

# Court of King’s Bench of Alberta

Citation: **Salamh v Alberta Health Services, 2025 ABKB 383**

**Date:** 20250625  
**Docket:** 2301 10584  
**Registry:** Calgary

Between:

**Mena Salamh, as Representative Plaintiff**

Plaintiff

- and -

**Alberta Health Services**

Defendant

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**Reasons for Decision  
of the  
Honourable Justice C.D. Simard**

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## **I. Introduction**

[1] The Plaintiff Mr. Salamh was trained as a cardiologist in Egypt. He emigrated to Canada in 2013 and is currently employed by the Defendant Alberta Health Services (**AHS**) as a Clinical Assistant.<sup>1</sup> AHS hires as Clinical Assistants individuals like the Plaintiff, who have been trained as physicians in other countries, but who are not licensed to practice medicine in Alberta. In this action, Mr. Salamh alleges that AHS breached its obligations to Clinical Assistants by, among other things, failing to pay them properly for working overtime, failing to provide them with required rest periods and requiring them to work overly long shifts, contrary to the *Employment Standards Code*, RSA 2000, c. E-9. He says that AHS did this knowingly, in bad faith, and that it made misrepresentations to Clinical Assistants about their entitlements.

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<sup>1</sup> AHS now refers to Clinical Assistants and Clinical Surgical Assistants as “Associate Physicians”. However, for ease of reference, I will refer to all these employees collectively as **Clinical Assistants**.

[2] Mr. Salamh sues as a representative plaintiff, on behalf of all the Clinical Assistants who have worked for AHS since August 12, 2013. He seeks to have this action certified as a class action under the *Class Proceedings Act*, SA 2003, c. C-16.5 (the *CPA*).

[3] I am case managing this action. Currently, the parties have filed evidence and are conducting questioning in advance of Mr. Salamh's application to have the action certified as a class proceeding (the **Certification Application**). William Hondas swore an affidavit for AHS on February 14, 2025 and Mr. Salamh's counsel cross-examined him on April 8 and 9, 2025. Mr. Salamh has applied to me for an order compelling AHS to answer questions and undertakings that were objected to or taken under advisement during Mr. Hondas's questioning (collectively, the **Disputed Questions and Undertakings**). Mr. Salamh also asks to question other individuals who worked for AHS and played roles in AHS's dealings with Clinical Assistants during the relevant time frame (the **Requested Witnesses**). These Requested Witnesses were identified in Mr. Hondas's evidence.

[4] I heard Mr. Salamh's application on June 20, 2025.

[5] For the reasons that follow, I have concluded that Mr. Hondas is required to answer only a small number of the Disputed Questions and Undertakings. Mr. Salamh is not permitted to question the Requested Witnesses at this time.

## II. Issues

[6] The only issues for determination are:

- (a) should Mr. Hondas be required to answer the Disputed Questions and Undertakings; and
- (b) should Mr. Salamh be allowed to question the Requested Witnesses?

## III. Analysis

### A. Applicable Law

#### 1. Relevant Evidence at the Certification Stage of Class Actions

[7] Our Court of Appeal recently summarized the law that applies to this application in *2007513 Alberta Ltd v Pet Planet Franchise Corp*, 2022 ABCA 310 at paras 9 – 12:

The contextual backdrop to this application is a pending application for certification of a class action lawsuit. What is considered relevant and material evidence for the purposes of a certification application is circumscribed by both the jurisprudence and the [*CPA*]. Notably, evidence going to the merits of the proposed class action is not relevant at the certification application.

To obtain certification, the appellants 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. While the first requirement can be 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 at paras 99-104; *Fisher v Richardson GMP Limited*, 2022 ABCA 123 [*Fisher*] at para 35.

In short, the certification stage focuses on the form of the action; that is, whether the action is properly prosecuted as a class action, not whether the claim is likely to succeed: *Hollick v Toronto (City)*, 2001 SCC 68 at para 16; *Fisher* at para 36.

