisation du recours collectif.

Je suis d'avis d'autoriser les défendeurs à interroger les représentants des demandeurs comme ils en ont le droit. Par la suite, l'interrogatoire des autres membres du groupe ne devrait être autorisé que par ordonnance de la cour, si les défendeurs prouvent que cela est raisonnablement nécessaire.

VI. Conclusion

Pour ces motifs, je suis d'avis de rejeter le pourvoi, d'autoriser les investisseurs à intenter un recours collectif et d'accueillir le pourvoi incident.

Les dépens du pourvoi et du pourvoi incident vont aux intimés.

*Pourvoi rejeté et pourvoi incident accueilli avec dépens.*

*Procureurs pour l'appelante/intimée au pourvoi incident La Compagnie Trust Royal : Burnet, Duckworth & Palmer, Calgary.*

*Procureurs pour les appelants/intimés au pourvoi incident James G. Engdahl, William R. MacNeill, Jon R. MacNeill, Gary L. Billingsley, R. Byron Henderson : McLennan Ross, Edmonton.*

*Procureurs pour l'appelant/intimé au pourvoi incident C. Michael Ryer : Peacock Linder & Halt, Calgary.*

*Procureurs pour l'appelant/intimé au pourvoi incident Peter K. Gummer : Brownlee Fryett, Edmonton.*

*Procureurs pour les appelants/intimés au pourvoi incident Ernst & Young et Alan Lundell : Parlee McLaws, Edmonton.*

*Solicitors for the appellants/respondents on cross-appeal Bennett Jones Verchere and Garnet Schulhauser: Gowling Lafleur Henderson, Calgary.*

*Solicitors for the appellant/respondent on cross-appeal Arthur Andersen & Co.: Lucas Bowker & White, Edmonton.*

*Solicitors for the respondents/appellants on cross-appeal: Durocher Simpson, Edmonton.*

*Procureurs pour les appelants/intimés au pourvoi incident Bennett Jones Verchere et Garnet Schulhauser : Gowling Lafleur Henderson, Calgary.*

*Procureurs pour l'appelant/intimé au pourvoi incident Arthur Andersen & Co. : Lucas Bowker & White, Edmonton.*

*Procureurs pour les intimés/appelants au pourvoi incident : Durocher Simpson, Edmonton.*

# TAB 6

# Court of Queen's Bench of Alberta

**Citation: Spring v Goodyear Canada Inc, 2020 ABQB 252**

**Date:** 20200414
**Docket:** 1401 03496
**Registry:** Calgary

Between:

**Christopher Cole Spring**

Applicant/Plaintiff

- and -

**Goodyear Canada Inc. and The Goodyear Tire & Rubber Company**

Respondents/Defendants

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**Reasons for Decision**
**of the**
**Honourable Madam G.A. Campbell**

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## I. Introduction

[1] The Goodyear Tire & Rubber Company (**Goodyear US**) designs, manufactures and distributes tires.

[2] One of Goodyear's tire models was an all-season, on-/off-road all terrain truck tire that came in a variety of sizes and two versions known as Wrangler SilentArmor and Wrangler SilentArmor Pro-Grade Tires (**Pro-Grade WSA Tires**) (collectively, **WSA Tires**).

[3] WSA Tires were designed specifically for use on automobiles (mainly SUVs and light trucks) and marketed as a particularly rugged tire with enhanced toughness and versatility intended for use in severe driving conditions. Pro-Grade WSA Tires were designed for vehicles subjected to heavy duty vehicle use.

[4] WSA Tires were manufactured at two manufacturing facilities (Fayetteville and Gadsden) in the United States of America and at one manufacturing facility (Napanee) in Canada. There are 51 sizes and types of WSA Tires. Goodyear US substantially ceased production of WSA Tires by December 2015.

[5] Goodyear Canada Inc. (**Goodyear Canada**) distributes Goodyear US tires, including WSA Tires, to Canadians through licensed dealers of Goodyear products. Goodyear Canada is a wholly owned subsidiary of Goodyear US.

[6] The Plaintiff, Christopher Cole Spring, commenced an action (the **Action**) against Goodyear US and Goodyear Canada (collectively, **Goodyear or the Defendants**) on his own behalf and on behalf of all consumers in Alberta, or elsewhere in Canada, who purchased or acquired WSA Tires (the **Proposed Class**).

[7] The Plaintiff brings this Action for alleged negligence in design, manufacturing, marketing and distribution of the WSA Tires, as well as for breach of a duty to warn and unjust enrichment.

[8] The Plaintiff alleges that all WSA Tires contain an inherent defect that makes them prone to tread separation during normal use, which can lead to serious motor vehicle crashes and harm to people and property, including death. The Plaintiff alleges that Goodyear unreasonably limited a tire recall to only 6 of 51 different sizes and types of WSA Tires manufactured in a limited 13-week period at only one of its manufacturing plants. He alleges that the recall was arbitrarily limited, leaving other WSA Tire consumers exposed to risk. The Plaintiff alleges that Goodyear limited the recall with knowledge that WSA Tires not included in the recall were likewise prone to tire failure to avoid the expense of a more thorough recall.

[9] The Plaintiff applies for certification of this Action as a class proceeding and to appoint him as the representative plaintiff. The Plaintiff contends that this Action is ideally suited for class certification as a matter of public importance and judicial economy and to deter corporate gain and malfeasance undertaken at the expense of consumer safety.

[10] Goodyear objects to certification arguing that the Plaintiff's Statement of Claim does not disclose a cause of action, he has not proved an identifiable class with common issues of any significance, and a class action is not the preferable procedure.

[11] Goodyear concedes that, if certification is granted, the Plaintiff would be a suitable representative plaintiff.

[12] Goodyear had originally requested that the Plaintiff's certification application be struck for abuse of process but has conceded the application is moot: if certification is granted, the Plaintiff could not have abused the process; if certification is denied, there is no need to consider an abuse of process application. I agree and do not address the abuse of process ground.

[13] For the reasons set out below, the Plaintiff's application for certification is granted, subject to certain amendments.

## II. Facts

[14] In early 2012, Goodyear recalled, in the US and Canada, 6 of the 51 types of WSA Tires manufactured between the 9th and 22nd weeks of 2009 at its Fayetteville plant (the **Recall**).

[15] The Plaintiff claims that on March 20, 2012, he received a recall notice from Goodyear Canada dated February 25, 2012, regarding certain WSA Tires (the **Recall Notice**). The Recall Notice stated in part:

> This notice is sent to you in accordance with the requirements of the Motor Vehicle Safety Act. Goodyear Canada Inc. (Goodyear) has decided that a defect which relates to motor vehicle safety exists in certain Goodyear brand Wrangler Silent Armor tires. Use of these tires in severe conditions could result in partial tread separation which could lead to vehicle damage or a motor vehicle crash.

[16] On March 27, 2012, the Plaintiff attended a Goodyear Canada dealership for tire replacement in accordance with the Recall Notice. The Plaintiff was informed that his WSA Tires were not eligible for replacement because they were manufactured outside of the manufacturing period that was addressed by the Recall. The Plaintiff's tires were of the same type as one of the recalled tires and were manufactured at the Fayetteville plant. However, they were manufactured in the 6th week of 2009, which was three weeks prior to the first week included in the Recall.

[17] Three days later, the Plaintiff was involved in a serious single vehicle motor vehicle accident on March 30, 2012, while driving on a highway. The cause of the accident is disputed by the parties.

[18] The Plaintiff alleges that the accident was caused by an inherent tire defect that resulted in a sudden tire failure caused by partial tread separation on one of the WSA Tires on his vehicle.

[19] Goodyear argues that a visual inspection of the Plaintiff's WSA tires showed that the WSA tires were all improperly inflated and, accordingly, that any tread separation of the Plaintiff's WSA Tires was not the result of any design or manufacturing defect.

[20] The Plaintiff seeks minimal damages for his personal injury and property damage because his personal losses were subrogated to his insurer. He prosecutes this Action on behalf of the Proposed Class as a matter of public interest because of the alleged risk WSA Tires pose to other Canadian consumers.

## III. Certification Analysis

### A. Applicable Legal Principles

[21] Certification is a procedural step that determines whether a class action proceeding is a more appropriate means to advance the litigation rather than by individual actions by each class member. It is not a determination of the merits of the plaintiff's claim: ***Class Proceedings Act***, SA 2003, c C-16.5, s 6(2) [*CPA*].

[22] That said, the conditions for certification are not mere formalities. They serve as an important screening process used by the courts to determine whether the claim is an appropriate one to be resolved through a class action proceeding. The Supreme Court of Canada explained that "[t]he standard for assessing evidence at certification does not give rise to a 'determination of the merits of the proceeding' [...] nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": ***Pro-Sys Consultants Ltd v Microsoft Corp***, 2013 SCC 57 at para 103.

[23] The *CPA* establishes five conditions that must be satisfied for certification of a class action. The court must certify the proceeding if the five conditions are met, and must not certify the action if any of them are not met: *CPA,* s 5(3−4).

[24] First, a plaintiff must show that the pleadings disclose a cause of action and then that there is "some basis in fact" for each of the remaining four conditions for certification: ***Hollick v Metropolitan Toronto (Municipality),*** 2001 SCC 68 at para 25.

[25] A plaintiff is not held to a rigorous standard of proof at the certification stage because pre-certification discovery is not a matter of right: ***Pro-Sys*** at para 119. However, while the plaintiff need not establish that there is some basis in fact for the claim, the plaintiff must show that there is a basis in the evidence to establish the remaining certification requirements: the existence of common issues shared by a group of claimants, the class definition, and whether a class proceeding is the preferable procedure. The opposing party may respond with evidence of its own to challenge certification: ***Hollick*** at para 22.

[26] The evidence adduced at this preliminary procedural stage must meet the usual standards for admissibility of evidence but does not require the court to decide factual issues as it would as a trier of fact during a trial of the merits. As such, there is no need to resolve conflicting facts, weigh and draw inferences from the evidence, or assess the relative strengths and merits of the respective cases: ***Pro-Sys*** at para 102. Nonetheless, some assessment of the merits of an action may be undertaken by the court because there is little point in certifying an action, even if the pleadings disclose a cause of action, where the action is determined to be purely speculative, have no air of reality or doomed to fail: ***TL v Alberta (Director of Child Welfare)***, 2006 ABQB 104 at para 36.

[27] Finally, the *CPA* should be interpreted generously to address its legislative goals, including facilitating access to justice, modifying harmful behaviour, and increasing judicial efficiency: ***Hollick*** at para 15 citing ***Western Canadian Shopping Centres Inc v Dutton,*** 2001 SCC 46 at paras 27-29.

### B. Do the Pleadings Disclose a Cause of Action?

[28] The first condition for certification requires that the Court be satisfied that "the pleadings disclose a cause of action": *CPA,* s 5(1)(a). This condition is easily satisfied unless it is plain and obvious that the plaintiff's claim cannot succeed, assuming that all facts stated in the pleadings are true: ***Hollick*** at para 25; ***Pro-Sys*** at para 63, citing ***Elder Advocates of Alberta Society v Alberta***, 2011 SCC 24 at para 20.

[29] This is a product liability action. Product liability claims have four established causes of action, described in ***Vester v Boston Scientific Ltd***, 2015 ONSC 7950 at para 5, which consist of a manufacturer's duty to:

> (i) ensure that no defects in the manufacturing process are likely to cause injury in the ordinary course of use;
>
> (ii) warn consumers of inherent dangers in the product of which the manufacturer knows or ought to know;
>
> (iii) design a product to avoid safety risks and make it reasonably safe for its intended uses; and

(iv) compensate consumers, as a claim for pure economic loss, for the cost of repairing a dangerous product where it presents a real and substantial danger to the public.

[30] The Plaintiff alleges causes of action in negligent design, manufacture, and marketing, as well as breach of a duty to warn and unjust enrichment. The Plaintiff agreed with Goodyear in oral submissions that negligent marketing falls within the duty to warn: ***Martin v Astrazeneca Pharmaceuticals Plc***, 2012 ONSC 2744 at para 152, aff'd 2013 ONSC 1169.

[31] I will address each of the causes of action individually.

### 1. Negligence in Design and Manufacturing

[32] Goodyear submits three reasons for its contention that there is no valid cause of action for negligent design and manufacturing. First, the pleadings do not distinguish between the Defendants. Second, the pleadings do not separate the types of negligence. Finally, the pleadings do not identify a specific design or manufacturing defect.

