IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *L'Anton v. Mackenzie Financial Corporation,* 2026 BCSC 1149

Date: 20260619
Docket: S238293
Registry: Vancouver

Between:

Martin L'Anton

Plaintiff

And

Mackenzie Financial Corporation and InvestorCOM Inc.

Defendants

Before: The Honourable Justice S. Ramsay

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. December 8–12, 2025
Place and Date of Judgment:	Vancouver, B.C. June 19, 2026

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Introduction

[1] The plaintiff, Martin L'Anton, applies for an order certifying this action as a multi-jurisdictional class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. He is pursuing this proceeding on behalf of Canadian residents who received notice from the defendant, Mackenzie Financial Corporation, that their personal information may have been compromised in a data breach experienced in early 2023 by the defendant, InvestorCOM Inc. ("ICOM"), as further described below.

Background

[2] Unless otherwise indicated, the following background facts are undisputed.

[3] Mackenzie is an investment management company. ICOM is a regulatory compliance and customer communications service provider in the financial industry. Mackenzie engaged ICOM to provide services related to Mackenzie's regulatory compliance, including to produce and deliver written communications that Mackenzie is required to send to investors. To facilitate ICOM's delivery of those services, Mackenzie provided its investors' personal information to ICOM. ICOM was not aware that, in many cases, the personal information it received from Mackenzie included the investor's social insurance number buried within an undifferentiated field of digits.

[4] On March 22, 2023, ICOM learned that a cybercriminal group known as Cl0p ("CLOP") had exploited a vulnerability in "GoAnywhere" software licensed and used by ICOM. CLOP had used the vulnerability to gain unauthorized access to files located on an ICOM server ("Cyberbreach"). As part of the Cyberbreach, CLOP accessed and locally copied data relating to 1.487 million Canadian Mackenzie investors, including just over 1.262 million social insurance numbers ("Mackenzie Data"). The plaintiff pleads that CLOP also exfiltrated—that is, stole—the Mackenzie Data.

[5] While there appears to be no question that CLOP exfiltrated data pertaining to some ICOM customers in the Cyberbreach, the defendants deny that CLOP exfiltrated any Mackenzie Data and emphasize that there is no evidence to support the plaintiff's allegation to that effect. The defendants observe that the Mackenzie Data was not included in CLOP's publication of data stolen from ICOM in the Cyberbreach, something that occurred after ICOM refused to pay CLOP's ransom demand. They say that if the Mackenzie Data had been stolen, it would have been included in the data that CLOP published.

[6] After learning of the Cyberbreach, ICOM notified Mackenzie. In turn, Mackenzie sent a notice to its investors, including the plaintiff.

[7] Mackenzie engaged TransUnion to provide no-cost credit monitoring and identity theft protection services to every investor who received the notice. After receiving reports that some investors experienced delays in registering with TransUnion, Mackenzie engaged Equifax to provide the same services as an alternative, also at no cost to investors. Mackenzie initially paid for two years of credit monitoring and related services but subsequently extended the coverage to five years.

[8] The plaintiff registered for the TransUnion services. He also purchased additional credit monitoring from Equifax. He says that he did so because he was concerned that TransUnion did not provide adequate protection for risks arising out of the Cyberbreach.

[9] In response to the Cyberbreach, certain Mackenzie investors commenced two separate proposed multi-jurisdictional class actions under class proceeding legislation. The plaintiff commenced this proceeding ("BC Action") and two investors, Alexander Litvin and David McNairn, commenced an action in Ontario ("Ontario Action"). While there are some pleadings differences between the two actions, both advance claims in negligence, breach of contract, and breach of statutory privacy torts under statutes in four jurisdictions, British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador ("Statutory Privacy Tort Provinces"). The Ontario

Action also includes a breach of fiduciary duty/breach of trust claim against Mackenzie only.

[10] The defendants are represented by the same counsel teams in both actions; the plaintiffs have different counsel. The Ontario Action was commenced first but originally named only Mackenzie as a defendant. After the BC Action was filed, the Ontario plaintiffs amended the Ontario Action to add ICOM as a defendant and to plead additional causes of action pleaded in the BC Action.

[11] After the Ontario plaintiffs amended their claim in the Ontario Action, the defendants applied to dismiss the BC Action as an abuse of process. That application was dismissed: *L'Anton v. Mackenzie Financial Corporation*, 2024 BCSC 1136 [*L'Anton BCSC*]. In dismissing the defendants' appeal of *L'Anton BCSC*, the Court of Appeal stated that "the proper place to consider whether, solely by reason of mere similarity of claims, one proposed class action should be stayed in preference to another one in another Canadian jurisdiction, is at the certification hearing and not in a preliminary application": *InvestorCOM Inc. v. L'Anton*, 2025 BCCA 40 at para. 31 [*L'Anton BCCA*].

[12] The Ontario Action has now been certified as a multi-jurisdictional class proceeding in respect of claims in negligence and breach of contract (against both defendants), and breach of fiduciary duty/breach of trust (against Mackenzie): *Litvin et al v. Mackenzie Financial Corporation et al,* 2025 ONSC 6138. However, Justice MacLeod declined to certify the claim for remedies under provincial privacy legislation (both in the common law provinces and Quebec) on the ground that the Ontario court does not have jurisdiction to grant a remedy under the relevant statutes: *Litvin* at paras. 52–55. The class definition ordered in the Ontario Action is substantively the same as that proposed in the BC Action.

[13] Mr. L'Anton appeared at the certification hearing in the Ontario Action as an intervenor. He argued in favour of British Columbia as the preferable jurisdiction to resolve claims arising out of the Cyberbreach, or at least the claims of those class members resident in Statutory Privacy Tort Provinces. The Court dismissed Mr.

L'Anton's application, without prejudice to his ability to apply "to amend the class definition or to subject it to carve outs should there be certification of overlapping class proceedings in [the BC Action]": Order of Justice C. MacLeod (30 October 2025[1]) CV-23-93325-CP (O.N.S.C.) at para. 5.

[14] The defendants have appealed from the decision to certify claims in the Ontario Action and the plaintiffs have cross-appealed from the decision to not certify the claim for breach of statutory privacy torts. The appeal hearing has not yet been scheduled.

Issues

[15] The first issue I must resolve on the plaintiff's application before me is whether the threshold requirements for certification, set out in s. 4(1) of the *CPA*, are met. If so, because this is a proposed multi-jurisdictional class proceeding I must also "determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved" in the Ontario Action: *CPA*, s. 4(3). Certification of the BC Action as a multi-jurisdictional class proceeding is only available if I conclude that the s. 4(1) requirements are met *and* the Ontario Action is not preferable.

[16] As explained below, I find that the s. 4(1) requirements are met in respect of most claims and common issues proposed by the plaintiff. However, except for the statutory privacy tort claims, I conclude it is preferable for the claims of the proposed class members to be resolved in the Ontario Action.

1. *Section 4(1)* certification requirements

[17] Pursuant to s. 4(1) of the *CPA*, a proceeding will be certified where the following requirements are met:

> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;

Issued February 12, 2026.

> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
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> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
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> (e) there is a representative plaintiff who
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> (i) would fairly and adequately represent the interests of the class,
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> (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
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> (iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

[18] If all s. 4(1) requirements are met, a court must certify the action as a class proceeding, subject to the multi-jurisdictional provisions set out in ss. 4(3) and 4(4) of the *CPA*.

[19] The law regarding the application of s. 4(1) is well-established in British Columbia. As summarized by Justice Blake in *Lam v. Flo Health Inc.*, 2024 BCSC 391:

> [27] … Certification of an action as a class proceeding is not a comment on the merits of the claim, but rather a determination of whether the action can appropriately move forward as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*]. As a certification application is not a test of the merits of the claim, it is largely procedural in nature: *Chow v. Facebook*, 2022 BCSC 137 at para. 9 [*Chow*]. Certification criteria are evaluated generously, with the aim of furthering the principal goals of class actions: behaviour modification, judicial economy and access to justice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109 [*Sun-Rype*], citing *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 14–15 [*Hollick*].
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> [28] Justice Francis succinctly summarized the settled legal principles governing the certification analysis in *Sharifi v. WestJet Airlines Ltd.*, 2020 BCSC 1996, rev'd on other grounds 2022 BCCA 149:
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> > [15] Subsection 4(1)(a), the requirement that the pleadings disclose a cause of action, is assessed by means of the same test that would apply to a motion to strike. A plaintiff will satisfy this requirement unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of success: *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [*Pro-Sys*].