While the court has jurisdiction to order discovery through record production or questioning for the purposes of certification, the applicant must demonstrate that the discovery is necessary to inform the certification process: *Tetefsky v General Motors Corp*, 2010 ONSC 1675 at para 38, aff'd 2011 ONCA 246; *Mancinelli v Royal Bank of Canada*, 2017 ONSC 87 at paras 15, 41, 54; *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2007 BCSC 1663 at paras 23-25; *Murray v Alberta (Calgary Health Region)*, 2007 ABQB 231 at paras 14-19.

[8] Therefore, to succeed in this application, Mr. Salamh must establish that compelling Mr. Hondas to answer the Disputed Questions and Undertakings and questioning of the Requested Witnesses will provide evidence that is “necessary” to establish “some basis in fact” for the last four certification requirements listed in section 5(1) of the *CPA*. The parties agree that these legal principles govern this application. The main difference between their positions is the scope and extent of the evidence that they say will be necessary at the Certification Application, to establish a “basis in fact” for certification.

[9] Mr. Salamh argues for an expansive approach. He points out that courts have endorsed at least a limited weighing of the evidence on the merits of a claim at the certification stage, based on the rationale that certification should not be granted if a claim is destined to “founder” at the merits stage, or stated differently, is “doomed to fail” on its merits: *e.g. Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57 at para 104; *Warner v Smith & Nephew Inc*, 2015 ABQB 139 at para 25.

[10] Mr. Salamh focuses particularly on his allegations that AHS acted in bad faith, made negligent and fraudulent misrepresentations and acted in a reprehensible manner (collectively, the **Alleged Wrongful Conduct**). Mr. Salamh says that AHS’s strategy at the Certification Application, revealed in Mr. Hondas’s affidavit, will be to attack the factual basis of the causes of action he has pleaded. Therefore, Mr. Salamh argues, he must enter evidence at the Certification Application establishing each of the essential elements of the causes of action comprising the Alleged Wrongful Conduct. In particular, he says he must do this to be able to establish a “basis in fact” for the certification requirements in section 5(1)(c) (common issue) and (d) (preferability of a class proceeding).

[11] In contrast, AHS asserts that evidence going to merits of Mr. Salamh’s causes of action, including the Alleged Wrongful Conduct, is not relevant and material to the issues that will be

argued at the Certification. In fact, during oral argument AHS confirmed that it would not be asserting at the Certification Application that Mr. Salamh's claim is "doomed to fail". Therefore, AHS says, it will not be necessary for the Court to inquire into the merits of Mr. Salamh's claims at the Certification Application. It says that because the evidence Mr. Salamh seeks to elicit in this application goes to the merits of his claims, I should dismiss his application.

[12] Even in the absence of AHS's admission about how it will approach the Certification Application, the law that governs this application does not support the view that the Court should allow expansive evidential inquires into the merits of the plaintiff's claim at the certification stage. As my colleague Justice Hall stated in *Walter v Western Hockey League*, 2017 ABQB 382 at para 13:

The question before the Court is not whether there is some basis in fact for the claim, but whether there is some basis in fact to establish each of the individual certification requirements ... The "some basis in fact" threshold is not onerous. A plaintiff need only demonstrate a minimum evidentiary basis to support the conclusion that the action can go forward as a class proceeding. The certification requirements need not be proven on a balance of probabilities, nor is the certification judge to enter into a weighing of conflicting evidence ...

[13] As I noted, Mr. Salamh focuses in this application on the "common issue" and "preferability" certification requirements set out in section 5(1)(c) and (d) of the *CPA*.