[33] Goodyear relies on ***Martin*** for the premise that the pleadings must differentiate between multiple defendants. However, ***Martin*** is distinguishable because the pleadings were repeatedly and blatantly inconsistent in referring to several defendants. In that case, no defendant was specifically identified as the designer or manufacturer and some defendants had no specific conduct alleged against them at all: ***Martin*** at paras 111−115, 127.

[34] In contrast, the pleadings here are consistent about the role of each party, despite the global reference to "the Defendants" in them. There are only the two Defendants in this case. The Plaintiff and Goodyear both agree as to the roles of Goodyear US, as the designer, manufacturer, and distributor of the WSA Tires and Goodyear Canada, as the Canadian distributor. Each Defendant's role is clear and consistent throughout the pleadings, such that each Defendant knows what is being claimed against it. It is not plain and obvious that the action will fail by referring to "the Defendants" together and not as separate entities in the pleadings.

[35] Goodyear also suggests that claims of negligent design and negligent manufacture must be pleaded separately, citing reliance on ***Martin*** and ***Kuiper v Cook (Canada) Inc***, 2018 ONSC 6487, rev'd in part on other grounds 2020 ONSC 128. However, both ***Martin*** and ***Kuiper*** are pharmaceutical class actions. Pharmaceutical drugs are unique products with unique issues because of the inherent risks that must be weighed against the benefits: ***Kuiper*** at para 124; ***Barwin v IKO Industries Ltd,*** 2013 ONSC 3054 at paras 21–22, refusing leave to appeal. In a non-pharmaceutical product liability class action, pleading negligent design and manufacture together may be appropriate: ***Barwin*** at paras 22−23. Product liability class actions, including those for motor vehicle defects, frequently allow causes of action for negligence in design and manufacturing: ***Thorpe v Honda Canada Inc***, 2011 SKQB 72; ***Evans v General Motors of Canada Co***, 2019 SKQB 98; ***Soroktski v CNH Global NV***, 2007 SKCA 104.

[36] Therefore, it is not plain and obvious at this stage that this cause of action will fail because of a failure to plead negligent design and negligent manufacturing as separate causes of action. While the issues may evolve through the pre-trial process, including through questioning, pleading negligence in design and manufacture is sufficient at this stage of certification: ***Barwin*** at paras 22−23.

[37] Finally, Goodyear argues that the pleadings do not identify a specific design or manufacturing defect. Goodyear submits that tread separation is a consequence, not a defect, and

that tires fail for many reasons other than negligent design or manufacturing. Goodyear relies on ***Martin*** and ***Kuiper*** again for its position. As previously discussed, these authorities are distinguishable and of little assistance here given the unique nature attributable to pharmaceutical products.

[38] Other product liability cases involving non-pharmaceutical products do not necessarily require proof of a specific defect. In such cases the courts have applied a general and flexible test. The test for defect is described in ***Marcil v Eastview Chevrolet Pontiac Buick GMC Ltd***, 2016 ONSC 3594 at paras 42, 58. The test is based on what is reasonable to expect of a product in all the circumstances, whether or not the cause of that defect could be determined: ***Marcil*** at paras 42, 58. For example, in ***Marcil***, the defect was referred to as a defect that caused auto-acceleration, and it was not necessary to prove what the specific cause of that result or consequence was: at para 58. Thus, it may be possible to establish negligence in design or manufacturing by providing evidence of a defect without evidence as to the cause of the defect.

[39] Further, the informational imbalance at this stage of the proceeding prevents the Plaintiff from more specifically identifying the exact cause of the alleged tire tread separation or issue that may exist in the design or manufacturing process. As stated in ***Miller v Merck Frosst Canada Ltd,*** 2015 BCCA 353 at para 52, leave to appeal to SCC refused 36668 (14 April 2016), a defendant manufacturer has "an enormous informational advantage" over a plaintiff. Discovery at the certification stage is not a matter of right, and it would be unfair to require a plaintiff to provide evidence that relates to matters exclusively within the manufacturer's specialized knowledge: ***Miller*** at para 52; ***Pro-Sys*** at para 119. Further, courts have held that there are sound policy reasons for claims for economic loss associated with repair for products that pose a danger to health or safety as it encourages remediation and repair or removal of dangerous products: ***Winnipeg Condominium Corp No 36 v Bird Construction Co***, [1995] 1 SCR 85, [1995] SCJ No 2.

[40] I accept Goodyear's argument that a tire may fail for reasons other than a deficiency in the tire's design or manufacture. However, what is alleged here is failure causing severe tire tread separation, which can lead to severe consequences, including possible serious injury or death. The claim is premised on WSA Tires causing harm or having the potential to cause harm resulting from tire tread separation caused by defective design or manufacturing. Without the benefit of further information, the Plaintiff has sufficiently identified what defect he is alleging.

[41] Overall, assuming the facts pleaded are true, it is not plain and obvious that the Plaintiff's claim for negligent design and manufacturing against Goodyear US would fail. Both design and manufacturing duties are established categories of product liability claims: ***Vester*** at para 5. The Plaintiff has pled the essential elements of a claim in negligence. The Plaintiff has also pled that alleged defect in the WSA Tires presents a real and substantial danger to persons using the WSA Tires. The pleadings are clear enough that each Defendant knows what is alleged against them, and at this preliminary stage of the proceedings, it is not necessary to identify a specific defect further than that it is alleged that there is a dangerous defect in the WSA Tires that results in tread separation during normal use, which gives rise to the Plaintiff's cause of action in negligent design and manufacturing.

### 2. Duty to Warn

[42] The duty to warn is a recognized cause of action in a product liability claim: ***Vester*** at para 5.

[43] Goodyear admits that a duty to warn would exist for those consumers who purchased WSA Tires outside of the Recall if the Action is certified.

[44] Goodyear disputes a duty to warn the Plaintiff's proposed subclass of those who received the Recall Notice. As discussed later, the proposed subclasses that differentiate between consumers who did or did not purchase WSA Tires within the Recall are not certified; therefore, it is unnecessary to discuss the duty to warn those who owned WSA Tires within the Recall at this stage of the proceedings.

[45] I am satisfied that the Plaintiff's claim provides particulars for a claim in negligence based on Goodyear's duty to warn. In my view, it is not plain and obvious that the Plaintiff's claim for breach of duty to warn cannot succeed.

### 3. Unjust Enrichment and Waiver of Tort

[46] Finally, the Plaintiff pleads that the Defendants were enriched, the Plaintiff and the Proposed Class were accordingly deprived in the form of payments made for WSA Tires passed through the distribution chain to Goodyear, and the point of sales contracts between the purchaser and distributor should not provide a juristic reason for the enrichment.

[47] The Plaintiff also pleads waiver of tort in seeking damages for disgorgement of profits and, in so doing, alleges that Goodyear unfairly profited from the sale of products that they knew or ought to have known were defective, to the deprivation of the Proposed Class and for no juristic reason.

[48] Goodyear disputes a cause of action in unjust enrichment or the restitutionary remedy of waiver of tort.

[49] Goodyear argues that a claim for unjust enrichment would fail for two reasons. First, they suggest it would fail because Goodyear was not directly enriched by WSA Tire consumers since they only provide WSA Tires to retailers who then sell them to consumers. Second, they argue that the contracts for sale between retailers and consumers and between Goodyear and retailers are a valid reason for any benefit received.

[50] The elements of a claim in unjust enrichment include an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of a juristic reason for that enrichment: ***Garland v Consumers' Gas Co***, 2004 SCC 25 at para 30.

[51] It is now well-settled law that indirect purchasers have a right of action for unjust enrichment notwithstanding the absence of a direct contract of sale: ***Pro-Sys*** at para 87.

[52] Further, the presence of contracts for sale between consumers and retailers and the manufacturer and retailer does not prevent certification of unjust enrichment as a cause of action. Any questions as to the specifics of the contracts and whether they provide a juristic reason or not should be left to the trial judge: ***Pro-Sys*** at paras 86 and 88.

[53] A cause of action for unjust enrichment was certified in ***Panacci v Volkswagen***, 2018 ONSC 6312 at paras 33-35, where the representative plaintiff alleged a dangerous defect in a vehicle's timing system and in ***Evans*** at para 39, where the representative plaintiff alleged that class members paid the defendants for a non-defective vehicle, which they did not receive.

[54] It is not plain and obvious at this stage of the proceedings that the Plaintiff's claim for unjust enrichment would fail.

[55] Alternatively, the Plaintiff alleges waiver of tort, seeking disgorgement of profits as a restitutionary remedy after a determination of their negligence claim.

[56] Waiver of tort has been defined as a remedy that "permits a plaintiff to recover benefits a defendant has obtained by its wrongdoing instead of damages measured by the plaintiff's loss": ***Koubi v Mazda Canada Inc***, 2012 BCCA 310 at para 16, leave to appeal to SCC refused 35017 (17 January 2013). It is based on the theory that, where a tort has been committed, the plaintiff may seek recovery of an unjust enrichment accruing to the defendant rather than normal tort damages: ***Pro-Sys*** at para 93.

[57] In ***Atlantic Lottery Corporation Inc-Société des loteries de l'Atlantique v Babstock***, 2018 NLCA 71, leave to appeal to SCC granted 38521 (23 May 2019), the Court of Appeal provided a useful discussion on the principles of restitution, unjust enrichment and waiver of tort and restitution by wrongdoing at paras 83 and 86:

> 83 The principles relating to restitution and unjust enrichment (there is no universal agreement as to how those two terms should be employed) have been sub-categorized in recent years into two broad fields: (i) the restitution of benefits conferred on someone who has been unjustly enriched at the claimant's expense (restitution for enrichment); and (ii) the restitution or disgorgement of benefits acquired as a result of the commission of a wrong (restitution or disgorgement for wrongdoing [citations omitted].
>
> 86 The cause of action supporting the second category is not the unjust enrichment itself but the existence of a wrong (such as a tort, breach of contract, breach of fiduciary duty or perhaps even a crime) against the claimant which has the result of enabling the defendant to acquire a gain (sometimes described as an unjust enrichment), not necessarily from the claimant, that justifies the court in ordering the disgorgement of the wrongdoer's gains ... .

[58] There is considerable debate as to whether waiver of tort exists as an independent cause of action in restitution or is merely a remedial alternative. In light of this debate, courts have generally declined to strike these claims at the pleadings stage, leaving the decision to the trial judge: ***Serhan Estate v Johnson & Johnson*** (2006), 85 OR (3d) 665 at para 68, 269 DLR (4th) 279, leave to appeal to ONCA refused M33963 (16 October 2006), leave to appeal to SCC refused 31762 (12 April 2007). In ***Pro-Sys***, the Supreme Court declined to decide the issue holding that it was not plain and obvious that the waiver of tort claim could not succeed, especially considering the uncertainty of law on that issue: at para 97. Waiver of tort continues to be certified in class proceedings irrespective of whether it is an independent cause of action or a remedy: ***Evans*** at para 51; ***Panacci*** at para 36; ***Pro-Sys*** at para 94.

[59] Given the unsettled law surrounding waiver of tort, it is not plain and obvious that there is no independent cause of action that might permit the Plaintiff and the Proposed Class to recover benefits gained by Goodyear from their alleged wrongful conduct.

[60] For the aforementioned reasons, it is not plain and obvious that the Plaintiff's claim either for unjust enrichment or, alternatively, enrichment from waiver of tort will fail.

### 4. Conclusion: Cause of Action

[61] For the purposes of certification under s 5(1)(a) of the *CPA*, the pleadings disclose a cause of action in negligent design and manufacturing, breach of a duty to warn and unjust

enrichment or waiver of tort, both being claims seeking the restitutionary remedy of disgorgement from wrongful enrichment. This condition is satisfied.

### C. Is There an Identifiable Class of Two or More Persons?

#### 1. Applicable Legal Principles

[62] The second condition for certification requires that there is an "identifiable class of 2 or more persons": *CPA,* s 5(1)(b). The purpose of this condition is to identify who has a potential claim, who will be bound by the action's result, and who is entitled to notice: ***Dutton*** at para 38. There must be "some basis in fact" to support the certification order: ***Hollick*** at para 25. This element is not onerous to satisfy; the relationship is usually obvious from the facts: ***Hollick*** at paras 20−21.

[63] The class must be capable of clear definition based on objective criteria and have a rational relationship to the common issues, without being dependent on the outcome of the litigation: ***Dutton*** at para 38. In product liability cases, the relationship is often comprised of individuals who purchased or acquired the product: ***Hollick*** at para 20.