> [16] With respect to the remaining subsection 4(b) – (e), the plaintiff must show "some basis in fact" to establish that the certification requirements have been met. In determining whether this standard has been met, the court should not engage in any detailed weighing of evidence at the certification stage but should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.
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> [29] While a plaintiff must demonstrate a cause of action that is not bound to fail, and must show some basis in fact to establish the remaining s. 4(1) criteria, "a deep dive into the evidence is neither necessary nor warranted": *Chow* at para. 9. However, while certification is generally a low hurdle, it is nonetheless a hurdle, and must be a "meaningful screening device": *Pro-Sys* at para. 103. A judge hearing a certification application has an important gatekeeping role to ensure that only claims in the common interest of class members are advanced: *Chow* at para. 10.

[20] The "some basis in fact" standard which applies to ss. 4(1)(b) to (e) is a "deliberately low" threshold that "anticipates that the evidence will be more developed at trial and the findings of fact may well be different": *Bowman v. Kimberly-Clark Corporation,* 2023 BCSC 1495 at paras. 73–74.

[21] As I discuss below, in this case the defendants' submissions invite an analysis that goes well beyond what I must assess for certification purposes, including under the "some basis in fact" threshold. Certification "is not intended to be a pronouncement on the viability of strength of the action" and the focus at this stage is therefore on the form of the action and not the merits of the claim: *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396 at para. 43, aff'd 2023 BCCA 72, leave to appeal to SCC ref'd 40694 (9 November 2023).

[22] Guided by the above principles and as explained below, I find that the plaintiff has met the s. 4(1) certification requirements for most claims in this case.

***CPA* s. 4(1)(a) – do the pleadings disclose a cause of action?**

[23] The s. 4(1)(a) analysis requires a generous reading of the pleadings, including possible amendments, with certification being refused on this ground only if it is plain and obvious that the claim is bound to fail, assuming the pleaded facts are true and permitting unsettled points of law to proceed: *Krishnan* at paras. 44–45. The pleaded facts include documents referenced in the notice of civil claim, but consideration of any such documents for the purpose of the s. 4(1)(a) analysis must

not become an assessment of the merits of the claim: *Situmorang v. Google, LLC*, 2024 BCCA 9 at para. 67.

[24] The plaintiff advances three causes of action in the Amended Notice of Civil Claim ("ANOCC"): breach of contract, negligence, and statutory privacy torts under statutes in four provinces. The plaintiff seeks to include Quebec residents as class members, which gives rise to distinct claims addressed separately below. Breach of confidence is also pleaded, but the plaintiff advises he is no longer pursuing that claim. Finally, the plaintiff pleads joint and several liability for damages as between the defendants and CLOP, pursuant to the *Negligence Act*, R.S.B.C. 1996, c. 333 and equivalent legislation in other provinces (collectively, "*Negligence Acts*").

[25] The defendants take issue with what they had understood to be pleaded claims under the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [*PIPEDA*]. In submissions, the plaintiff clarified that he is not advancing a claim under *PIPEDA*. Instead, he says he has pleaded *PIPEDA* as relevant to the analysis of his claims or to the relief he is seeking.

[26] I will address each of the claims the plaintiff advances separately. In doing so, I confirm that the plaintiff has the burden of proving that the s. 4(1)(a) pleadings requirement is met. In this case, the ANOCC is comprehensive. It is obvious from the plaintiff's submissions that the ANOCC has been carefully drafted with reference to the elements of each pleaded cause of action and the undisputed and alleged facts of this case, and also to the pleadings in other certified data breach and privacy breach class proceedings in British Columbia. I will therefore focus my analysis of the s. 4(1)(a) pleadings requirement on the issues raised by the defendants. Other than those issues, which I address below, I am satisfied that the ANOCC discloses a claim based on my review of the pleading and the plaintiff's submissions regarding s. 4(1)(a).

Breach of contract

[27] The plaintiff's claim in contract against Mackenzie relies not only on Mackenzie's contract with its customers ("Mackenzie Contract"), but also on

Mackenzie's Privacy Protection Notice ("PPN"), a Privacy Protection Statement ("PPS"), and Mackenzie's contract with ICOM ("ICOM Contract").

[28] The plaintiff says its pleading identifies the terms of the contract (which it says included the PPN and PPS), how the terms were breached, and the types of damages that would flow from the breach. He says the ANOCC therefore satisfies the requirements for pleading a claim for breach of contract.

[29] Mackenzie says it is plain and obvious that the plaintiff has no claim in contract, because the PPN and PPS did not form part of the Mackenzie Contract, nor did they referentially incorporate *PIPEDA* into the Mackenzie Contract. Further, even if the PPN and PPS do form part of the Mackenzie Contract, Mackenzie says the plaintiff has not pleaded material facts identifying which alleged terms Mackenzie is alleged to have breached, or how. Mackenzie says that the plaintiff's reliance on *PIPEDA* is an attempt to do what cannot be done directly: sue for breach of a statute.

[30] I agree with the plaintiff's argument that I would need to engage in contract interpretation to consider the merit of Mackenzie's submissions, which goes beyond what the court may do at this stage: *Situmorang* at paras. 67–70. I also agree with the plaintiff that it is at least arguable that a claim in contract is made out in respect of the PPN and the PPS. In other words, it is not plain and obvious that the PPN and the PPS cannot possibly give rise to contractual obligations as between Mackenzie and the plaintiff. Determination of that issue will require reference to evidence, which is not available at this stage of the analysis.

[31] While I agree with Mackenzie that the plaintiff cannot sue in contract for a breach of *PIPEDA*, that is not the claim the plaintiff advances. As I understand it, the plaintiff's claim in contract is not that Mackenzie breached *PIPEDA*, but that certain aspects of *PIPEDA* are incorporated into the PPN by reference and create contractual obligations as between the parties in that way. In my view, it is not plain and obvious that the contract claim will fail in that respect.

[32] I find that breach of contract claim pleaded against Mackenzie meets the s. 4(1)(a) pleadings requirement.

[33] The plaintiff does not allege any contract between the class members and ICOM. Rather, he pleads that the class members are third party beneficiaries of the ICOM Contract, relying on language in the PPN regarding protection of personal information in Mackenzie's contracts with third parties and on Mackenzie's ability to oversee and audit the services of ICOM. The plaintiff points to Mackenzie's Response to Civil Claim, where Mackenzie pleads that "Mackenzie Contractually required [ICOM] to maintain appropriate data protection measures in accordance with the PPN" and lists several measures ICOM was required to take, which the plaintiff says would have prevented the hack. In these circumstances, the plaintiff says the class members can sue ICOM in contract without privity, relying on *Ladysmith Maritime Society v. Ladysmith (Town),* 2023 BCSC 2285 [*Ladysmith Maritime*].

[34] ICOM says there is nothing in any of the pleaded contracts that could support the plaintiff's claim against ICOM in contract, and that the ANOCC simply contains bare allegations and conclusory legal statements that the plaintiff is the intended beneficiary of the contract between Mackenzie and ICOM. ICOM distinguishes *Ladysmith Maritime* on the ground that the Court in that case found it was at least arguable that the parties intended to confer the benefit of the contract on the plaintiff, so as to engage the principled exception to the privity rule: at para. 58. ICOM says that exception could not arise in this case given the nature of the ICOM Contract, which is a services agreement between ICOM and Mackenzie that does not mention the plaintiff or proposed class members and does not create any rights or obligations relating to the plaintiff or proposed class members.

[35] In my view, it is at least arguable that the plaintiff and proposed class members could be found to be intended beneficiaries of the ICOM Contract. The sharing and use of personal information of the plaintiff and the proposed class

members is central to the services provided by ICOM to Mackenzie; were it not for them, there would be no need for the ICOM Contract at all.

[36] To find there is no possible claim against ICOM in contract requires an assessment of the merits of the claim, which is not permissible at this stage of the proceeding. I find that breach of contract claim pleaded against ICOM also meets the s. 4(1)(a) pleadings requirement.

Negligence

[37] The defendants say it is plain and obvious there is no claim in negligence against them because, on the alleged facts, the pleadings do not establish that the defendants owed the plaintiff a duty of care or that the plaintiff sustained compensable damages.

[38] I will first separately address each defendant's position regarding duty of care, followed by their joint position on damages.

Duty of care

[39] As stated, the Cyberbreach was of ICOM's server. Effectively, Mackenzie says that is cannot owe a duty of care to the plaintiff and proposed class members in respect of the Cyberbreach for that reason; that is, it can owe no duty of care to the plaintiff in respect of *ICOM's* data protection practices. This argument ignores that Mackenze was the data custodian who collected the proposed class members' personal information *and provided it to* ICOM. In those circumstances, I agree with the plaintiff that it is at least arguable that Mackenzie owed a duty of care to the proposed class members as alleged.