[14] In *Fischer v Richardson GMP Limited*, 2022 ABCA 123, our Court of Appeal described in detail the nature of the "common issue" inquiry under section 5(1)(c) of the *CPA* at para 37, as follows:

To satisfy s. 5(1)(c) of the *CPA*, the action must raise common issues of fact or law. Section 1(e) defines "common issues" as "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical facts." The common issues need not be determinative; the requirement is that they advance the litigation: *Warner* at para 30. An issue is common where its resolution is necessary to the resolution of each class member's claim. Conversely, an issue will not be a common issue, in the requisite sense, unless it is a substantial ingredient of each class member's claim: *Hollick* at para 18, cited in *Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA), 2004 CanLII 45444 (ON CA) at para 51, leave to appeal to SCC ref'd [2005] SCCA No 50. Success for one class member must not result in failure for another. "A question is considered 'common', then, 'if it can serve to advance the resolution of every class member's claim', even if the answer to the question, while positive, will vary among those members": *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 105, citing *Vivendi Canada Inc v Dell'Aniello*, 2014 SCC 1 at paras 45, 46.

[15] Therefore, respecting section 5(1)(c), Mr. Salamh must establish that the evidence he wants to solicit is necessary for him to establish at the Certification Application a basis in fact that the common issues can serve to advance the resolution of every class member's claim.

[16] Our Court of Appeal also provided similar guidance with respect to section 5(1)(d) of the *CPA* in *Setoguchi v Uber BV*, 2020 ABCA 45 at para 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.

[17] Therefore, respecting section 5(1)(d), Mr. Salamh must establish that the evidence he wants to solicit is necessary for him to establish at the Certification Application a basis in fact that a class proceeding would be a fair, efficient and manageable method of advancing this claim, and that it would be preferable to any other reasonably available means of resolving the class members’ claims.

## 2. Waiver of Privilege

[18] Waiver of privilege is a live issue in this case, because AHS objected to a number of the Disputed Questions and Undertakings on the basis that they sought privileged information. An example was the following question:

Q: So AHS received legal advice in July 2022 and thereafter decided to pay overtime; is that right?

A: That is correct.

Q: And did the legal advice say that [Clinical Assistants] are to receive overtime?

[OBJECTION]: I object to that question on the grounds that it trenches on privilege.

[19] Mr. Salamh argues that AHS has waived its privilege over any legal advice regarding the Clinical Assistants’ entitlements, by referring to a legal opinion in Mr. Hondas’s affidavit and thereby voluntarily putting into issue its state of mind in defence of the allegations of fraud, misrepresentation and bad faith. The relevant paragraphs of Mr. Hondas’s affidavit, paras 64 and 65, state:

64. As part of its review, in July 2022, AHS Employee Relations sought legal advice concerning whether Clinical Assistants were subject to employee standards legislation regarding overtime, which advice was received on September 6, 2022.

***AHS Implemented the payment of overtime retroactive to April 1, 2022***

65. Following the receipt of this advice, AHS took steps to implement the payment of overtime to Clinical Assistants at 1.5 times their effective hourly rate for hours worked in excess of 44 hours in any given week. AHS determined that such payment would be made retroactive for a period of 6 months, to April 1, 2022. The 6-month retroactive payment was based on AHS's understanding that this was the maximum retroactive period for overtime under employment standards legislation.

[20] It is well-established that a party can waive privilege intentionally: *CNOOC Petroleum North America ULC v ITP SA*, 2024 ABCA 139 at para 46 (*CNOOC/ITP*). However, a party can also waive privilege even if it does not intend to do so, by using the privileged material in a manner inconsistent with the privilege, or otherwise treating it as no longer being confidential. Such uses could include:

- relying on a privileged record:
  - to explain the party's state of mind; or
  - to support the party's case;
- arguing that the party acted in good faith based on the contents of the privileged record;
- referring to the privileged record in the party's pleadings; or
- disclosing the record to an unrelated third party in a way that did not maintain confidentiality over the material;

*CNOOC/ITP* at paras 48 – 50.

[21] A court must consider the following types of competing interests in deciding whether an inadvertently disclosing party should lose the benefit of the privilege (*CNOOC/ITP* at para 51):

Is there still some legitimate interest to be protected by the privilege notwithstanding the disclosure? This will depend in large part on the identity of the person to whom disclosure has been made.