[64] The class should not be unlimited or unnecessarily broad, as long as a narrower definition would not arbitrarily exclude some persons with an interest in the common issue: ***Hollick*** at para 21. It is not necessary for each member of the class to have the same interest in the resolution of the common issues: ***Hollick*** at para 21. The fact that some members may not have a claim is not a disqualifying factor on its own. Further, a class can be certified even if the class definition requires amendment before or after certification: ***Warner v Smith & Nephew Inc***, 2016 ABCA 223 at para 22, leave to appeal to SCC denied 37229 (2 February 2017).

[65] As noted, the Plaintiff proposes to define the class as encompassing all consumers in Alberta, or elsewhere in Canada, who purchased or acquired the WSA Tires, including subclasses for (a) consumers whose WSA Tires were not subject to the Recall; and (b) consumers whose WSA Tires were subject to the Recall. The Plaintiff defines "WSA Tires" as all 51 sizes of WSA tires manufactured at any of the three plants operated by Goodyear US.

[66] The Plaintiff agreed in oral submissions that the subclass of consumers whose WSA Tires fell within the Recall period is not necessary. Any issues regarding whether some of the Proposed Class have already been compensated through the Recall can be addressed at the individual issues stage if the Action continues to that point: ***Thorpe*** at para 59. The Plaintiff agreed that the Proposed Class definition should be amended to delete the inclusion of the subclasses at this stage.

[67] Goodyear concedes that there is a rational connection among the Proposed Class and the claim, if there is some basis in fact that the alleged claims actually exist. However, Goodyear suggests that the Plaintiff is the only person with a complaint and that there must be evidence of two or more people with a current complaint in order to certify an identifiable class. Further, they argue that there is no basis in fact for the allegation of a defect in either the WSA Tire design or manufacturing process.

[68] I first address whether it is necessary to identify other complainants, then whether there is some basis in fact in the circumstances that unites the Proposed Class, and finally, if the Proposed Class is overbroad.

### 2. Does the Plaintiff Need to Show Other Complainants?

[69] Goodyear argues that the Plaintiff has not provided some basis in fact in the evidence that establishes the existence of a group of people who share similar complaints about WSA Tires.

[70] The Plaintiff contends that Goodyear alone is in possession of information and records to ascertain the identity of prospective class members. The Plaintiff says that Goodyear has this information as demonstrated by its ability to distribute the Recall Notice to Canadian purchasers of WSA Tires. The Plaintiff contends that the evidence does, however, provide some basis in fact that there were thousands of WSA Tires sold and distributed to people in Canada, even though their precise identity remains unknown.

[71] In ***Hollick*** at para 24, citing ***Taub v Manufacturers Life Insurance Co***, (1998), 40 OR (3d) 379, OJ No 2694 (Gen Div), the Court noted that there was no basis in fact to support a finding of an identifiable class in circumstances where a representative plaintiff did not provide any evidence that anyone else had suffered the same mould problem. On the other hand, where a representative plaintiff adduced evidence of other complaints about the emissions at issue, there was a sufficient basis in fact for an identifiable class with common issues: ***Hollick*** at para 26.

[72] A court is not to refuse certification by reason only of the number of prospective class members not being yet ascertained or ascertainable, nor is it necessary for the plaintiff to provide evidence of the specific identity of prospective class members at the time of certification: *CPA,* s 8(d); ***Warner*** at para 22. Whether the existence of one or more claims is required at the time of certification depends on the circumstances of the case: ***Keatley Surveying Ltd v Teranet Inc***, 2015 ONCA 248 at para 71.

[73] A class action may depend on a representative plaintiff taking the initiative to pursue an action alone because other members of the class may be unaware of their loss or acquiesce due to disinterest, limited resources, or fear of an adverse costs award: ***Keatley*** at para 72.

[74] As ***Warner*** and ***Keatley*** indicate, there is no requirement at this stage to identify specific prospective class members or claims at the time of certification beyond the objectively identifiable class of those consumers who purchased the WSA Tires. Considering the circumstances, there is some basis in fact to support that there are other consumers of the WSA Tires with similar claims at issue in this certification, which is sufficient at this stage to show an objectively identifiable class of two or more people.

### 3. Is There Some Basis in Fact for a Common Defect?

[75] An application brought under the *CPA* for certification of an action as a class proceeding requires evidence for the court to consider in assessing criteria to be satisfied under s 5. As described above, there is no requirement that other individuals with complaints must have come forward at the time of certification. However, there must be some basis in fact that an alleged common issue actually exists to support the certification: ***Hollick*** at para 25. As such, I will address the evidentiary foundation necessary to certify this Action under this condition. This evidentiary basis is also necessary to support other of the conditions for certification, in particular the common issues.

#### i. Parties' Positions on Evidentiary Foundation

[76] As evidence to support his certification application, the Plaintiff relies on the Recall Notice; the proximity and time of manufacturing data relative to his WSA Tires and other WSA

Tires included in the Recall Notice; the circumstances of his accident and two other motor vehicle accident fatalities that allegedly involved WSA Tire tread separation, including Transport Canada's investigation of one of those fatalities; 10 complaints to Transport Canada's American counterpart, the National Highway Transport Safety Authority (**NHTSA**), regarding WSA Tires; Goodyear's crown separation adjustment and early warning data for WSA Tires that he alleges shows other periods and other WSA Tires with a similar magnitude of complaints, some manufactured at plants other than Fayetteville; and a statement by Goodyear US's representative that WSA Tires have no discernible differences in design or manufacturing processes apart from differences in specifications such as size and a unique tread compound for Pro-Grade WSA Tires.

[77] The Plaintiff contends that Goodyear voluntarily issued the Recall Notice so that it could avoid a regulatory investigation by NHTSA and Transport Canada and the expense of a more expansive recall.

[78] The Plaintiff also relies on Goodyear's Recall Notice to provide some "basis in fact" for representations that Goodyear made to certain of its consumers that goes to the issue of the unidentified defect that he alleges exists in some or all WSA Tires. The Plaintiff further claims that Goodyear either failed to investigate, or its investigation could not identify, the root cause of the defect to ensure that all WSA Tires were safe for their intended use.

[79] Goodyear contends that there is no evidentiary foundation to support certification of the Plaintiff's Action. Goodyear says that the only defect established is one that rests on a foundation of unsubstantiated beliefs and conjectures by the Plaintiff with no evidence that the Plaintiff's WSA Tires or any other WSA Tires are inherently defective.

[80] In support of its contention that there is no evidence to provide some basis in fact of a defect in WSA Tires, Goodyear submits that the Plaintiff cannot rely on the Recall Notice because it is Goodyear's out of court statement tendered for the truth of its contents and, as such, is inadmissible hearsay evidence.

[81] Further, even if the Recall Notice is admissible, Goodyear points to its responding evidence to demonstrate that the Recall Notice was not an admission of defect, but rather a voluntary customer service campaign intended to address a "slight" increase in warranty returns and property damage claims for some WSA Tires. Goodyear says that use of the term "defect" in the Recall Notice was one mandated by Transport Canada and the NHTSA, and was not an admission of an actual defect.

[82] Finally, Goodyear argues that its evidence demonstrates that no root cause has ever been identified for any issues with WSA Tires included in the Recall.

#### ii. The Recall Notice

[83] A central issue in this certification proceeding is the admissibility and use of the Recall Notice issued by Goodyear. As previously noted, Goodyear objects to the admission of the Recall Notice into evidence because they say it is a hearsay document. Goodyear states that, although it was subject to cross-examination regarding the Recall Notice, it did not adopt the truth of the statement contained in it. They argue that the Recall Notice does not meet the criterium of reliability under the principled approach to the admission of hearsay, that it is irrelevant, and that its prejudicial effect outweighs its probative value. Further, Goodyear contends that the Recall Notice was not an admission but an involuntary statement because it

consisted of wording mandated by Transport Canada. At this stage, there is no evidence from Transport Canada or the NHTSA on this wording issue.

[84] The Plaintiff argues that the Recall Notice is an admission that Goodyear made voluntarily to consumers to advise them of a defect in the identified WSA Tires. The Plaintiff points to the criteria used by Transport Canada to satisfy itself in directing Goodyear to issue the Recall Notice and submits that Goodyear had other options that it could have pursued if it objected to the wording suggested by Transport Canada.

[85] The Plaintiff also points to Goodyear's voluntary inclusion of the Recall Notice in its affidavit evidence before the Court. Goodyear's representative Mr Henderson deposed to Goodyear's understanding of the Recall Notice, including its use of the word "defect". In this way, Goodyear relied on the Recall Notice, albeit for a different purpose.

[86] The Plaintiff also says that the Recall Notice is not being presented for the truth of the contents, but rather to show that Goodyear issued the Recall Notice to certain of its purchasers of WSA Tires. The Plaintiff suggests that, at this stage, this is sufficient to show some basis in fact and any further assessment of the Recall Notice is better left to the trial of the merits of the issues.

[87] Certification is not a trial of the merits in which applicable substantive law is a key part of the process. Rather, the focus on a certification application is procedural; the court's task is not to decide whether the plaintiff's claim is likely to succeed but to determine the preferable procedure for how the litigation is to proceed: ***Hollick*** at para 16.

[88] With the exception of the lower standard of proof for the first condition for certification, success on certification requires only "some basis in fact", not "proof of fact", because there can be no proving of substantive facts or a determination of the merits at the certification stage. Certification does not permit a court to extensively weigh or resolve conflicting evidence, assess the merits of the claim, or determine the strength or viability of a proceeding: ***Pro-Sys*** at paras 99–102. Further, if during the proceedings that follow certification, additional information establishes that the conditions for certification are no longer met, then an application can be made to decertify the action: ***Pro-Sys*** at para 105; *CPA* s 11(1)(b).

[89] Nonetheless, evidence tendered on a certification motion must meet the usual standards for admissibility: ***Williams v Canon Canada Inc***, 2011 ONSC 6571 at para 65, aff'd 2012 ONSC 3692; ***Ernewein v General Motors of Canada Ltd***, 2005 BCCA 540 at para 31, leave to appeal to SCC refused 31218 (23 March 2006).

[90] As previously stated, the parties dispute whether the Recall Notice is inadmissible on the basis of being hearsay evidence.

[91] Hearsay is presumptively inadmissible: ***R v Khelawon***, 2006 SCC 57 at paras 34–35. If the evidence is hearsay, then it must be assessed to determine whether it falls within an exception to the hearsay rule or has the requisite indicia of reliability and necessity: ***R v Mapara***, 2005 SCC 23 at para 15; ***Khelawon*** at para 42.

[92] The two defining features of hearsay evidence are that the statement is adduced to prove the truth of its contents and in the absence of a contemporaneous opportunity to cross-examine the declarant: ***Khelawon*** at para 35.

[93] At this stage, given the conflicting evidence, I am prepared to accept that the Recall Notice is admissible for the purposes of this certification application. The Recall Notice is not hearsay evidence because it is not being provided for the truth of its contents: ***Khelawon*** at para 36. Rather, the Plaintiff relies on the Recall Notice to provide "some basis in fact" for a defect in WSA Tires by showing that that there was a Recall Notice sent to certain purchasers of some WSA Tires. As Goodyear conceded in oral submissions, the Recall Notice is admissible for the fact that the statements were made, sent and received by the Plaintiff and other purchasers of some WSA Tires. Goodyear issued the Recall Notice and intended that consumers of the affected WSA Tires would rely and act on the Recall Notice. In the Recall Notice, Goodyear publicly represented to certain of its consumers that the identified WSA Tires had a "defect", which was the reason for the Recall. Whether Goodyear's explanation for the use of the word "defect" in the Recall Notice is accepted as true speaks to the merits of this case and therefore is an issue for trial.

[94] The fact that the Recall Notice is not being used for the truth of its contents is also evidenced by Goodyear's arguments on its admissibility. Goodyear argues that the Recall Notice remains an out of court statement of hearsay, despite the fact that a Goodyear representative was cross-examined on the Recall Notice. This is because Goodyear did not adopt the statements made in the Recall Notice as true. Specifically, Goodyear maintained in cross examination that the use of the word "defect" in the Recall Notice is not an admission that there was any defect in any of the WSA Tires. As discussed earlier, the Recall Notice is only admissible to show that the Recall Notice was sent by Goodyear to certain of its consumers, not whether there was in fact any defect. It is therefore not being admitted for the truth of its contents, or beyond its meaning adopted by Goodyear.