[40] For its part, ICOM says it is plain and obvious there is not a sufficient degree of proximity between it and the plaintiff to establish a duty of care. It emphasizes that the cases the plaintiff relies on to establish a duty of care all involve claims by individuals who provided information to the defendant directly. ICOM did not directly receive personal information from the plaintiff and proposed class members; rather, it is a third-party service provider.

[41] ICOM relies on *Del Giudice v. Thompson*, 2021 ONSC 5379, aff'd 2024 ONCA 70, leave to appeal to SCC ref'd 41202 (19 September 2024), as the only common law case it has been able to identify where a negligence claim involved a third-party service provider. In *Del Giudice*, the Court found there was no duty of care owed by the third-party service provider: at paras. 235–250.

[42] I am not persuaded that *Del Giudice* supports ICOM's position. In *Del Giudice,* the service provider did not have custody of the data, but instead only provided cloud infrastructure used by the data custodian. ICOM had actual custody of the class members' personal information, which is a relevant difference that makes *Del Giudice* distinguishable.

[43] In accepting delivery of and storing the proposed class members' personal information, I agree with the plaintiff that it is at least arguable that ICOM owed a duty of care to the proposed class members in the circumstances of this case.

[44] ICOM's argument that there are strong public policy reasons against finding a duty of care where there is a contractual allocation of risk as between two parties (here, Mackenzie and ICOM) goes to the merits of the claim and is not appropriately resolved at this stage.

Damages

[45] The plaintiff claims damages in three general categories: (1) damages for mental or emotional distress; (2) damages to compensate for an increased risk of future harm; and (3) recovery of costs incurred to prevent a risk of future harm.

[46] Both Mackenize and ICOM say that the damages sought by the plaintiff for their alleged negligence are not available.

[47] I agree with the defendants that the first category of damages is not available on the pleadings. While there is a bare allegation of "serious and prolonged" mental or emotional distress in the ANOCC, the pleadings do not allege injury that rises "above the ordinary annoyances, anxieties and fears that people living in society

routinely, if sometimes reluctantly, accept": *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27 at para. 9. Pleading that the mental or emotional distress was "prolonged" is not sufficient. The plaintiff must also plead material facts to support a psychological injury that rises to the level described in *Mustapha*: *Lam* at para. 114. The ANOCC does not include pleaded material facts that meet that requirement. To the extent the plaintiff advances a claim in negligence for damages for mental or emotional distress, I therefore find that the ANOCC does not meet the s.4(1)(a) pleadings requirement.

[48] However, I do not agree with the defendants' submission that it is plain and obvious that the second and third category of damages sought by the plaintiff are unavailable.

[49] The defendants argue that damages for an increased risk of future harm are not compensable in negligence: *Dussiaume v. Sandoz Canada Inc*., 2023 BCSC 795 at paras 54–57. I agree with the plaintiff's submission that *Dussiaume* is distinguishable, because it was not a data breach case.

[50] In *Tucci v. Peoples Trust Company*, 2023 BCSC 2004 [*Tucci BCSC 2023*], the Court certified a claim for damages for an increased risk of harm where the harm related to data breaches and a risk of identity theft. In my view, *Tucci BCSC 2023* is indistinguishable on this issue. I acknowledge the defendants' submissions against the application of *Tucci BCSC 2023* but consider that their arguments go to the merits of the claim and are not appropriately resolved at this stage. I find that it is at least arguable that damages for an increased risk of future harm are available in the circumstances of this proceeding, also a data breach case.

[51] The defendants say that the pleaded claim for out-of-pocket expenses for credit monitoring are also not recoverable, because it is a pure economic loss claim. The difficulty with their position is that it is at least arguable, based on legal precedent in British Columbia, that such expenses can be recovered in circumstances involving privacy breaches: *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928 at para. 54 [*Campbell BCSC*]; aff'd 2024 BCCA 253

[*Campbell BCCA*]; *Tucci BCSC 2023* at para. 85. Again, I acknowledge the defendants' arguments against the application of these British Columbia precedents, including their position that the cases are based on a misapprehension of Ontario jurisprudence, but I do not consider those arguments appropriate for determination at this stage of the proceeding.

Conclusion – negligence pleading

[52] For the above reasons, except for the claim in negligence for damages for mental or emotional distress, I find that the negligence claim pleaded against Mackenzie and ICOM meets the s. 4(1)(a) pleadings requirement.

Statutory privacy tort claims

[53] The plaintiff pleads the statutory tort claim available under each of the following statutes in the Statutory Privacy Tort Provinces: *Privacy Act,* R.S.B.C. 1996, c. 373; *Privacy Act,* C.C.S.M. c. P125; *Privacy Act,* R.S.S. 1978, c. P-24; *Privacy Act,* R.S.N.L. 1990, c. P-22. Each of these statutes creates a tort for unlawful violation of privacy that is actionable without proof of loss (collectively, "*Privacy Act* Claims").

[54] Pursuant to s.1(1) of the British Columbia *Privacy Act*, the tort claim only arises where the violation of privacy occurs "wilfully". The legislation in Saskatchewan and Newfoundland and Labrador uses similar language. In Manitoba, the legislation uses the words "substantially" and "unreasonably" instead of "wilfully".

[55] The defendants say it is plain and obvious that the *Privacy Act* Claims cannot succeed because the plaintiff has not pleaded facts that could amount to recklessness on the part of Mackenzie or ICOM. They rely on *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252, leave to appeal to SCC ref'd 41452 (6 March 2025), to argue that, at minimum, recklessness is required to prove that a privacy violation was wilful.

[56] The difficulty with the defendants' argument is that in *G.D.* the Court of Appeal held that the mental state required to constitute a wilful invasion of privacy

for the purpose of s. 1(1) of the British Columbia *Privacy Act* could arguably *include* recklessness: at para. 132. In reaching that conclusion, the Court of Appeal did not conclusively *limit* the definition of "wilfully" to circumstances involving, at minimum, reckless failures to protect personal information.

[57] In my view, given the following passages from *G.D.* it is possible that behaviour that falls short of recklessness could at least arguably give rise to liability under s.1(1) of the British Columbia *Privacy Act*:

> [124] Understood in this context, there is more than one way for a defendant to violate a plaintiff's privacy in personal information. For example, a defendant might violate another person's privacy interests in personal information by the defendant accessing the plaintiff's personal information, without the plaintiff's consent; or by the defendant who does have consent to access the personal information, enabling a broader audience to have access to that information contrary to the plaintiff's reasonable expectations of privacy. It is the latter category at issue in this type of case against a data custodian.
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> [125] In the latter category there is no doubt a spectrum of potentially privacy-affecting behaviour on the part of a data custodian, by way of actions or omissions. For example:
>
> > a. At one end of the more culpable extreme could be behaviour by the data custodian that involves making the personal information available to others without any safeguards, and with knowledge of its potential for misuse.
> >
> > b. At the other end of the more innocent extreme of the spectrum, could be behaviour by a data custodian that meets recognized technological standards to protect personal information but which nevertheless fails to protect it because of the ingenuity of a nefarious cyber attacker.
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> [126] After hearing evidence of the circumstances, a trial judge might have little difficulty in concluding that the data collector and custodian's behaviour at the one end of the extreme amounts to wilful violation of privacy under the *Privacy Act*; and that behaviour at the other end of the extreme does not. But the facts as found by a judge in a particular case surely will dictate where, in between these two extremes, an alleged tortfeasor's behaviour will lie and whether it constitutes "wilfully" violating a reasonable expectation of privacy.
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> …
>
> [131] Therefore, contrary to TransLink's arguments, I am of the view it is arguable, again referring to the pleadings standard, a person's reasonable expectation of privacy may include an expectation that their personal information will be safeguarded and protected by the person to whom they entrusted it so as to protect the privacy in the information. Therefore, depending on the circumstances, it is at least arguable to claim against a

> data custodian who has collected plaintiffs' private information but failed to safeguard it from an unrelated cyber attacker, that the data custodian has committed the statutory tort of wilful violation of privacy.
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> [132] Without defining the theoretical limits of BC's statutory privacy tort, it is at least arguable that the mental state required to "wilfully" violate the privacy of another could include the mental state pleaded in this case, of reckless failure to safeguard a person's private information in the defendant's possession, thereby enabling the information to be disclosed to other persons.
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> [emphasis added.]