[95] As such, it is unnecessary to consider further arguments regarding the Recall Notice or whether it falls into a hearsay exception.

[96] I also note that a party seeking certification, as a matter of procedural law, may rely upon some hearsay and opinion evidence without prejudicing the other party because it is not relied upon for any substantive purpose: ***Harrison v XL Foods Inc***, 2014 ABQB 720 at para 18. For example, Rule 13.18 of the *Alberta Rules of Court* provides an exception permitting hearsay evidence properly deposed to be admissible in applications that are not final but interlocutory (procedural or form) in nature. Certification is an interlocutory proceeding in which no formal findings of fact are made except for a recognition of alleged facts that give a basis for continuing the action procedurally as a class action: ***578115 Ontario Inc v Sears Canada Inc***, 2010 ONSC 4571 at para 30; ***Thorpe*** at para 19; ***Harrison*** at para 19.

[97] The Recall Notice is relevant evidence in assessing the conditions for an identifiable class and common issues. The Recall Notice connects some of the pieces of evidence by showing the substantially unchallenged facts relating to the Recall. This includes the limited extent of the Recall and the advice given therein, as well as the resulting consequences at issue in this proceeding — a limited recall that may or may not have allowed defective WSA Tires to be distributed across Canada, exposing consumers of other WSA Tires manufactured outside the Recall to risk of significant harm, even death.

[98] At this stage of the proceedings, for the purpose of this procedural motion and given the conflicting evidence, I permit the Plaintiff to rely on the Recall Notice not for the truth of its contents but for the purpose of showing that there is some link between Goodyear's

representations to consumers of its WSA Tires in the Recall and the other pieces of evidence that suggest there is some basis in fact that an inherent defect or safety concern (whether one of design or manufacturing) may exist in relation to all WSA Tires.

[99] There is caselaw that suggests that a recall notice, while not determinative proof of a defect, may provide some basis in fact that a defect may exist across a class, similarly to an automobile service bulletin or a warning letter: ***Williams*** at para 174; ***Thorpe; Evans; Panacci***; ***Willar v Ford Motor Co of Canada***, (1991), 118 NBR (2d) 323 at paras 7-8, [1991] NBJ No 843 (NBQB); ***McEvoy v Ford Motor Co***, [1989] BCJ No 1639 at paras 27, 33, [1989] BCWLD 2317 (BCSC), aff'd 63 BCLR (2d) 362; ***Johansson v General Motors of Canada Ltd***, 2012 NSCA 120 at para 59.

[100] On this application, the Plaintiff is not relying on the Recall Notice for the purpose of proving the defect based on the wording of the Recall Notice, but rather to support the fact that Goodyear represented to some of its consumers that there was a "defect" in certain of its WSA Tires such that it warranted the Recall campaign.

[101] In that respect, the Plaintiff relies on the Recall Notice as one piece of evidence to establish "some basis in fact" for its claim that WSA Tires are defective in that Goodyear recalled some of its WSA Tires. But this is not the only evidence put forward. I will now address the additional evidence relied on by the parties to demonstrate whether there is some basis in fact of a defect in WSA Tires.

### iii. Additional Evidence

[102] Goodyear argues that the Plaintiff has not identified the nature of the defect alleged to exist in the WSA Tires that make them dangerous to use and has provided no evidence whatsoever as to what caused the treads to separate on his WSA Tire. Goodyear submits that the Plaintiff has failed to provide any basis in fact to support his claim that the tread separation that occurred with his WSA Tire was caused by a defect common in all other WSA Tires. It says there is no evidence as to whether the alleged defect is one of design or manufacturing. There is no expert report. The Plaintiff did not make his WSA Tires available for inspection by Goodyear so that Goodyear could have perhaps identified whether there was a defect in his WSA Tires. The Plaintiff did not ask Transport Canada to evaluate his WSA Tires to see if they could identify a defect.

[103] In response, the Plaintiff points to statements by Goodyear confirming that there is no material difference in the design or manufacture of WSA Tires included or not included in the Recall. Further, as pointed out by the Plaintiff, Goodyear's own early warning data showed increases in warranty returns and property damage claims and crown separation adjustment data in periods outside the Recall Notice. For example, the Plaintiff notes that early warning data from the first quarter of 2008 through to the third quarter of 2013 identified 169 tread-related incidents, of which fewer than half were within the Recall population. Of 869 recorded crown separation adjustments of WSA Tires made in 2009, only 300 or so were within the Recall population. The Plaintiff also provided evidence that suggested that there were increased warning data from plants other than Fayetteville. Additionally, Transport Canada identified 10 complaints on an NHTSA database relating to tread separation of WSA Tires, all of which were manufactured outside the Recall.

[104] The Plaintiff further noted that the early warning data purportedly relied on by Goodyear to limit the scope of the Recall Notice did not distinguish between incidences of tread separation during normal or "severe" use or conditions. The implication to consumers arising from the Recall Notice was that recalled WSA Tires were safe under normal conditions, and that any "defect" only arose under use in "severe" conditions. The Plaintiff noted that the tread separation that occurred to the Plaintiff's WSA Tires' tread occurred not under severe operating conditions but while he was operating his vehicle on a highway under normal conditions.

[105] The Plaintiff also points to Goodyear's refusal to provide information or records to substantiate its claim that no defect has been found in the WSA Tires, either inside or outside the Recall population. This is so even though Goodyear, deeming it prudent to issue the Recall Notice, has to date represented that it has been unable to isolate a root cause for the increase in warranty and property damage claims that gave rise to the Recall. This is Goodyear's position even though it advised its US consumers under the recall undertaken in that jurisdiction that "Goodyear has decided that a condition which relates to motor vehicle safety may exist in certain [WSA Tires]. Use of these tires in severe conditions could result in partial tread separation ...". The Plaintiff questions how Goodyear made this determination that there is some "condition" or "defect" in only certain of its WSA Tires and when used in "severe" conditions.

[106] The Plaintiff points to evidence that ultimately the WSA Tires returned to Goodyear under the Recall were found to have crown area tread separation conditions and a risk of tread separation. Although not all of the returned WSA Tires were inspected, adjustment data arising from those returns disclosed tire tread separation.

[107] The Plaintiff also submits that Goodyear was aware of two motor vehicle accidents resulting in fatalities and the Plaintiff's own motor vehicle accident, all of which involved WSA Tires and tire tread separation.

[108] Finally, the Plaintiff relies on Goodyear's failure to provide any standard or threshold against which warranty claims would have been measured to define the temporal scope of the Recall in light of its knowledge of incidence of tread separation in WSA Tires outside the Recall.

[109] The Plaintiff asserts that all of this evidence provides some basis in fact for his allegation that the Recall was a purely arbitrary decision.

**iv. Analysis**

[110] The first step in every product liability case alleging negligent design, manufacture or marketing requires the plaintiff to provide some evidence that a defect exists: ***Harrington v Dow Corning Corp***, 2000 BCCA 605 at para 42. As the Court stated in ***Williams*** at para 174:

> The evidence necessary to establish that the product is defective and that liability can be determined on a class-wide basis will vary from case to case. In some cases, evidence that the defendant or regulatory authority has made a product recall may be sufficient. In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

[111] It is inappropriate to weigh evidence during certification: ***Dine v Biomet Inc***, 2016 ONSC 4039 at para 34. Courts should avoid weighing evidence where the defence provides evidence to directly contradict evidence from the plaintiff in establishing or disproving some basis in fact: ***Dine*** at paras 35-36. Any weighing of the evidence to determine whether such a

defect is admitted in the Recall Notice or actually exists is beyond the scope of a certification proceeding.

[112] Goodyear's submissions that other factors could be related to any alleged WSA Tire failure do not prevent certification, because those issues must be considered in context of the Plaintiff's theory about the defect: ***Reid v Ford Motor Co***, 2003 BCSC 1632 at para 65. The question of whether other factors may be responsible for WSA Tire failure can only be answered after a determination of the merits of the Action.

[113] Additionally, Goodyear's suggestion that expert evidence is necessary at the certification proceeding is not so. Goodyear suggests that their early warning data, relied on by the Plaintiff to show that the Recall Notice was arbitrarily limited in scope, requires expert evidence to explain when increases in early warning data might warrant a recall. Yet, as explained by the Plaintiff, inconsistencies in this data are readily apparent, negating the need for expert evidence at this stage.

[114] There is no requirement for a specific type of evidence for certification as long as the evidence relied upon provides some basis in fact for the common issues. While expert evidence is often relied upon in product liability cases, it is not mandatory: ***Thorpe***; ***Panacci***; ***Evans***.

[115] In my view, the remainder of Goodyear's arguments are all concerned with the merits of the Action. Its underlying arguments against certification is that their alleged facts demonstrate that the claims asserted on behalf of the Proposed Class are without merit.

[116] For example, Goodyear relies on its own investigation and analysis, or lack thereof, to contend that they have as yet to confirm a defect in the WSA Tires. Yet Goodyear refused to disclose information regarding its internal investigations while simultaneously relying on whatever inspections or investigations they undertook to say there is no identified defect in the WSA Tires. It is conceivable that there is a defect; it has not yet been confirmed.

[117] It is not unusual in a certification hearing for a plaintiff to contend that the facts relating to a defendant's knowledge, conduct and information that are exclusively within the defendant's knowledge and directly relevant to the determination of the claims against it are disputed and in issue: ***Miller*** at para 52; ***Pro-Sys*** at para 119. This tactic recognizes that the merits of a claim are not assessed in a certification application and opportunities for discovery in a full trial setting are not necessarily available to a plaintiff at this time.

[118] Although not compelled to do so, Goodyear could disclose facts that may assist in defining more narrowly the class or the common issues. If, however, they elect to rely on assertions of facts only within their own knowledge, and which cannot adequately be assessed at this stage, they cannot expect their evidence to be accepted as determinative. Considering the Court's role during certification, with its focus on the claims as advanced by the Plaintiff, and based on the applicable standard of proof, it would be improper to weigh the evidence without a consideration of all of the evidence.

[119] This case is unique because the issue is whether there is a dangerous common defect in WSA Tires that are *not* the subject of the Recall that Goodyear knew or ought to have known but failed to take steps to warn its consumers or alleviate the danger through a more expansive recall. As discussed, the Plaintiff provided evidence other than the Recall Notice to provide some basis in fact for his allegation that the Recall was not sufficient, including crown separation data,

statements by Goodyear about design and manufacturing similarities in WSA Tires, and other accidents and complaints for WSA Tires outside the Recall.

[120] In my view, all of this evidence provides "some basis in fact" for the Plaintiff's allegation that Goodyear knew or ought to have known that there was a dangerous defect, be it one of design or manufacturing, which affected more WSA Tires than those only within the Recall and that it failed to take steps to warn consumers of the danger.

[121] Considering all of the evidence as a whole, I conclude that the Plaintiff has provided some factual basis for his proposition that the WSA Tires owned by him share a common defect with the Proposed Class. The Plaintiff has provided some basis in fact that a common defect may exist that also affects WSA Tires outside those identified in the Recall Notice.

[122] Conversely, Goodyear has failed to adduce any evidence to indicate that there is no basis in fact for a possible defect. Notably, Goodyear indicates that it failed to find either evidence of a defect or evidence that there is *not* a defect in WSA Tires.

[123] All of these considerations lead me to conclude that there is some basis in fact that there is a common defect in WSA Tires outside the Recall that provides some connection between the proposed common issues and the Proposed Class.

### 4. Is the Proposed Class Definition Overbroad?

[124] The Proposed Class is defined broadly to include purchases of all WSA Tires in Canada.

[125] There are 51 types of WSA Tires yet only six types were included in the Recall. The six WSA Tires included in the Recall Notice were all Pro-Grade WSA Tires. According to Goodyear, the principal difference between WSA Tires and WSA Pro-Grade Tires is the different tread compound used in WSA Pro-Grade Tires for the purpose of heavy-duty vehicle use. Further, all of the WSA Tires in the Recall Notice were manufactured at the Fayetteville plant.

[126] However, early warning data and crown separation adjustment data reveals significant inconsistencies in the selection of sizes and production dates relied on by Goodyear in setting the Recall population and period. Further, crown separation adjustment data showed that there was tread separation in WSA Tires manufactured at plants other than Fayetteville. As conceded by Goodyear, all of this evidence suggests there is no sound and rational basis on which to narrow the class.

[127] Accordingly, there is no rational basis on which to narrow the Proposed Class at this stage. There is some basis in fact at this stage that the alleged defect may be present in all WSA Tires, regardless of the make, date or place of manufacture. As such, the Proposed Class definition at this stage encompasses all individuals who bought WSA Tires and there is a rational connection between the Proposed Class as defined and the proposed common issues concerning the existence of a common defect, breach of a duty of care, duty to warn and unjust enrichment/waiver of tort.

### 5. Conclusion: Identifiable Class

[128] For these reasons, I find that the Plaintiff has provided some basis in fact to establish that the Proposed Class definition, as amended to delete the inclusion of the subclasses, satisfies the condition set out in s 5(1)(b) of the *CPA*. The definition provides objective criteria and there is no suggestion that identification of the class would pose any difficulties.

[129] While other options may be pursued following certification to address issues arising from the Proposed Class definition, such as any additional evidence that may indicate a more appropriate narrowing of the class, at this time, I find that this condition is satisfied.

### D. Does the Claim Raise a Common Issue?

#### 1. Applicable Legal Principals

[130] The third condition for certification requires that the claims of prospective class members raise a common issue: *CPA,* s 5(1)(c). Common issues are defined as "(i) common but not necessarily identical issues of fact, or (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts": *CPA*, s 1(3).

[131] Class members' claims must share a substantial common element in order to justify certifying a class action. An issue is common if it is necessary for the resolution of each class member's claim and, accordingly, advances the litigation. Determining whether there is a common issue requires a purposive approach, with consideration given to whether allowing the claim to proceed will meet the purpose of class litigation to avoid duplication of fact-finding or legal analysis: ***Dutton*** at para 39.

[132] However, the common issues do not have to predominate over individual issues or result in complete resolution of the litigation; individual issues may still remain after the common issues are resolved: *CPA,* s 5(1)(c); ***Dutton*** at para 39. While all members of the class must benefit from the successful prosecution of the claim without conflicting interests, the extent of their individual benefit may vary: ***Dutton*** at para 40. Class members also do not have to be situated identically in regard to the opposing party: ***Dutton*** at para 39. Even a significant level of difference between class members does not prevent a finding of commonality: ***Pro-Sys*** at para 112.

[133] Goodyear disputes certification of each common issue. In addition to previously addressed issues of some basis in fact for a specific defect, they argue that there is no basis to show that all WSA Tires are manufactured and designed identically, considering the differences in size and type amongst WSA Tires and manufacturing plants.

[134] I will first address Goodyear's arguments regarding lack of some basis in fact for the common issues before addressing the proposed issues individually.

#### 2. Is There Some Basis in Fact for Common Issues?

[135] The common issues condition requires some evidence that the proposed issues actually exist and that they can be answered in common across the entire class: ***Hollick*** at para 19. However, the evidence does not have to establish that the alleged acts actually occurred: ***Pro-Sys*** at para 110. Factual evidence goes toward establishing whether these questions are common to all class members: ***Pro-Sys*** at para 110.

[136] Unless there are significant design differences that prevent extrapolation of the allegations regarding the plaintiff's affected product to other affected products, common issues are certifiable in product liability cases where some basis in fact shows that the alleged defect would extend across the proposed class: ***Poulin v Ford Motor Company of Canada, Limited***, CanLII 54299 (ON SCDC) at para 34, 301 DLR ($4^{th}$) 610, aff'g (2006), 153 ACWS (3d) 30, 35 CPC ($6^{th}$) 264 (Ont SCJ); ***Ernewein*** at para 32; ***Barwin*** at paras 26-29. For example, in ***Poulin,*** the Court upheld the motion judge's finding that there were not common issues between the

multiple types of vehicles included in the proposed class because of differences in the allegedly defective door latch mechanisms as between those vehicles. As a result, resolving the issue of defect with respect to the plaintiff's door latch mechanism would not resolve whether other vehicles with different door latch mechanisms were similarly defective: ***Poulin*** at paras 32–34.

[137] Those facts are distinguishable from the present circumstances where the Plaintiff has provided evidence, such as the early warning data, crown separation data and complaints, to suggest there is a defect that extends across the Proposed Class, being common to all WSA Tires. Conversely, Goodyear has failed to refute the potential for the defect to be common to all WSA Tires beyond referencing the tread compound used in Pro-Grade WSA Tires, previously addressed. Further, as discussed within the identifiable class analysis, there is some basis in fact for common design and manufacturing processes of WSA Tires such that the core proposed common issues of whether a defect in the design or manufacturing process exists is a common issue for all WSA Tires.

[138] The necessity and possibility of identifying the specific defect at this stage of the proceedings has already been addressed. It is sufficient that the Plaintiff has identified that a condition leading to possible tread separation that poses a safety risk to users may exist in all WSA Tires and not just those in the Recall population.

[139] Since there is some basis in fact to support that a potential defect resulting in tire tread separation exists in the class defined as consumers of WSA Tires, each proposed issue must be addressed to determine whether it is common to the Proposed Class and advances the litigation.

### 3. Which Proposed Common Issues are Certifiable?

[140] Caselaw suggests that a court should refrain from fundamentally adjusting the common issues. A court may modify the common issues where necessary to comply with the legislation, but the power should be exercised with caution and any adjustments should be the exception, not the norm: ***McCracken v Canadian National Railway***, 2012 ONCA 445 at para 144. As long as the common issues meet the overall requirements, precise formulation of the issues may be resolved on a subsequent appearance: ***Warner*** at para 34.

[141] The Plaintiff submitted a long list of proposed common issues within four categories, consisting of proposed issues related to negligent design and manufacture, duty to warn, unjust enrichment, and entitlement to damages.

[142] While many of these issues could arguably be condensed into a more streamlined approach, the central question is whether there is some basis in fact that the issue is one common among the Proposed Class such that it prevents duplication of fact finding or legal analysis while advancing the litigation.

[143] I do, however, agree with Goodyear that some of the proposed common issues are too broadly worded or would not advance the litigation and so need amendment or deletion.

[144] I now address the proposed common issues individually.

#### i. Common Issues: Negligence in Design and Manufacture

[145] The proposed common issues in regard to negligence in design and manufacture are:

1) Did either or both of the Defendants owe a duty to Class Members to exercise reasonable care in designing and manufacturing the WSA Tires?

2) If so, what is the standard of care expected of a reasonably prudent designer and manufacturer of automobile tires?

3) Did either or both of the Defendants breach the standard of care by failing to design or manufacture the WSA Tires in accordance with accepted industry standards and safety regulations?

4) Is there a defect in the design of the WSA Tires making them susceptible to tread separation during normal use?

5) Is there a defect in the WSA Tires caused by the Defendants' manufacturing processes, or conditions prevalent at the Defendants' manufacturing plant?

6) Is there a difference in design or processes used to manufacture WSA Tires within or outside of the Recall period?

7) Did a breach of duties on the part of either or both of the Defendants cause or contribute to loss or harm to Class members?

[146] The Plaintiff agreed in oral submissions that the duties related to design and manufacturing only apply to Goodyear US. Thus, proposed common issues 1 to 7 should be amended to refer to Goodyear US only.

[147] Proposed common issues 1 and 2 relate to the existence of a duty and the applicable standard of care. These are issues in every product liability and negligence claim in which it is alleged there is a defective product and are therefore appropriate for certification.

[148] However, common issue 2 should be reworded so that it does not provide a conclusion as to the standard of care prior to a determination of that standard. Proposed common issue 2 should be amended to remove the reference to a standard of a "reasonably prudent" designer and manufacturer.

[149] Proposed common issue 3, as drafted, is not an appropriate question because it provides a conclusion as to the applicable standard. The applicable standard is an issue to be decided. Common issue 3 should be amended to ask whether Goodyear breached the applicable standard or standards of care in designing and/or manufacturing the WSA Tires.

[150] I have determined that the Plaintiff has provided some basis in fact supporting the existence of a common or similar defect, whether by design or manufacturing, across different models, years and plants. While I would have worded proposed common issues 4 and 5 differently, I am satisfied that both these proposed common issues would advance the litigation and should be certified as common issues.

[151] A determination of proposed common issue 6 would assist in advancing the Plaintiff's theory of a common or similar defect or, alternatively, could result in a narrowing of the current class identification and common issues certified in these proceedings. I am satisfied that this issue should be certified as a common issue.

[152] Proposed common issue 7 would obviously advance the litigation and should be certified as a common issue.

### ii. Common Issues: Duty to Warn

[153] The proposed common issues in regard to the duty to warn are:

8) Did either or both of the Defendants owe a duty to warn Class Members or the public that the WSA Tires are defective and prone to tread separation during normal use?

9) What was the scope and extent of the Defendants' review of early warning data disclosing heightened incidence of tread separation?

10) What was the scope and extent of the Defendants' inspection of returned WSA Tires?

11) Did either or both of the Defendants take reasonable steps to diligently investigate the cause of a defect in the WSA Tires?

12) Did either or both of the Defendants have knowledge that the WSA Tires pose an unreasonable risk of harm to Class Members based on the review of early warning data and information acquired in the course of investigating the cause of a potential defect?

13) Have either or both of the Defendants breached duties to warn the public and Class Members that the WSA Tires are defective by limiting the scope of the Recall, or failing to recall WSA Tires they knew or ought to reasonably have known were defective?

14) Did a breach of a duty to warn on the part of either or both of the Defendants cause or contribute to harm or loss to Class Members?

15) In respect of the subclass of consumers who received a recall notice:

(i) Did members of the subclass receive notice of the Recall from the Defendants?

(ii) Was notice of the Recall issued by the Defendants sufficient to satisfy a duty to warn members of this subclass that the Tires are or may be defective?

(iii) Was notice of the Recall unreasonably delayed by the Defendants despite knowledge that the Tires are or may be defective?

(iv) Did the Defendants' Recall permit, and did members of the subclass receive, replacement Tires manufactured outside the Recall period?

[154] The Plaintiff agreed to remove "the public" from proposed common issues 8 and 13, which are key questions to be determined in any failure to warn case. With this amendment, proposed common issues, 8, 13 and 14 are suitable issues for certification as they will advance the litigation for the Proposed Class.

[155] Proposed common issues 9, 10, 11 and 12 are factual questions that will advance the litigation by showing whether Goodyear was reasonably diligent in its investigation and whether Goodyear had, or should have had, knowledge such that a duty to warn was breached. Proposed

common issues 9, 10, 11 and 12 will advance the litigation and are therefore appropriate for certification.

[156] Proposed common issue 15, which relates only to those who received the Recall Notice, will not be certified because the parties agreed to remove this subclass from the pleadings.

### iii. Common Issues: Unjust Enrichment and Waiver of Tort

[157] The proposed common issues in regard to unjust enrichment and waiver of tort are:

16) Did either or both of the Defendants deliberately limit the scope of an investigation to ascertain the cause of a potential defect in the WSA Tires?

17) Did either or both of the Defendants deliberately limit the scope of the Recall to avoid the cost of replacing defective WSA Tires?

18) Did either or both of the Defendants continue to market potentially defective Tires for sale to the public and Class Members in Canada?

19) Were either or both of the Defendants enriched by the marketing and sale of defective Tires?

20) Have Class Members suffered a corresponding deprivation due to enrichment of the Defendants?

21) If so, is there any juristic reason for the Defendants' enrichment?

[158] As with proposed common issues 8 and 13, the Plaintiff agreed to remove "public" from proposed common issue 18 and so will be amended accordingly.

[159] Proposed common issues 16, 17, and 18 are factual questions that will advance the litigation by establishing whether there was unjust enrichment or waiver of tort. That said, proposed common issue 18 should be amended to indicate that the issue is asking whether "the Defendants continued to market potentially defective WSA Tires for sale in Canada after they knew the WSA Tires contained a defect that rendered them dangerous and/or unfit for their purpose".

[160] Proposed common issues 19, 20, and 21 are legal questions that will advance the litigation by establishing whether the necessary elements of an unjust enrichment claim are present.

[161] Given my comments with respect to waiver of tort as an appropriate cause of action, at this stage there should be a proposed common issue relating to restitutionary damages to account for waiver of tort, if it is found to be a cause of action and not a remedy by the trial judge. The proposed common issue would be as follows: are either or both of the Defendants liable, on a restitutionary basis, to account and disgorge to the Proposed Class any profits earned on the sale of the WSA Tires?

### iv. Common Issues: Damages

[162] The proposed common issues in regard to damages are:

22) What is the appropriate measure of damages in tort, for negligent design, manufacture or sale of the WSA Tires the Defendants knew, or ought to have known, were defective?