[58] The plaintiff pleads with some specificity various alleged failures in the data storage and protection practices of Mackenzie and ICOM. In my view, based on *G.D.*, the allegations in the ANOCC are sufficient to give rise to an arguable claim that the defendants committed a wilful violation of privacy. I also consider the allegations sufficient to give rise to an arguable claim that the defendants "substantially" and "unreasonably" violated the privacy of the proposed class members, the standard applicable under the Manitoba *Privacy Act.*

[59] I find that the *Privacy Act* Claims pleaded against Mackenzie and ICOM meet the s. 4(1)(a) pleadings requirement.

Breach of Quebec law

[60] The plaintiff alleges that class members resident in Quebec are entitled to damages for the defendants' alleged breach of arts. 35, 36, and/or 37 of the *Quebec Civil Code*, C.Q.L.R. c. CCQ-1991 [*CCQ*], and to damages for alleged breach of contract pursuant to art. 1458 of the *CCQ.* He also pleads that class members resident in Quebec are entitled to punitive damages pursuant to art. 49 of the Quebec *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12.

[61] A plaintiff seeking to certify a multi-jurisdictional class action including Quebec must ensure that the pleading addresses the distinctive nature of Quebec law: *Campbell BCSC* at para 46. I am not satisfied that the plaintiff has done so based on the relatively limited submissions made on this issue. Specifically, I am unable to assess whether it is plain and obvious that claim for breach of Quebec law is bound

to fail. I do not have enough information about the nature of that claim and its legal basis to conclude that the ANOCC meets the pleadings requirement.

[62] The plaintiff cites what he says are the relevant articles of the *CCQ*, but I have not been provided with the text or copies of those articles. I have not been provided with authority for the pleading requirement for liability outside of contract under Quebec law. I have been provided with only a partially translated copy of the decision the plaintiff cites for the pleading requirement for breach of contract claims under Quebec law (*Homsy c. Google*, 2024 QCCS 1324). I have insufficient information on which I can assess whether the claim under Quebec law has any prospect of success.

[63] I therefore find that the plaintiff has not satisfied his burden under s. 4(1)(a) in respect of the claim for breach of the *CCQ.*

Negligence Acts

[64] As I understand it, the defendants' objection to the plaintiff's reliance on the *Negligence Acts* relates only to the allegation of joint and several liability as between the defendants and CLOP.

[65] The plaintiff relies on *Campbell BCCA* in support of its pleading that CLOP is a joint tortfeasor. He cites para. 54 for the proposition that "[t]he *Negligence Act* is, in concept, available in the privacy context to a plaintiff who seeks compensatory damages, for an indivisible loss, from the parties who are jointly responsible for that loss".

[66] The defendants emphasize that the *Negligence Act* does not extend to circumstances where the conduct of different tortfeasors gives rise to different kinds of damages: *Campbell BCCA* at para. 46. The plaintiff does not dispute that proposition but says that to the extent that class members have compensatory damages arising from combined violations of the applicable *Privacy Acts* by CLOP and the defendants, these are the *same type* of damages. To that extent, I find it is at least arguable that the defendants and CLOP could be found liable for causing the

same damage to the plaintiffs, and it is therefore not plain and obvious that the joint and several liability claim is doomed to fail.

[67] I find that the claim pleaded under the *Negligence Acts* meets the s. 4(1)(a) pleadings requirement.

CPA s. 4(1)(b) – is there an identifiable class?

[68] The plaintiff proposes the following class definition: "any individual resident in Canada who received notice from Mackenzie that their information may have been compromised in the breach". As I have said, this is substantively the same as the class certified in the Ontario Action. It is based on objective criteria and determining membership in the class should pose no issues.

[69] The only issue raised by the defendants in respect of s. 4(1)(b) is whether the plaintiff has established that there are two or more people in the class.

[70] To the extent that the claim seeks damages that do not require proof of loss, based on the number of people who Mackenzie notified of the Cyberbreach there is no question that there are more than two people in the class. However, ICOM says the plaintiff has failed to show some basis in fact to support there being at least two members of the class who can claim compensatory damages.

[71] There is no affidavit evidence from a second potential class member before me. Instead, the plaintiff relies on an affidavit affirmed by a lawyer at plaintiff's counsel's firm, Sumaiya Akhter, who affirms that more than two individuals who say they received the Mackenzie notice have registered with the law firm and have completed a questionnaire regarding their potential claim. They further affirm that two of the registered individuals report paying out of pocket for additional credit monitoring. The text of the registrants' questionnaire responses is attached to the affidavit, but the registrants' names are not included.

[72] In *Campbell BCSC,* Justice Iyer, as she then was, considered whether this type of evidence is admissible in a certification hearing. She concluded that the

evidence "is not hearsay because it is not tendered for the truth of its contents, but to show that two or more individuals have claimed that they incurred certain costs…": at para. 150.

[73] The evidence the plaintiff relies on in this case is substantively equivalent to that before the Court in *Campbell BCSC*. I therefore find that the plaintiff has established there is some basis in fact to meet the s. 4(1)(b) requirement. However, given my finding that the pleadings do not disclose a cause of action in respect of claims of Quebec residents, the proposed class definition must be amended to read "any individual resident in Canada, except for residents of the province of Quebec, who received notice from Mackenzie that their information may have been compromised in the breach".

***CPA* s. 4(1)(c) – do the claims of the class members raise common issues?**

[74] The plaintiff emphasizes that the s. 4(1)(c) requirement to show the claims of the class members raise common issues is a low threshold. Justice Matthews summarized the applicable principles as follows in *Bowman*:

> [119] Section 4(1)(c) of the *Class Proceedings Act* requires the plaintiff to establish that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. Section 1of the *Class Proceedings Act* defines common issues as "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts".
>
> [120] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39, the Court held that the underlying question when analyzing commonality is "whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis".
>
> [121] A common issue need not be determinative of liability in order to advance the litigation for or against the class: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 65, citing *Cloud v. Canada (Attorney General)* 2004), 2004 CanLII 45444 (ON CA), 247 D.L.R. (4th) 667 (O.N.C.A.) at para. 53.
>
> [122] In *Pro-Sys* at para. 108, the Court discussed commonality, incorporating and refining the principles set out in *Dutton*, including that commonality must be approached purposively. The Court explained that while an issue will be common only where its resolution is necessary to each class member's claim, it is not essential that the class members be identically

> situated *vis-à-vis* the opposing party. The Court also explained that it is not a requirement that the common issues predominate over individual issues, but the class members' claims must share a substantial common ingredient.
>
> [123] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45–46, the Court further clarified some of its earlier statements about commonality with regard to common success, explaining that questions can be considered common even if the answers to those questions vary between class members. Even a significant difference among class members does not necessarily defeat a finding of commonality. If material differences emerge, they can be addressed as required.
>
> [124] In *Service v. University of Victoria*, 2019 BCCA 474 at para. 59, the Court of Appeal interpreted *Vivendi* as imposing a low threshold on this requirement, i.e. that the "plaintiff need only show that there is a triable factual or legal issue that, once determined, will advance the litigation".
>
> [125] The question of whether a common issue will advance the litigation is appropriately determined by reference to the litigation as a whole, not simply the perspective of the plaintiff: *Godfrey* SCC at para. 109.
>
> [126] As discussed above, to satisfy s.4(1)(c) of the *Class Proceedings Act*, the proposed representative plaintiff must show "some basis in fact" that the claims raise common issues: *Hollick* at para. 25; *Pro-Sys* at paras. 101–102. The evidentiary burden on commonality is low. It is understood by recognizing that some basis in fact can be contrasted to no basis in fact: *Nissan Canada* at paras. 134–136, citing *Hollick* at paras. 24–25, and *Ewert v. Nippon Yusen Kabushiki* Kaisha, 2019 BCCA 187 leave to appeal ref'd [2019] S.C.C.A. No. 311, at paras. 100–104.

[75] With those principles in mind, I turn to the common issues proposed by the plaintiff. I will use the same numbering that the plaintiff used at the hearing of this application as reflected in the excerpts included in his condensed book. I will not address the proposed common issues related to Quebec residents, given my finding above regarding the pleadings.

[76] As a general comment, I observe that the defendants' emphasis in opposing certification is on the pleadings requirement under s. 4(1)(a). While they also object to the plaintiff's proposed common issues, their position in that respect rests to a significant degree on their argument that it is plain and obvious that the pleaded claims will fail. I have already addressed those arguments above and will not repeat my conclusions here; however, they apply equally to the s. 4(1)(c) analysis.