23) What is the appropriate measure of damages for restitution and disgorgement of profits wrongfully earned by the Defendants from the sale of defective WSA Tires?

24) Is an award of aggravated, exemplary or punitive damages appropriate having regard to the nature of established breaches on the part of the Defendants?

[163] In regard to punitive damages, certification may be appropriate in a class action because punitive damages are premised on an individual defendant's conduct, rather than on the conduct of class members: ***Rumley v British Columbia***, 2001 SCC 69 at para 34; ***Wheadon v Bayers Inc***, 2004 NLSCTD 72 at para 136, leave to appeal to SCC denied 30920 (10 November 2005). In ***Wheadon*** at para 136, where the court found "colourable claims for compensatory damages that give rise to certifiable common issues", a punitive damages common issue was certified.

[164] However, as the Plaintiff agreed in oral submissions, aggravated damages are not certifiable in a class action. Aggravated damages are based on harm caused to a plaintiff's emotions by reprehensible or outrageous conduct by a defendant: ***Whiten v Pilot Insurance Co***, 2002 SCC 18 at para 116. They are based on individual assessment and are not determinable on a class wide basis: ***Banerjee v Shire Biochem Inc***, 2010 ONSC 889 at para 35.

[165] As such, common issues 22, 23, and 24 will be certified with the exception of the proposed reference to aggravated damages, which will not be certified.

**4. Conclusion: Common Issues**

[166] The proposed common issues, as amended, that will be certified are as follows:

1) Did Goodyear US owe a duty to Class Members to exercise reasonable care in designing and manufacturing the WSA Tires?

2) If so, what is the standard of care expected in designing and/or manufacturing the WSA Tires?

3) Did Goodyear US breach the standard of care in designing or manufacturing the WSA Tires?

4) Is there a defect in the design of the WSA Tires making them susceptible to tread separation during normal use?

5) Is there a defect in the WSA Tires caused by Goodyear US's manufacturing processes, or conditions prevalent at its manufacturing plants?

6) Is there a difference in design or processes used to manufacture WSA Tires within or outside of the Recall?

7) Did a breach of duties on the part of Goodyear US cause or contribute to loss or harm to the Proposed Class?

8) Did either or both of the Defendants owe a duty to warn the Proposed Class that the WSA Tires are defective and prone to tread separation during normal use?

9) What was the scope and extent of the Defendants' review of early warning data disclosing heightened incidence of tread separation?

10) What was the scope and extent of the Defendants' inspection of returned WSA Tires?

11) Did either or both of the Defendants take reasonable steps to diligently investigate the cause of a defect in the WSA Tires?

12) Did either or both of the Defendants have knowledge that the WSA Tires pose an unreasonable risk of harm to the Proposed Class based on the review of early warning data and information acquired in the course of investigating the cause of a potential defect?

13) Have either or both of the Defendants breached duties to the Proposed Class by limiting the scope of the Recall, or failing to recall WSA Tires they knew or ought to reasonably have known were defective?

14) Did a breach of a duty to warn on the part of either or both of the Defendants cause or contribute to harm or loss to the Proposed Class?

15) Did either or both of the Defendants deliberately limit the scope of an investigation to ascertain the cause of a potential defect in the WSA Tires?

16) Did either or both of the Defendants deliberately limit the scope of the Recall to avoid the cost of replacing defective WSA Tires?

17) Did either or both of the Defendants continue to market potentially defective WSA Tires for sale in Canada after they knew the WSA Tires contained a defect that rendered them dangerous and/or unfit for their purpose?

18) Were either or both of the Defendants enriched by the marketing and sale of defective WSA Tires?

19) Have the Proposed Class suffered a corresponding deprivation due to enrichment of the Defendants?

20) If so, is there any juristic reason for the Defendants' enrichment?

21) Are either or both of the Defendants liable, on a restitutionary basis, to account and disgorge to the Proposed Class any profits earned on the sale of the WSA Tires?

22) What is the appropriate measure of damages in tort, for negligent design, manufacture or sale of WSA Tires the Defendants knew, or ought to have known, were defective?

23) What is the appropriate measure of damages for restitution and disgorgement of profits wrongfully earned by the Defendants from the sale of defective WSA Tires?

24) Is an award of exemplary or punitive damages appropriate having regard to the nature of established breaches on the part of the Defendants?

[167] While the court may modify the proposed common issues, it will not perform the role of class counsel by making wholesale changes to proposed common issues it would accept. These minor amendments are not wholesale changes. Accordingly, I find that s 5(1)(c) of the *CPA* has been satisfied and these 24 common issues are certified. This condition is satisfied.

### E. Is a Class Action the Preferable Procedure?

#### 1. Applicable Principles

[168] The fourth condition for certification requires that the "class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues": *CPA,* s 5(1)(d). Section 5(2) lists several factors that the court must consider at a minimum, namely whether:

(a) questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) other means of resolving the claims are less practical or less efficient; and

(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[169] The inquiry should consider the three principal advantages of class actions, which are judicial economy, access to justice, and behaviour modification: ***Hollick*** at para 27. However, courts must ensure their focus is on the statutory requirements; there is no obligation for a plaintiff to prove that all beneficial effects of a class action will be realized: ***AIC Limited v Fischer,*** 2013 SCC 69 at para 22. The key question is whether other available means for resolution are preferable: ***AIC Limited*** at para 23.

#### 2. Procedures Considered

[170] Goodyear argues that it would be more appropriate in the circumstances here for the Plaintiff to pursue an individual action, initiate a complaint to Transport Canada or the NHTSA, or rely on Goodyear's warranty process. Goodyear further suggests that there are already behaviour modification methods available through legislation and statutory bodies, including regulations and sanctions under the *Motor Vehicle Safety Act,* SC 1993, c 16 and through investigations and enforcement by Transport Canada.

[171] The circumstances in ***Thorpe,*** where a class action was determined to be the preferable procedure in a motor vehicle defect class action, are similar to the present circumstances. Individual litigation was not preferable there because of the complexity and cost of a trial for negligence due to defective design or manufacturing as well as the low amount of recovery sought: ***Thorpe*** at paras 93−94.

[172] In ***Reid,*** the role of Transport Canada was not a hindrance to finding that a class action was the preferable procedure. Transport Canada had received complaints but there was no evidence that Transport Canada had engaged in any recent prosecutions. The Court also noted that Transport Canada decisions are not binding or governing in a civil proceeding and that it did not have the power to award damages: ***Reid*** at para 105.

[173] In the present case, Transport Canada and the NHTSA were aware that a voluntary recall was conducted. The parties dispute the validity or existence of other complaints. Without weighing conflicting evidence, it seems that a complaint to a regulatory body would not necessarily result in an investigation or provide relief to individuals exposed to risk from the alleged defect.

[174] Similarly, the warranty claim process only provides for returns in limited circumstances and it is not within the control of a consumer seeking redress for negligence or failure to warn. In this case the Plaintiff was denied redress under the Recall as would be the case for all other consumers of WSA Tires falling outside the Recall.

[175] Ultimately, it is not clear that either of these processes would address the role of class actions in behaviour modification, particularly considering the alleged risk of harm that consumers, including those with WSA Tires falling outside the Recall, may have been exposed to in these circumstances.

[176] The common issues regarding the alleged defect are common to all the Proposed Class and predominate over any individual issues. The key issue in this proceeding is whether the WSA Tires contain a defect that make them dangerous or unfit for their intended purpose. If this Action was not certified and the Plaintiff and the Proposed Class were left to pursue Goodyear individually, this same issue would be litigated and decided multiple times, resulting in a significant and costly duplication of effort, impeding access to justice and undermining the objective of judicial economy.

[177] Resolution of the common issue, will advance the Action by determining Goodyear's liability and disposing of the greater part of the claims of the Proposed Class, including disgorgement of profits, leaving only issues of causation and damages in negligence related to individual personal injury and property damage.

[178] A class action proceeding would address the interests of all the Proposed Class and the claims advanced in this Action are not the subject of other class action proceedings. Further, there is no evidence that other means are more practical or efficient, and proceeding as a class action would be a more efficient way to address the concerns of the Proposed Class.

#### 3. Conclusion: Class Action Preferred Procedure

[179] Based on the foregoing, I conclude that a class action is the preferable procedure in these circumstances. I therefore find that s 5(1)(d) of the *CPA* is satisfied.

### F. Is the Plaintiff an Appropriate Representative Plaintiff?

#### 1. Applicable Legal Principles

[180] The fifth condition for certification requires a "person eligible to be appointed as representative Plaintiff": *CPA,* s 5(1)(e).

[181] The representative should, in the opinion of the Court, (i) "fairly and adequately represent the interests of the class"; (ii) produce "a plan for the proceeding that sets out a workable method of advancing the proceeding:" and "notifying class members of the proceeding"; and (iii) be without a conflict of interest in regard to the interests of other prospective class members in respect of the common issues: *CPA,* s 5(1)(e)(i-iii).

[182] When determining whether a representative can adequately represent the class, factors to consider may include the representative's motivation to prosecute the claim, whether the representative's counsel is competent to prosecute the claim, and their ability to bear the costs of litigation: ***Dutton*** at para 41.

### 2. Consideration of the Plaintiff as Representative Plaintiff

[183] Goodyear does not dispute that that the Plaintiff is a suitable representative plaintiff.

[184] The Plaintiff seeks to be the representative plaintiff. He says that he has retained competent legal counsel, has the ability to bear the costs that might arise from the Action and is motivated to move the Action forward. The parties have agreed that the litigation plan will be addressed following certification.

[185] I conclude that the Plaintiff is a suitable representative plaintiff for the Action.

### 3. Conclusion: Plaintiff is Suitable Representative Plaintiff

[186] I find that the Plaintiff has satisfied the condition set out in s 5(1)(e) of the *CPA*. The Plaintiff will be appointed the representative plaintiff for the Action. This condition is satisfied.

## V. Decision

[187] For the reasons above, the Plaintiff's Action satisfies the five conditions under s 5(1) of the *CPA*, with the amendments made to the class definition and proposed common issues.

[188] The causes of action in negligent design and manufacturing, duty to warn, and unjust enrichment/waiver of tort are certified for all Canadian consumers of WSA Tires.

[189] In the event the parties do not agree on the matter of costs, the parties may make arrangements for submissions through my office.

Heard on the 13th day of March, 2019 to the 14th day of March, 2019 and the 3rd day of September, 2019 to the 4th day of September, 2019.
**Dated** at Calgary, Alberta this 14th day of April, 2020.

**G.A. Campbell**
**J.C.Q.B.A.**

**Appearances:**

Chad Babiuk/Ben Frenken
for the Applicant/Plaintiff

Sara E. Hart/Philip Tinkler
for the Respondents/Defendants

# TAB 7

**K.L.B., P.B., H.B. and V.E.R.B.** *Appellants*

*v.*

**Her Majesty The Queen in Right of the Province of British Columbia** *Respondent*

and

**Attorney General of Canada, Nishnawbe Aski Nation, Patrick Dennis Stewart, F.L.B., R.A.F., R.R.J., M.L.J., M.W., Victor Brown, Benny Ryan Clappis, Danny Louie Daniels, Robert Daniels, Charlotte (Wilson) Guest, Daisy (Wilson) Hayman, Irene (Wilson) Starr, Pearl (Wilson) Stelmacher, Frances Tait, James Wilfrid White, Allan George Wilson, Donna Wilson, John Hugh Wilson, Terry Aleck, Gilbert Spinks, Ernie James and Ernie Michell** *Interveners*

**K.L.B., P.B., H.B. et V.E.R.B.** *Appelants*

*c.*

**Sa Majesté la Reine du chef de la province de la Colombie-Britannique** *Intimée*

et

**Procureur général du Canada, Nation Aski Nishnawbe, Patrick Dennis Stewart, F.L.B., R.A.F., R.R.J., M.L.J., M.W., Victor Brown, Benny Ryan Clappis, Danny Louie Daniels, Robert Daniels, Charlotte (Wilson) Guest, Daisy (Wilson) Hayman, Irene (Wilson) Starr, Pearl (Wilson) Stelmacher, Frances Tait, James Wilfrid White, Allan George Wilson, Donna Wilson, John Hugh Wilson, Terry Aleck, Gilbert Spinks, Ernie James et Ernie Michell** *Intervenants*

**INDEXED AS: K.L.B. *v.* BRITISH COLUMBIA**

**Neutral citation: 2003 SCC 51.**

File No.: 28612.