Proposed PIPEDA common issues

[77] The proposed common issues under *PIPEDA* are as follows, with "Personal Data" meaning information about an identifiable individual as defined in s. 2(1) of *PIPEDA*:

> 1. Did one or both Defendants have a duty in their collection, use and retention of the Personal Data, to keep it confidential and secure pursuant to sections 4.1, 4.5 and 4. 7 of *PIPEDA*?
>
> 2. Did one or both Defendants have a duty not to retain the Personal Data longer than necessary pursuant to s. 4.5 of *PIPEDA*?
>
> 3. Does *PIPEDA* Schedule 1,4.3 Principle 3 - Consent apply to MacKenzie's contract/privacy policies with class members?
>
> 4. Does *PIPEDA* Schedule 1,4.3 Principle 3 - Consent apply to ICOM's contract with MacKenzie?
>
> 5. Did one or both Defendants retain Personal Data without obtaining meaningful consent under *PIPEDA* Schedule 1,4.3 Principle 3 - Consent?
>
> 6. Did one or both Defendants use SINs as identifiers without obtaining meaningful consent under *PIPEDA* Schedule 1,4.3 Principle 3 - Consent?

[78] In summary, proposed common issues 1–4 ask if *PIPEDA* applied to the defendants and proposed common issues 5–6 ask if the defendants had the duty to, and did, obtain the necessary consent to use and retain class members' information.

[79] While the plaintiff does not advance a claim under *PIPEDA*, the defendants' compliance with *PIPEDA* will arguably be relevant to determination of the alleged claims in negligence, breach of contract, and breach of the statutory privacy torts: *Lam* at para. 50. The undisputed fact that the personal information of proposed class members was, at minimum, accessed and copied by CLOP gives rise to some basis in fact for an argument that the defendants failed to comply with *PIPEDA.*

[80] I find that the defendants' compliance with *PIPEDA* provides necessary factual context to the alleged claims in negligence, breach of contract, and breach of the statutory privacy torts that will be common to all class members. Mackenzie submits that there is no reason for discrete common issues to be certified in relation to *PIPEDA*, and that compliance with *PIPEDA* can simply form part of future submissions if relevant to the certified causes of action. If that is the case, and given

my above conclusions regarding the pleaded claims, it is clear that the proposed *PIPEDA* common issues will meaningfully advance the claim, and I can identify no other reason why they do not meet the s. 4(1)(c) requirement.

Proposed negligence common issues

[81] The plaintiff proposes the following common issues on negligence:

> 7. Did one or both defendants owe a duty of care to class members with respect to the uses it made of their Personal Data?
>
> 8. If the answer to the above question is yes, did one or both of the defendants breach the standard of care owed to class members? If so how?
>
> 9. If the answer to 7 and 8 is yes did the defendant(s) negligence cause or contribute to CLOP gaining access to the ICOM database?

[82] ICOM says there is no basis in fact for a claim in negligence against it, because there is no basis in fact for any relationship between ICOM and the plaintiff to establish the proximity necessary to create a duty of care. It also says there is no basis in fact that it was reasonably foreseeable to ICOM that the plaintiff or class members would suffer the harm alleged because there is no evidence that ICOM was aware it possessed the plaintiff's or class members' personal information.

[83] The difficulty with ICOM's position is that there is some basis in fact to demonstrate proximity—at least arguably—given the very terms of the ICOM Contract and the services it provided to Mackenzie, which necessarily involved ICOM receiving proposed class members' personal information. For that same reason, I find there is also some basis in fact that the alleged harm was reasonably foreseeable to ICOM.

[84] Mackenzie says there is no basis in fact to support certification of the proposed common issues regarding negligence against it, because there is no evidence to suggest Mackenzie breached any standard of care or caused or contributed to CLOP gaining access to ICOM's database. It emphasizes evidence of the plaintiff's expert, Nicholas Scheurkogel, which Mackenzie says supports the finding that its contractual safeguards with ICOM were aligned with industry best practices.

[85] Even if I accept Mackenzie's characterization of Mr. Scheurkogel's evidence about contractual safeguards, I find that his evidence regarding Mackenzie's supervision and oversight of ICOM's data handling is sufficient to establish some basis in fact to support an argument in negligence against Mackenzie.

[86] Both defendants say there is no basis in fact for the negligence claim because there is no basis in fact for any compensable damages. I have already found that it is arguable that out-of-pocket costs for credit monitoring could be compensable given the state of the law in British Columbia on that issue. I find there is some basis in fact for such damages in Mr. Scheurkogel's evidence that TransUnion credit monitoring was insufficient to fully protect class members, the plaintiff's evidence that he purchased additional credit monitoring for that reason, and the more general questionnaire responses plaintiff's counsel obtained from potential class members.

[87] As the plaintiff observes, negligence is regularly certified as a common issue in class proceedings, including in class proceedings related to data breaches or the loss of personal information: *Tucci BCSC 2023* at paras. 1–3, 10–11; *Campbell BCSC*. While proof of those damages will be an individual issue for each class member, the possibility that some class members might not be able to prove damages at individual issues stage does not preclude certification of common issues relating to negligence: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 74, leave to appeal to SCC ref'd 38678 (17 October 2019).

[88] I am satisfied that there is some basis in fact for the proposed negligence common issues, which involve triable factual and legal issues that will advance the litigation once determined. To accept the defendants' argument to the contrary requires a weighing of the evidence that is not appropriate at this stage.

Proposed breach of contract common issues

[89] The plaintiff proposes following common issues on breach of contract:

> 15. Did the Class enter into standard form contracts with Mackenzie?

16. What are the relevant terms (express or implied) of the Class Members contracts with MacKenzie respecting the protection of and/or retention of class members' Personal Data?

17. Was it an express or implied term of the contracts that Mackenzie:

a. would comply with its own privacy policies and with applicable privacy laws?

b. would provide strict safeguards and rigorous privacy and security standards to protect personal information and prevent identity theft and unauthorized access?

c. would encrypt user data to prevent identity theft and unauthorized access to personal information?

d. would not retain personal information longer than needed?

e. would hold third-party contractors (such as InvestorCOM) to the same standards?

f. would comply with PIPEDA?

18. Did MacKenzie breach the contracts? If so, how?

19. Is there a contract between MacKenzie and ICOM governing the collection, retention, use and security of Class Member Personal Data?

20. If the answer to 19 is yes, are Class Members third party beneficiaries of the contract?

21. If so, did ICOM breach its contract with MacKenzie in a manner that gives rise to damages for Class Members?

[90] Mackenzie says that the plaintiff has provided no basis in fact that these questions can be answered on a class-wide basis, largely because the evidence is that not all proposed class members had a contract with Mackenzie. Mutual fund securities are typically purchased through a registered securities dealer, rather than directly from Mackenzie, and in those instances there is no Mackenzie Application Form used as the accounts are registered in the name of the securities dealer rather than the investor. As such, only individuals who signed a Mackenzie Application Form for their accounts had a contract with Mackenzie.

[91] Further, Mackenzie says that the plaintiff has provided no basis in fact to support the existence of any issue concerning the inclusion of the contractual terms alleged in proposed common issue 17, nor of any breach of any such terms (issue 18). Mackenzie says it is plain and obvious that the PPN and PPS are not contracts

with the proposed class members and that the PPN does not incorporate *PIPEDA* by reference.

[92] The difficulty with Mackenzie's argument is that I have found it is at least arguable that the PPN and PPS are contracts. Given that finding, the PPN and PPS themselves, together with the undisputed fact that CLOP accessed and copied proposed class members' personal information, provide a basis in fact for the breach of contract claim against Mackenzie. In terms of the difference between class members who purchased mutual fund securities directly from Mackenzie versus through a securities dealer, as the plaintiff observes, there is no doubt that the proposed class held Mackenzie products and, as such, must have a contractual relationship with Mackenzie.

[93] ICOM says there is no basis in fact to support any claim or breach of contract against it, because there is no contract between the plaintiff or class members and ICOM. As discussed above, I have found that the claim in contract against ICOM is not bound to fail. The ICOM Contract itself establishes some basis in fact for the proposed common issues related to ICOM, that is, issues 19–21.

[94] As the plaintiff submits, in privacy breach cases, common issues have routinely been certified to ascertain the existing contractual obligations relating to a common contract: *Lam* at paras. 79–83; *Campbell BCSC* at paras. 68–84, 123; *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 at paras. 110–112, rev'd on other grounds 2020 BCCA 246; *Matthews v. La Capitale Civil Service Mutual*, 2020 BCSC 787 at para. 55. I agree with the plaintiff that the proposed common issues do not require individual-specific analysis and will establish contract terms and any breaches, which will advance the litigation and leave only the question of individual damages for individual determination if a breach is found.

Proposed **Privacy Act** ***Claims common issues***

[95] The plaintiff proposes the following common issue regarding the *Privacy Act* Claims:

> 22. Are Class Members in British Columbia, Manitoba, Saskatchewan and Newfoundland and Labrador entitled to damages without individual proof of damage pursuant to:
>
> a) The *Privacy Act,* R.S.B.C. 1996, c. 373 (the "British Columbia *Privacy Act"),* section 1(1)?
>
> b) *The Privacy Act,* C.C.S.M. c. P125 (the "Manitoba *Privacy Act"),* sections 2(1) and 2(2)?
>
> c) *The Privacy Act,* R.S.S. 1978, c. P-24 (the "Saskatchewan *Privacy Act"),* section 2?
>
> d) *Privacy Act,* R.S. N. L. 1990, c. P-22 (the "Newfoundland *Privacy Act"),* section 3(1)?

[96] Given that the scope of conduct that could give rise to liability under the above statutes is unsettled, I find that the undisputed facts regarding the defendants' treatment of personal information in this case give rise to some basis in fact to support a potential finding of liability against one or both of them, particularly given the low threshold required for certification.

[97] Of course, it may ultimately be that the circumstances of this case are found to fall outside the scope of liability under the provincial statutory torts, but that is something that can and should be decided on a class-wide basis. As the plaintiff observes, establishing liability will require an assessment of the defendants' actions, including their data collection and security practices, with no individual issues related to class members. A determination of liability will advance the litigation.

[98] The same types of common issues were certified in three British Columbia privacy breach cases: *Tucci v. Peoples Trust Company*, 2025 BCSC 816 at para. 25; *Campbell BCSC* at paras. 105–113, 162–164; *Lam* at paras. 55–57. I find that the *Privacy Act* Claims common issues meet the s. 4(1)(c) requirement.

Proposed Negligence Acts common issues

[99] The plaintiffs propose four common issues dealing with apportionment of liability among the defendants and CLOP for violations of the statutory privacy torts and the cause of action in negligence:

> 24. Did Class Members sustain indivisible injuries as a result of CLOP's intentional tortious conduct and the Defendants' negligence? If so, how should liability be apportioned between CLOP and the Defendants?
>
> 24A. Did Class Members sustain indivisible injuries as a result of CLOP's intentional tortious conduct in violation of the Privacy Acts and the Defendants' intentional or reckless tortious conduct in violation of the Privacy Acts? If so, how should liability be apportioned between CLOP and the Defendants?
>
> 25. Are the Defendants and CLOP several concurrent tortfeasors?
>
> 26. In terms of apportioning liability in negligence between the defendants, are the defendants concurrent tortfeasors and jointly and severally liable for the damages?

[100] The plaintiff says these questions deal solely with the conduct and liability of the defendants and CLOP and, with respect to the class, the answers will be identical. As such, the plaintiff says these proposed common issues are well suited for certification. The plaintiff also observes that a similar common issue was certified in *Campbell BCSC*: at paras. 59, 165, 178. The plaintiff says that proposed common issue 24A is intentionally separated from issue 24 to address the Court of Appeal's guidance regarding joint and several liability at paras. 44–46 of *Campbell BCCA.*

[101] As I understand it, the defendants' opposition to these proposed common issues rests on the assertion that there is no possibility that the court could find joint and several liability as between them and CLOP. As I have found that it is not plain and obvious that an argument in that regard will fail, I can identify no reason to not certify these common issues. They are something that can readily be decided on a class-wide basis and will move the litigation forward.

Proposed remedy and damages common issues

[102] The plaintiff proposes the following common issues on remedy and damages:

> 29. Are the defendants liable to the class for damages (including punitive damages,) for:
>
> a. Negligence?
>
> b. [*damages related to breach of confidence deleted*]
>
> c. Breach of contract?
>
> e. Breaches of the British Columbia Privacy Act, the Manitoba Privacy Act, the Saskatchewan Privacy Act, and/or the Newfoundland Privacy Act?
>
> f. [*damages related to Quebec deleted*];
>
> g. [*damages related to Quebec deleted*];
>
> 30. If the defendants are liable to the Class for damages, can the court assess damages in the aggregate, in whole or in part, for the Class? If so, what types of damages can be assessed in the aggregate?
>
> a. Nominal damages for breach of contract? If so, what amount?
>
> b. [*damages related to breach of confidence deleted*]
>
> c. A base award for violations of the statutory privacy breach torts? If so, what amount?

[103] ICOM says that while the plaintiff alleges specific claims and specific heads of damage, he fails to identify which damages relate to which cause of action and, as such, proposed common issue 28 is not sufficiently clear for certification. In my view, that is an issue that can readily be addressed by refinement of the issue as drafted and is not a reason to deny certification.

[104] I do not agree with ICOM that proposed common issue 28(e) regarding damages for breaches of the various *Privacy Acts* will require individual analyses of whether class member personal information was only accessed or if it was exfiltrated and, if so, the nature of that information. Liability under the statutory privacy torts does not require proof of damage.

[105] The defendants argue that there is no basis in fact to certify any common issue regarding liability for damages, because there is no evidence that any Mackenzie Data was exfiltrated by CLOP or that class members have suffered any actual damages. There are several difficulties with this position. The plaintiff's damages claim includes nominal damages for breach of contract. Damages for the

Privacy Act Claims do not require proof of loss. And, as discussed above, I find there is some basis in fact in support of compensatory damages in negligence.

[106] Another difficulty with the defendants' position is that it presupposes that liability under the *Privacy Acts* requires exfiltration of the data, which is an arguable issue. In any event, given the low threshold that applies, I accept there is some basis in fact, found in the expert report of Mr. Scheurkogel, that it is at least possible there could be a finding of exfiltration made on a complete evidentiary record.

[107] I do, however, agree with the defendants that there is no basis in fact to certify a common issue for punitive damages. As stated by the Court of Appeal in *Kirk:*

> [139] Punitive damages are the court's mechanism for expressing its outrage at the egregious conduct of the defendant. They are available to punish misconduct that is "so malicious, oppressive, and high-handed that it offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130 at para. 196. The test is whether the misconduct "represents a marked departure from ordinary standards of decent behaviour": *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at para. 36.

[108] There is no basis in fact to support a finding that the defendants have engaged in the type of behaviour that would attract punitive damages in this case. A common issue regarding punitive damages is not certifiable in the absence of such evidence: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 173, leave to appeal to SCC ref'd 39882 (17 March 2022).

[109] Mackenzie objects to proposed common issue 29 relating to aggregate damages because an order for an aggregate monetary award may only be made if "no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability": *CPA*, s. 29. Mackenzie says that establishing liability to the class is a prerequisite to an award of aggregate damages under s. 29, which cannot be used to establish liability. The difficulty with Mackenzie's position is that the plaintiff does not rely on s. 29 to establish liability in this case. The proposed common issue

expressly contemplates that the issue of aggregate damages will be addressed only if liability is found.

[110] The proposed common issues regarding remedy involve triable issues that, once determined, will advance the litigation. With the deletion of the reference to punitive damages, I find these proposed common issues meet the s. 4(1)(c) requirement.

Proposed directions for individual issues common issue

[111] The plaintiff has proposed common issues related to the participation of individual class members if there is a finding of liability at the common issues trial. The plaintiff characterizes these as procedural questions that can be answered in common for the class, which would continue to move the litigation forward following the common issues trial.

[112] Mackenzie made no submissions regarding these proposed common issues. ICOM says they are unnecessary because there is no basis in fact to certify any of the proposed common issues.

[113] Given my findings regarding the other common issues as set out above, I conclude that common issues that address directions for individual issues if liability is found are appropriate. Determination of these issues, if necessary, will advance the litigation.

***CPA* s. 4(1)(d) – is a class proceeding the preferable procedure?**

[114] The preferability analysis asks whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. A class proceeding will be preferable if it would be better than other methods or other means of resolving the dispute, and if it represents a fair, efficient, and manageable procedure that is preferable to any alternative method: *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 28–30.

[115] Section 4(2) of the *CPA* provides a non-exhaustive list of relevant factors that must be considered in the preferability analysis:

> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class 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.

[116] Mackenzie argues that even if there are certifiable common issues, their importance is dwarfed by the substantial individual issues that would remain regarding the determination of liability and the assessment of damages, which weighs against preferability because a class proceeding will not further judicial economy.