2002: December 5, 6; 2003: October 2.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

**RÉPERTORIÉ : K.L.B. *c.* COLOMBIE-BRITANNIQUE**

**Référence neutre : 2003 CSC 51.**

N$^{o}$ du greffe : 28612.

2002 : 5, 6 décembre; 2003 : 2 octobre.

Présents : La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel et Deschamps.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Torts — Liability — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Whether government negligent — Whether government vicariously liable for torts of foster parents — Whether government liable for breach of non-delegable duty — Whether government liable for breach of fiduciary duty.*

*Limitation of actions — Torts — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Whether tort actions barred by*

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

*Responsabilité délictuelle — Responsabilité — Délits intentionnels — Enfants victimes de mauvais traitements par leurs parents de famille d'accueil — L'État peut-il être tenu responsable du préjudice que des enfants ont subi en famille d'accueil? — L'État a-t-il été négligent? — L'État est-il responsable du fait d'autrui pour les délits civils commis par les parents de famille d'accueil? — L'État est-il responsable pour manquement à une obligation intransmissible? — L'État est-il responsable pour manquement à une obligation fiduciaire?*

*Prescription — Responsabilité délictuelle — Délits intentionnels — Enfants victimes de mauvais traitements par leurs parents de famille d'accueil — L'État peut-il être tenu responsable du préjudice que des enfants ont*

*Limitation Act — Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(2), 7(1)(a)(i).*

*Torts — Damages — Intentional torts — Abuse of children by foster parents — Whether government can be held liable for harm children suffered in foster care — Proper basis for assessing damages for child abuse by parent or foster parent.*

The appellants suffered abuse in two successive foster homes. In the second home the appellants were also exposed to inappropriate sexual behaviour by the older adopted sons. On one occasion, K. was sexually assaulted by one of these young men. The trial judge found that the government had failed to exercise reasonable care in arranging suitable placements for the children and in monitoring and supervising these placements. She also found that the children had suffered lasting damage as a result of their stays in the two homes. She rejected the defence that the tort actions were barred by the British Columbia *Limitation Act*. Consequently, in addition to allowing K.'s claim for sexual abuse, she found the government: (1) directly liable to all four children for its negligence in the placement and the supervision of the children and for breach of its fiduciary duty to the children; and (2) vicariously liable for the torts committed by the foster parents. However, the trial judge made low damage awards, on the ground that the children would in any case have had difficulties as adults because of the impoverished circumstances of their birth family. The Court of Appeal allowed the Crown's appeal. All three judges found that the appellants' claims were statute-barred, with the exception of K.'s claim for sexual assault. In addition, all three judges overturned the ruling that the government had breached its fiduciary duty to the children. However, the majority upheld the trial judge's conclusion that the government was vicariously liable and in breach of a non-delegable duty of care in the placement and supervision of the children.

*Held*: The appeal should be dismissed.

*Per* McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel and Deschamps JJ.: The

*subi en famille d'accueil? — Les actions en responsabilité délictuelle sont-elles prescrites par la Limitation Act? — Limitation Act, R.S.B.C. 1996, ch. 266, art. 3(2), 7(1)a)(i).*

*Responsabilité civile — Dommages-intérêts — Délits intentionnels — Enfants victimes de mauvais traitements par leurs parents de famille d'accueil — L'État peut-il être tenu responsable du préjudice que des enfants ont subi en famille d'accueil? — Critères à appliquer pour fixer le montant des dommages-intérêts à verser à un enfant pour les mauvais traitements que lui a infligés l'un de ses parents biologiques ou de famille d'accueil.*

Les appelants ont subi des mauvais traitements dans deux familles d'accueil successives. Dans le second foyer, les appelants ont également été exposés à des comportements sexuels inappropriés de la part des fils adoptifs plus âgés. Une fois, l'un de ces jeunes hommes a agressé K. sexuellement. La juge de première instance a conclu que l'État n'avait fait preuve d'une diligence raisonnable ni dans ses démarches pour placer les enfants dans des familles d'accueil convenables, ni dans le contrôle et la surveillance de ces placements. De plus, selon elle, les enfants avaient subi des torts irréparables par suite de leur placement dans les deux foyers. La juge a rejeté le moyen de défense selon lequel les actions en responsabilité civile délictuelle étaient prescrites par application de la *Limitation Act* de la Colombie-Britannique. En conséquence, en plus d'accueillir l'action de K. pour agression sexuelle, elle a tenu l'État (1) directement responsable envers les quatre enfants pour sa négligence dans leur placement et leur surveillance et pour son manquement à son obligation fiduciaire envers eux; et (2) responsable du fait d'autrui pour les délits commis par les parents de famille d'accueil. La juge de première instance a toutefois accordé aux enfants des dommages-intérêts peu élevés au motif qu'ils auraient de toute façon connu des difficultés à l'âge adulte, vu le dénuement de leur famille naturelle. La Cour d'appel a accueilli l'appel interjeté par l'État. Les trois juges ont conclu à l'unanimité que les actions des appelants étaient prescrites, à l'exception de celle intentée par K. pour agression sexuelle. En outre, les trois juges ont infirmé la conclusion selon laquelle l'État avait manqué à son obligation fiduciaire envers les enfants. Les juges majoritaires ont néanmoins confirmé la conclusion de la juge de première instance selon laquelle l'État était responsable du fait d'autrui et avait manqué à son obligation intransmissible de diligence dans le placement et la surveillance des enfants.

*Arrêt* : Le pourvoi est rejeté.

*La* juge McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache, Binnie, LeBel et Deschamps : L'État

government is liable to the appellants on the basis of direct negligence, subject to the defence of the limitation period. Both courts below held that the government had a duty under the *Protection of Children Act* to place children in adequate foster homes and to supervise their stay, and that this duty had been breached. These unchallenged findings are fully supported on the record. The trial judge proceeded on the basis that the standards of the time required: (1) proper assessment of the proposed foster parents and whether they could meet the children's needs; (2) discussion of the acceptable limits of discipline with the foster parents; and (3) frequent supervisory visits in view of the fact the foster homes were "overplaced" and had a documented history of breach. She found that the government negligently failed to meet this standard, and that this negligence was causally linked to the physical and sexual abuse suffered by the children and their later difficulties. It is clear from these conclusions that the government failed to put in place proper placement and supervision procedures, as required by the Act. The system of placement and supervision was faulty, permitting the abuse that contributed to the children's subsequent problems.

The case for extending vicarious liability to the relationship between governments and foster parents has not been established. To make out a successful claim for vicarious liability, plaintiffs must demonstrate first that the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate. In determining whether the tortfeasor was acting "on his own account" or acting on behalf of the employer, the level of control the employer has over the worker's activities will always be a factor. Other relevant factors include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers and whether the worker has managerial responsibilities. These factors suggest that the government is not vicariously liable for wrongs committed by foster parents against the children entrusted to them. It is inherent in the nature of family-based care for children that foster parents are in important respects independent, and that the government cannot exercise sufficient control over their activities for them to be seen as acting "on account" of the government. Foster parents do not hold themselves out as government agents in their daily activities with their children, nor are they reasonably perceived as such. Foster families serve a public goal — the goal of giving children the experience of a family, so that they may develop into confident and

est responsable envers les appelants sur le fondement de la négligence directe, sous réserve du moyen de défense de la prescription. Les deux juridictions inférieures ont statué que la *Protection of Children Act* imposait à l'État l'obligation de placer les enfants dans des familles d'accueil convenables et de surveiller leur placement et que l'État avait manqué à cette obligation. Ces conclusions non contestées sont bien étayées par le dossier. La juge de première instance a orienté son analyse sur la nécessité, suivant les normes de l'époque, (1) d'évaluer correctement les parents d'accueil envisagés et d'apprécier leur capacité de répondre aux besoins des enfants; (2) de discuter avec eux des limites acceptables de la discipline à imposer; et (3) de visiter fréquemment les foyers d'accueil à des fins de surveillance, compte tenu qu'ils étaient surpeuplés et qu'ils avaient déjà été pris en faute dans le passé, selon ce qui figurait au dossier. Elle a estimé que l'État avait fait preuve de négligence en ne respectant pas cette norme, et que cette négligence avait un lien de causalité avec la violence physique et sexuelle dont les enfants avaient été victimes et avec les difficultés qu'ils avaient connues par la suite. Il ressort de ces conclusions que l'État ne s'est pas acquitté de l'obligation que lui imposait la loi d'établir des marches à suivre adéquates pour le placement et la surveillance. Le système de placement et de surveillance présentait des lacunes, ce qui a permis l'infliction de mauvais traitements qui ont contribué aux problèmes subséquents des enfants.

Le bien-fondé de l'élargissement de la responsabilité du fait d'autrui à la relation entre l'État et les parents de famille d'accueil n'a pas été démontré. Pour que leur action en responsabilité du fait d'autrui soit accueillie, les demandeurs doivent tout d'abord démontrer que la relation entre l'auteur du délit et la personne dont on cherche à retenir la responsabilité est suffisamment étroite pour que la responsabilité du fait d'autrui puisse être valablement invoquée. Pour déterminer si l'auteur du délit agissait « à son compte » ou au nom de l'employeur, il faut toujours prendre en considération le degré de contrôle que l'employeur exerce sur les activités du travailleur. Parmi les autres facteurs pertinents, on compte la question de savoir si le travailleur fournit son propre outillage, s'il engage lui-même ses assistants et s'il a des responsabilités de gestion. Ces facteurs donnent à penser que l'État n'engage pas sa responsabilité du fait d'autrui pour les fautes commises par les parents de famille d'accueil à l'égard des enfants qui leur ont été confiés. Le fait que les parents de famille d'accueil soient indépendants à d'importants égards et que l'État ne puisse pas exercer suffisamment de contrôle sur leurs activités pour qu'ils soient considérés comme agissant « pour le compte » de l'État est inhérent à la nature de la prestation de soins aux enfants en milieu familial. Les parents de famille d'accueil ne se présentent pas comme des mandataires de

responsible members of society. However, they discharge this public goal in a highly independent manner, free from close government control.

The *Protection of Children Act* offers no basis for imposing on the Superintendent of Child Welfare a non-delegable duty to ensure that no harm comes to children through the abuse or negligence of foster parents. Nor did the government breach its fiduciary duty to the appellants. There is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty.

The Court of Appeal's conclusion that the appellants' claims were statute-barred should be upheld. The meetings between the appellants and various members of the government suggest that the appellants, by June of 1991 at the latest, had acquired sufficient awareness of the relevant facts to start the limitation period running. The appellants have not established disability as required by the Act.

Had the appellants been successful in their appeal, the trial judge's findings of fact and the factual inferences she drew from them on the appropriate quantum of damages would have been upheld. The trial judge's assessment of the evidence before her is a question of fact, which an appellate court cannot set aside absent palpable and overriding error.

*Per* Arbour J.: The majority's analysis as to direct negligence by the government was substantially agreed with. The appellants have also made out the elements of a successful claim of vicarious liability against the government for the abuse inflicted by their foster parents. The central question, when determining whether a relationship is close enough to justify the imposition of vicarious liability in the context of a non-profit enterprise, is whether the tortfeasor was acting on his or her own behalf or acting on behalf of the defendant. The relevant factors, properly weighed, indicate that foster parents do in fact act on behalf of the government when they care for foster children. The government has sufficient power of control over the foster parents' activities to justify finding vicarious liability. It is clear that the government, as the legal guardian of foster children and by the terms of the government's agreement with foster parents, maintains ongoing control, or at the very least an ongoing right of

l'État dans leurs activités quotidiennes avec les enfants, et on ne les perçoit pas non plus raisonnablement comme tels. Les familles d'accueil servent un objectif public — celui de permettre aux enfants de vivre l'expérience de la famille, de sorte qu'ils puissent devenir des membres confiants et responsables de la société. Elles poursuivent toutefois cet objectif public de manière très indépendante, sans contrôle gouvernemental étroit.

Aucune disposition de la *Protection of Children Act* ne permet d'imputer au *Superintendent of Child Welfare* une obligation intransmissible de garantir que les enfants ne subiront aucun préjudice dû à la négligence des parents de famille d'accueil ou à des mauvais traitements qu'ils leur infligeraient. L'État n'a pas manqué non plus à son obligation fiduciaire envers les appelants. Rien n'indique que l'État ait fait passer ses propres intérêts avant ceux des enfants ou qu'il ait accompli des actes préjudiciables aux enfants qu'on pourrait assimiler à un bris de la relation de confiance ou à un manque de loyauté.