[117] I do not agree with Mackenzie's submission that individual issues predominate over questions of fact or law common to the proposed class. The fact of individual issues regarding damages is not a basis to refuse certification: *CPA,* s. 7(a). It is apparent from the number of proposed common issues I have accepted that there are numerous common factual and legal issues, the resolution of which will meaningfully advance the litigation. Even if individual issues must then proceed, there is no question that determination of the common issues will make efficient use of court resources.

[118] Both defendants argue that a class proceeding is not required for access to justice because class members have an alternative procedure available to them under *PIPEDA*.

[119] Sections 14 and 16 of *PIPEDA* permit individuals whose data was compromised in a data breach to pursue claims in the Federal Court, which has "exceptionally broad" powers under *PIPEDA*, including the ability to award damages without proof of financial loss: *Nammo v. TransUnion of Canada Inc.*, 2010 FC 1284 at paras. 66, 71.

[120] I do not accept the defendants' submission that *PIPEDA* provides a preferable means for the plaintiff and proposed class members to obtain a remedy. It is not practical or efficient for individuals to pursue separate claims in Federal Court when resolution of their common issues in a class proceeding is an available alternative means of resolving their claims. There is no basis to conclude that the administration of a class proceeding will create greater difficulties than those likely to be experienced in individual Federal Court claims; to the contrary, resolution of the common issues in a single proceeding will be far more efficient.

[121] There is no evidence to suggest that this proceeding involves claims that are the subject of any other proceedings in British Columbia. The claims are of course the subject of the Ontario Action, which I will address in the multi-jurisdictional preferability analysis below.

[122] Other than the question of preferability as between British Columbia and Ontario, which I address below, I find that the s. 4(1)(d) preferability requirement is met.

***CPA* s. 4(1)(e) – is there an appropriate representative plaintiff?**

[123] ICOM takes no issue with the adequacy of Mr. L'Anton as the proposed representative plaintiff. Mackenzie only takes issue with the s. 4(1)(e)(ii) requirement that the representative plaintiff have a suitable plan for advancing the proceeding on behalf of the class.

[124] Mackenzie says the plaintiff's litigation plan does not set out a workable and manageable method of advancing the proceeding on behalf of the class, including how damages or any other form of relief are to be assessed or determined. It says

the plan consists of boilerplate terms and is not tailored to address the complexities of this proceeding.

[125] In my view, while perhaps boilerplate, the litigation plan is comprehensive and its contents fall well within the range of what can reasonably be expected at this stage of the proceeding. Mackenzie did not explain how the litigation plan could better address the complexities of this proceeding. If it has concerns in that regard, it can raise them with plaintiff's counsel and if they are not addressed, Mackenzie can raise specific concerns with the Court.

[126] I find the litigation plan is adequate for the purposes of the s. 4(1)(e)(ii) requirement.

CPA s. 4(3) – multi-jurisdictional proceeding

[127] As this is a proposed multi-jurisdictional class proceeding, the certification analysis does not end with s. 4(1). The requirement that a court must certify a proceeding where the s. 4(1) requirements are met is subject to ss. 4(3) and (4) of the *CPA*.

[128] Section 4(3) requires that I "determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere".

[129] Section 4(4) sets out various considerations that must inform the determination under s. 4(3):

> (4) When making a determination under subsection (3), the court must
>
> (a) be guided by the following objectives:
>
> (i) to ensure that the interests of all parties in each of the relevant jurisdictions are given due consideration;
>
> (ii) to ensure that the ends of justice are served;
>
> (iii) to avoid irreconcilable judgments, if possible;
>
> (iv) to promote judicial economy, and
>
> (b) consider relevant factors, including the following:

> (i) the alleged basis of liability, including the applicable laws;
>
> (ii) the stage that each of the proceedings has reached;
>
> (iii) 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 proposed class;
>
> (iv) the location of class members and representative plaintiffs in each of the proceedings, including the ability of representative plaintiffs to participate in the proceedings and to represent the interests of class members;
>
> (v) the location of evidence and witnesses.

[130] Pursuant to s. 3.1 of the *CPA,* counsel for the plaintiffs in the Ontario Action appeared at this certification hearing to make submissions on multi-jurisdictional issues. The Ontario plaintiffs, Mackenzie, and ICOM all argue that it would be preferable for the claims of the proposed class members to be resolved in the Ontario Action, given certification of all claims other than the statutory privacy torts in that proceeding. In the alternative, their position is that only the statutory privacy torts should proceed in British Columbia, and that it is preferable for the remaining claims to be resolved in the Ontario Action.

[131] The plaintiff says that it is not preferable for the claims of the proposed class members to be resolved in the Ontario Action. He says the fact that the statutory privacy torts have not been certified in Ontario is significant and weighs against deferring to Ontario as the preferable jurisdiction. The plaintiff argues that the statutory torts are an important avenue for recovery and the fact that they are entirely closed to the plaintiffs resident in British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador is determinative of jurisdiction preferability as between Ontario and British Columbia, with this province being the preferable jurisdiction.

[132] To the extent the plaintiff submits that the Court of Appeal's decision in *L'Anton BCCA*, supports a finding that British Columbia is the preferable jurisdiction, I do not accept that the decision assists his position. The Court of Appeal's conclusion that "there are legitimate reasons for Mr. L'Anton to pursue relief in BC rather than Ontario" (para. 27) does not necessarily mean that British Columbia is

the preferable jurisdiction for the purpose of the analysis under s. 4(3) of the *CPA*. *L'Anton BCCA* only stands for the proposition that the BC Action is not an abuse of process that brings the administration of justice into disrepute, which is the test on a stay application and the question that was before the Court of Appeal in that decision.

[133] Sections 4(3) and 4(4) of the *CPA* raise distinct considerations from abuse of process and were not considered in *L'Anton BCCA*. The Court of Appeal expressly left determination of preferability to be decided as part of certification: "In BC, the proper place to consider whether, solely by reason of mere similarity of claims, one proposed class action should be stayed in preference to another one in another Canadian jurisdiction, is at the certification hearing and not in a preliminary application": para. 31.

Preferability – relevant factors

[134] I will first address the s. 4(4)(b) factors relevant to preferability of jurisdiction.

[135] I agree with the plaintiff that the *Privacy Act* Claims are an alleged basis of liability that is highly relevant and weighs against Ontario as the preferable jurisdiction, since the Court did not certify those claims in the Ontario Action.

[136] The plaintiff also argues that the BC Action is also superior because of its emphasis on the role of *PIPEDA* and its pleading of the *Negligence Acts.* I am not persuaded that this is a factor that weighs in favour of the BC Action. I consider the elements of the BC Action cited by the plaintiff as being superior to the Ontario Action to simply reflect a difference in pleading styles. Ultimately, negligence and breach of contract claims are being advanced in both the BC Action and the Ontario Action. Those claims have been certified in Ontario.

[137] The Ontario Action also includes a claim for breach of fiduciary duty, which has also been certified. This weighs in favour of Ontario, because it is an alleged basis of liability that is not being advanced in British Columbia.

[138] The plaintiff notes that British Columbia is a "no costs" jurisdiction for proposed class actions, which has been recognized in Ontario as a reason why plaintiffs might want to file in British Columbia: *Underhill v. Medtronic Canada*, 2023 ONSC 5919 at paras. 14, 39–40. The plaintiff says this weighs against the Ontario Action. I do not consider this to be a significant factor on preferability. Here, there are plaintiffs in Ontario who have chosen to file their claim and have pursued certification. Presumably, they have done so with knowledge of the potential costs consequences and determined that those consequences did not outweigh the benefits of proceeding in Ontario.

[139] The location of evidence and witnesses are factors that somewhat weigh in favour of Ontario, as Mr. L'Anton will most likely be the only witness located in British Columbia.

[140] I consider the comparative stage of the proceedings to weigh in favour of Ontario because there is a certification order in that jurisdiction, something I discuss further below in relation to the objectives relevant to the multi-jurisdictional preferability analysis. That fact distinguishes this case from the circumstances in *Ennis v. Johnson & Johnson*, 2024 BCSC 1759, cited by the plaintiff, where there was no certification in Ontario.

[141] I do not otherwise consider the comparative stage of the proceedings to be a significant factor. While the Ontario Action was filed first, the British Columbia action was filed less than three months later and both actions have been actively pursued since being filed. In *Ennis*, the plaintiff in the Ontario proceeding had taken no steps to move the matter forward for years and was facing an application to dismiss for want of prosecution.