La conclusion de la Cour d'appel selon laquelle les demandes des appelants étaient prescrites doit être confirmée. Les rencontres entre les appelants et divers agents de l'État semblent indiquer que les appelants, dès juin 1991 au plus tard, avaient suffisamment connaissance des faits pertinents pour que le délai de prescription commence à courir. Les appelants n'ont pas établi l'incapacité au sens de la Loi.

Si le pourvoi des appelants avait été accueilli, les constatations de fait de la juge de première instance et les inférences qu'elle a tirées des faits quant au montant approprié de dommages-intérêts auraient été confirmées. Son évaluation de la preuve relevant de l'appréciation des faits, un tribunal d'appel ne peut pas l'annuler à moins d'erreur manifeste et dominante.

*La* juge Arbour : Il y a accord pour l'essentiel avec l'analyse des juges majoritaires concernant la négligence directe de l'État. Les appelants ont en outre établi le bien-fondé de leur demande contre l'État fondée sur la responsabilité du fait d'autrui pour les mauvais traitements que leur ont infligés leurs parents d'accueil. Pour déterminer si une relation est suffisamment étroite pour justifier l'imputation de la responsabilité du fait d'autrui dans le cas d'une entreprise sans but lucratif, il faut essentiellement se demander si l'auteur du délit agissait en son nom ou au nom du défendeur. Appréciés comme il se doit, les facteurs pertinents révèlent que les parents d'accueil agissent effectivement au nom de l'État lorsqu'ils prennent soin des enfants qu'on leur a confiés. L'État jouit d'un pouvoir de contrôle suffisant sur les activités des parents de famille d'accueil pour que lui soit imputée la responsabilité du fait d'autrui. Il est clair qu'à titre de tuteur légal des enfants placés en famille d'accueil

control, over the care of children living in foster homes. While foster parents do control the organization and management of their household to the extent permitted by government standards, the government does indeed supervise via the social workers, and may interfere to a significant degree, precisely to ensure that the child's needs are being met. A secondary factor indicating that foster parents act on behalf of the government is the perception that children have of who in fact is ultimately responsible for their well-being. It is clear that the relationship between foster parents and foster children is a more transient relationship than the usual parent/child relationship. Where children stay successively in a number of homes for relatively short periods, the government may — through assigned social workers — remain the only steady authority figure for foster children. In such circumstances, foster parents may well be perceived as acting on behalf of the government by the foster children, and by the larger community. A useful indicator of whether the relationship between government and foster parents is sufficiently close to justify vicarious liability is whether the imposition of vicarious liability could in fact deter harm to children. The evidence reveals that as the government becomes aware of risks to children in foster care, it can respond, and has responded, by imposing rules and restrictions on how foster parents exercise their authority. These measures often involve continuing control over foster parents' activities and yet they need not undermine foster parents' relationships with foster children or deny foster children the experience of a real family. Rather, they reflect the reality that children in foster care remain the responsibility of the government, which is their legal guardian.

The wrongful act at issue here was sufficiently connected to the tortfeasor's assigned tasks for vicarious liability to be imposed. It is clear that the foster care arrangement reflects the highest possible degrees of power, trust, and intimacy. The relationship does more than merely provide an opportunity for child abuse; it materially increases the risk that foster parents will abuse. As well, the policy goals that justify vicarious liability, namely just compensation and deterrence of future harm, are served by finding vicarious liability in the present circumstances. However, as vicarious liability is a form of tort liability, the claim is statute-barred, for

et suivant les modalités dont il a convenu avec les parents d'accueil, l'État conserve un contrôle permanent — ou à tout le moins un droit de contrôle permanent — sur les soins donnés aux enfants hébergés dans ces foyers. Quoique les parents de famille d'accueil exercent effectivement un contrôle sur l'organisation et la gestion de leur foyer dans la mesure permise par les normes gouvernementales, l'État exerce bel et bien une surveillance par l'entremise des travailleurs sociaux, et il peut intervenir dans une large mesure, précisément pour s'assurer que les besoins de l'enfant sont comblés. Un deuxième facteur milite en faveur de la thèse voulant que les parents de famille d'accueil agissent au nom de l'État : la personne que les enfants perçoivent comme responsable de leur bien-être en bout de ligne. Il est manifeste que la relation qu'entretiennent les parents de famille d'accueil avec les enfants confiés à leur garde est plus passagère que l'habituelle relation parent/enfant. Pour les enfants qui vont de foyer d'accueil en foyer d'accueil pour des périodes relativement courtes, l'État peut — en la personne des travailleurs sociaux désignés — représenter la seule figure d'autorité qui soit constante. En pareil cas, il se peut fort bien que les parents de famille d'accueil soient perçus, tant par les enfants qui leur sont confiés que par l'ensemble de la collectivité, comme agissant au nom de l'État. Pour déterminer si la relation entre l'État et les parents de famille d'accueil est suffisamment étroite pour engager la responsabilité du fait d'autrui, il est utile de se demander si l'imputation de cette responsabilité pourrait en réalité prévenir l'infliction de sévices aux enfants. La preuve révèle que plus l'État est conscient des risques auxquels les enfants en foyer d'accueil sont exposés, plus il est en mesure d'y réagir, ce qu'il a fait, en imposant des règles et des restrictions quant à la manière dont les parents d'accueil exercent leur autorité. Ces mesures exigent souvent un contrôle continu sur les activités des parents de famille d'accueil, sans pour autant miner inévitablement les relations entre parents et enfants de famille d'accueil, ni même priver ces enfants de l'expérience d'une vraie famille. Elles reflètent plutôt la réalité voulant que les enfants placés en famille d'accueil demeurent sous la responsabilité de l'État, leur tuteur légal.

L'acte fautif était suffisamment lié aux tâches assignées à l'auteur du délit pour justifier l'imputation de la responsabilité du fait d'autrui. Il est clair que le placement en famille d'accueil est un régime où l'on retrouve le plus haut degré possible de pouvoir, de confiance et d'intimité. La relation qui se noue au sein d'une famille d'accueil fait plus que simplement donner l'occasion d'agresser un enfant; elle accroît sensiblement le risque d'abus par les parents d'accueil. L'imputation de la responsabilité du fait d'autrui en l'espèce sert les principes directeurs qui la sous-tendent, à savoir la juste indemnisation et la dissuasion. Toutefois, la responsabilité du

TAB 8

Province of Alberta

# CLASS PROCEEDINGS ACT

Statutes of Alberta, 2003
Chapter C-16.5

Current as of November 16, 2022

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## Note

All persons making use of this consolidation are reminded that it has no legislative sanction, that amendments have been embodied for convenience of reference only. The official Statutes and Regulations should be consulted for all purposes of interpreting and applying the law.

**Right to appear**

**2.1** A person who receives notice of an application for certification under section 2(2)(b) may make submissions at the application for certification.

2010 c15 s4

**Defendant's class proceeding**

**3(1)** A defendant to a proceeding may, at any stage of the proceeding, make an application to the Court for an order certifying the proceeding as a class proceeding and appointing a person who on certification will be a member of the class as the representative plaintiff, whether or not more than one proceeding has been commenced against the defendant.

**(2)** Notwithstanding subsection (1), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.

**(3)** Section 2(5) and (6) apply to the appointment of a representative plaintiff under this section.

**Certification re settlement of proceeding**

**4** Where a plaintiff has reached a settlement with a defendant in respect of a proceeding prior to the proceeding's being certified but certification of the proceeding as a class proceeding is being sought as a condition of the settlement for the purposes of imposing the settlement on persons who will be class members in respect of the proceeding if the proceeding is certified as a class proceeding, those persons, on the application for certification being commenced, constitute a settlement class with respect to the proceeding for which certification is being sought.

**Class certification**

**5(1)** In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;

(b) there is an identifiable class of 2 or more persons;

(c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

**(2)** In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) whether other means of resolving the claims are less practical or less efficient;

(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

**(3)** Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

**(4)** The Court may not certify a proceeding as a class proceeding unless the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e).

**(5)** Notwithstanding subsection (3), where an application is made to certify a proceeding as a class proceeding for the purposes of binding members of a settlement class, the Court may not certify the proceeding unless the Court has approved the settlement.

**(6)** If a multi-jurisdictional class proceeding or a proposed multi-jurisdictional class proceeding has been commenced elsewhere in Canada that involves subject-matter that is the same as or similar to that of a proceeding being considered for certification under this section, the Court must determine whether it would be preferable for some or all of the claims or common issues raised by the prospective class members to be resolved in the proceeding commenced elsewhere.

**(7)** When making a determination under subsection (6), the Court must be guided by the following objectives:

(a) ensuring that the interests of all parties in each of the relevant jurisdictions are given due consideration;

(b) ensuring that the ends of justice are served;

(c) where possible, avoiding irreconcilable judgments;

(d) promoting judicial economy.

**(8)** When making a determination under subsection (6), the Court may consider any matter that the Court considers relevant but must consider at least the following:

(a) the alleged basis of liability, including the applicable laws;

(b) the stage each of the proceedings has reached;

(c) the plan for the proposed multi-jurisdictional class proceeding, including the viability of the plan and the capacity and resources for advancing the proceeding on behalf of the prospective class members;

(d) the location of the class members and representative plaintiffs in the various proceedings, including the ability of the representative plaintiffs to participate in the proceedings and to represent the interests of the class members;

(e) the location of evidence and witnesses;

(f) the advantages and disadvantages of litigation being conducted in more than one jurisdiction.

2003 cC-16.5 s5;2010 c15 s5

# TAB 9

# THE SCHOOL ACT

## CHAPTER 329

Short title

**1.** This Act may be cited as *The School Act.*

[1970, c. 100, s. 1]

Definitions

**2.** In this Act,

(*a*) "board" means a board of trustees of a district or division;

(*b*) "city district" means a district situated wholly or partly within the boundaries of a city;

(*c*) "district" means a school district established pursuant to this or any predecessor Act or Ordinance;

(*d*) "division" means a school division established pursuant to this or any predecessor Act;

(*e*) "elector" means a person

(i) 19 years of age or older,

(ii) who is a Canadian citizen or British subject, and

(iii) resident,

(A) in the case of a vote, in the district or division in which the vote is to be held for at least the 12 months immediately preceding polling day, or

(B) in the case of petition, in a district or division for at least the 12 months immediately preceding the day on which the petition is presented;

(*f*) "Indian" means an Indian as defined in the *Indian Act* (Canada);

(*g*) "Minister" means the Minister of Education;

(*h*) "municipality" means a city, town, village, municipal district, county, new town, improvement district, special area or summer village;

(*i*) "parent" includes a guardian of a child or person standing in *loco parentis;*

(*j*) "public school district" means a public school district established pursuant to this or any predecessor Act or Ordinance;

(*k*) "school building" means a building owned or occupied by a board and includes a building owned or occupied with another person or municipality;

(*l*) "separate school district" means a separate school district established pursuant to this or any predecessor Act or Ordinance;

(*m*) "trustee" means a member of a board.

[1970, c. 100, s. 2]

(2) No board is under any liability for negligence to the parent of a pupil or to a pupil who is being conveyed to and from a school or bus route pursuant to an agreement made between the board and the parent. [1970, c. 100, s. 157]

Residence allowance

**158.** Where a pupil, with the approval of a board, attends a school that requires the pupil's absence from his residence the board shall pay such sum per day as is specified in the regulations. [1970, c. 100, s. 158]

Dispute re transport fees

**159.** Any dispute regarding the payment of transport fees or maintenance grant shall be submitted for settlement to the Minister whose decision is final. [1970, c. 100, s. 159]

Agreements

**160.** A board with the prior approval of the Minister may

(*a*) enter into an agreement with the Provincial Government, the Government of Canada or the government of any other province or municipality for the provision of educational services to children who are supported wholly or partly by public moneys of the Province, and

(*b*) enter into an agreement with the Government of Canada or any agency or person having responsibility for the education of Indian children to educate Indian children or the children of members of the Canadian Forces or of other persons employed by the Government of Canada in a school or schools of the district or division and receive consideration therefor. [1970, c. 100, s. 160]

Work experience programs

**161.** (1) A board may approve work experience programs for pupils in its schools.

(2) Where a board wishes to send pupils on a work experience program it shall obtain the approval of

(*a*) the pupil's parents,

(*b*) the Minister or person designated in writing by him, and

(*c*) the Board of Industrial Relations.

(3) A pupil attending a work experience program shall receive credit for attendance at school for the time he spends in the program. [1970, c. 100, s. 161]