[142] I have already addressed the plaintiff's litigation plan above in relation to s. 4(1)(e) of the *CPA* and those comments also apply in respect of s. 4(4)(b)(iii). However, while I have no concerns with the plaintiff's plan for the BC Action, as I discuss below I do have concerns regarding the plaintiff's proposed plan for how to

deal with multijurisdictional issues if claims already certified in the Ontario Action are certified in this proceeding.

Preferability – guiding objectives

[143] The relevant objectives under s. 4(4)(a) of the *CPA* pull in two directions on the question of preferable jurisdiction.

[144] On one side, the interests of residents of Statutory Privacy Tort Provinces clearly weigh in favour of proceeding in British Columbia, because they do not have access to statutory remedies in the Ontario Action. As the law currently stands in Ontario, the objective of serving the ends of justice cannot be met in the Ontario Action in respect of the statutory privacy tort claims. I reach that conclusion despite the Ontario plaintiffs' appeal of the order declining to certify common issues arising out of the *Privacy Act* Claims. The outcome of that appeal and whether it will even proceed are uncertain. While it may be appropriate to revisit the status of the BC Action in the future, depending on developments in the Ontario Action, as of now the issues arising out of the *Privacy Act* claims are not certified as common issues in the Ontario Action.

[145] On the other hand, the inclusion of a claim in breach of fiduciary duty/breach of trust in the Ontario Action, something not claimed in the BC Action, means that residents of Statutory Privacy Tort Provinces have an interest in participating as class members in the Ontario Action. This weighs in favour of the Ontario Action.

[146] Also pulling in the direction of Ontario as the preferable jurisdiction are the objectives of avoiding irreconcilable judgments and promoting judicial economy, given that a class proceeding with a national class has already been certified in the Ontario Action. I reach that conclusion despite the defendant's appeal in the Ontario Action. Again, the outcome of that appeal and whether it will even proceed are uncertain.

[147] There is no question that certification of an overlapping multi-jurisdictional class proceeding in this province when the Ontario Action has already been certified

on behalf of the same class will unnecessarily duplicate judicial resources. The courts in British Columbia and Ontario will each be required to decide the same issues on the same evidence in respect of the same class members. This of course also creates a risk of irreconcilable decisions, either in whole or in part, in each action.

Decision on preferability

[148] The plaintiff proposes that the BC Action and the Ontario Action can both proceed on a coordinated basis. He suggests that the presiding judges in British Columbia and Ontario, each sitting in their jurisdiction, "can participate in person or virtually at one trial hearing all of the evidence relevant to liability/the causes of action and damages. These issues can be decided collaboratively between the courts, if necessary." I do not accept that as a reasonable or realistic way to proceed. The plaintiff has cited no precedent and has provided no workable plan for what I consider to be an extraordinarily novel proposal that gives rise to significant procedural and jurisdictional issues.

[149] Even if it were possible to proceed as the plaintiff proposes—which I do not accept—having two judges sit on the same trial is contrary to the objective of judicial economy and would be an unnecessary and unreasonable use of judicial resources.

[150] It may well be that counsel in British Columbia and Ontario would cooperate after certification to avoid duplication or other inefficiencies between the two class proceedings, as the plaintiff suggests. However, in my view it is not appropriate to simply rely on counsel to avoid wasting judicial and client resources in circumstances where s. 4(3) of the *CPA* provides a mechanism for the court to achieve that important objective by simply avoiding—or at least limiting—duplication and inefficiencies in the first place.

[151] The plaintiff's alternative position is that the Court should certify a class in the BC Action that consists only of residents of the Statutory Privacy Tort Provinces, but which certifies all claims of those class members. He suggests that those class members can then be carved out of the class in the Ontario Action. The plaintiff says

proceeding in that way is preferable to a scenario where only the *Privacy Act* Claims are certified in the BC Action, because it avoids logistical issues that will arise if residents of the Statutory Privacy Tort Provinces are forced into two separate proceedings.

[152] The plaintiff's position ignores that his proposal—certification of all claims of residents of Statutory Privacy Tort Provinces—will also create logistical issues. Either way, coordination of the two proceedings will be required. It is reasonable to expect that far fewer logistical issues will arise if only the discrete *Privacy Act* Claims that have not been certified in the Ontario Action proceed in the BC Action, as compared to the issues likely to arise if the exact same claims are certified in each proceeding but in respect of different classes, as the plaintiff proposes.

[153] I accept that certification of only the common issues arising out of the *Privacy Act* Claims in the BC Action will likely still require at least some coordination with the Ontario Action. However, it is reasonable to expect that the degree of coordination that is required will be significantly reduced. Further, certification of only the *Privacy Act* Claims in the BC Action will significantly reduce the likelihood of duplication of judicial resources and the risk of irreconcilable findings as between the BC Action and the Ontario Action. Proceeding in that way also best addresses the interests of residents of Statutory Privacy Tort Provinces, giving them access to statutory remedies but also maintaining their claim in breach of fiduciary duty/breach of trust as members of the class in the Ontario Action, which are claims that are not being advanced in the BC Action.

[154] Further, it seems likely that there will be little, if any, dispute regarding facts relevant to whether the defendants "wilfully" or "substantially and unreasonably" invaded class members' privacy contrary to the applicable statutes. Given that, it may be that a trial on only the *Privacy Act* Claims could proceed more quickly than a trial of all proposed claims, and perhaps even on a summary basis. Timely resolution of the *Privacy Act* Claims is in the interests of justice and the interests of residents of the Statutory Privacy Tort Provinces. I am confident that any potential issues related

to resolution of the *Privacy Act* Claims prior to resolution of the Ontario Action could be addressed without difficulty by coordination between the two jurisdictions.

[155] The plaintiff says that I do not have jurisdiction to certify only the *Privacy Act* Claims in the BC Action. He argues that an order to that effect is not contemplated in s. 4.1(1) of the *CPA*, which he says sets out only three options for orders in an application to certify a multi-jurisdictional class proceeding.

[156] I do not accept the plaintiff's position in that regard. First, the list of orders in s. 4.1(1) is not exhaustive. Section 4.1(1) authorizes the court to "make any order it considers appropriate in an application to certify a multi-jurisdictional class proceeding, including an order…" (emphasis added).

[157] Second, the plaintiff's position is not supported by s. 4(3), which provides that "the court must determine whether it would be preferable for some or all of the claims of the proposed class members, or some or all of the common issues raised by those claims, to be resolved in the proceeding commenced elsewhere" (emphasis added). That language clearly contemplates a scenario where only some of the claims or some of the common issues in a multi-jurisdictional class proceeding proceed in another jurisdiction.

[158] In my view, certification of only the common issues arising out of the *Privacy Act* Claims in the BC Action is an available outcome under the *CPA*. I find that it is also the preferable outcome, having considered the relevant objectives enumerated in s. 4(4)(a) of the *CPA* and all relevant factors, including those factors set out at s. 4(4)(b). I conclude that it is preferable that all of the remaining claims proceed in the Ontario Action, for the reasons discussed above.

[159] Certifying only common issues arising out of the *Privacy Act* Claims in the BC Action and preferring Ontario as the jurisdiction for resolution of the remaining claims achieves all s. 4(4)(a) objectives. Proceeding in that way gives due consideration to the interests of all parties in each of the relevant jurisdictions, ensures the ends of justice are service for residents of the Statutory Privacy Tort Provinces, avoids

irreconcilable judgments and minimizes the coordination that will be required in that regard, and promotes judicial economy. Not only is this outcome consistent with the objectives of the *CPA*, it is consistent with the relevant principles and overarching objectives of class proceedings articulated in *Sanis Health v. British Columbia*, 2024 SCC 40.

Conclusion

[160] In conclusion, I find that the claim in negligence for damages for mental or emotional distress and those claims relating to Quebec residents and Quebec law do not meet the requirements for certification. I find that all remaining claims advanced by the plaintiff meet the requirements for certification set out in s. 4(1) of the *CPA*.

[161] However, other than the *Privacy Act* claims, pursuant to s. 4(3) of the *CPA* I find that it would be preferable for all claims to be resolved in the Ontario Action. This proceeding shall therefore be certified as a class proceeding only in respect of the common issues arising out of the *Privacy Act* Claims.

[162] Because the certification order in the Ontario Action is under appeal, the order certifying only the *Privacy Act* Claims shall be without prejudice to any future applications that the parties might consider necessary or appropriate once the outcome of the Ontario Action appeal is known.

[163] In accordance with s. 37(1) of the *CPA*, there will be no costs awarded for this hearing.

[164] If the parties are unable to reach agreement on the order arising out of these reasons, they have leave to request an appearance before me in that regard.

"Ramsay J."