Given the disclosure that has taken place, will the maintenance of the privilege result in unfairness or prejudice to the adversary? In many cases the disclosure is perfectly legitimate, and collateral to the litigation. This factor raises questions such as whether any legitimate interest the adversary has in seeing the document has been enhanced by the disclosure.

Would the maintenance of the privilege in the face of the disclosure undermine the integrity of the system of administration of justice? This factor will overlap the previous one, as it will involve to some extent a balancing of the prejudice to the party asserting the privilege and the adversary. It will also engage wider public

policy issues, including the general issue of the fairness of maintaining or not maintaining of the privilege.

[22] As a result of considering these types of interests, the Court may decide that the disclosure of the privileged record may result in the loss of the privilege.

[23] Having summarized the applicable law, I now turn to my analysis of and decision on the disputed issues.

**B. Should Mr. Hondas be Required to Answer the Disputed Questions and Undertakings?**

[24] For the reasons that follow, I conclude that the majority of the answers that Mr. Salamh seeks to the Disputed Questions and Undertakings are not necessary for him to establish at the Certification Application a basis in fact for the certification requirements in section 5(1)(b) – (e) of the *CLA*. Rather, the information sought goes to the merits of Mr. Salamh’s claims. Mr. Salamh admits that this is the goal of his questions in his written and oral submissions.

[25] In the context of this case, including because AHS has conceded that it will not be making a “doomed to fail” argument at the Certification Application, evidence that might tend to prove or disprove Mr. Salamh’s allegations will simply not be relevant and material in the Certification Application. Whether Mr. Salamh’s claims are more or less likely to ultimately succeed at trial will not impact whether he has established a basis in fact for the certification requirements in section 5(1) of the *CPA*. Evidence tending to establish or disprove the merits of the causes of action he has pleaded will only become relevant and material later in the lawsuit.

[26] With respect to the statutory requirements Mr. Salamh has focused on in section 5(1)(c) and (d) of the *CPA*, I find that majority of the information he seeks in the Disputed Questions and Undertakings is not necessary for him to seek to establish a basis in fact that:

- (a) the common issues can serve to advance the resolution of every class member’s claim; or
- (b) a class proceeding would be a fair, efficient and manageable method of advancing this claim, and that it would be preferable to any other reasonably available means of resolving the class members’ claims.

[27] Additionally, almost all the objected-to questions seek to elicit privileged information: the contents of the legal opinion obtained by AHS in 2022, or information that falls within the “continuum” of solicitor-client communications that surround or are directly related to the seeking and giving of legal advice: *CNOOC Petroleum North America ULC v 801 Seventh Avenue Inc*, 2021 ABQB 861.

[28] Having considered the principles and the competing interests set out in *CNOOC/ITP*, I find that AHS did not waive privilege by including paragraph 64 and 65 in Mr. Hondas’s affidavit. Those paragraphs merely recite the steps AHS took in seeking and obtaining of a legal opinion, as part of the narrative explaining the manner in which AHS has treated Clinical Assistants’ working conditions. Mr. Salamh argues that in these two paragraphs, AHS is implying a number of things,

for the purpose of trying to prove that the Alleged Wrongful Conduct did not occur: *i.e.* that AHS reasonably sought legal advice on the issue of overtime, and that when that advice was received, it reasonably acted to recognize the Clinical Assistants' rights. I disagree. To waive the privilege, AHS would have had to be much more explicit in putting forward this type of position. It is possible that AHS might subsequently waive privilege over this legal advice, depending on how it pleads and argues its defence of this action in the future. But it has not done so at this time.

[29] In conclusion, Mr. Hondas does not have to answer the majority of the Disputed Questions and Undertakings, for two reasons: (1) the evidence they seek to elicit goes to the merits of Mr. Salamh's claim and is not necessary to establish a basis in fact for the certification requirements in section 5(1) of the *CPA* and will therefore not be relevant and material at the Certification Application; and (2) they seek to elicit privileged information.

[30] However, the following two Disputed Questions must be answered:

**Page 191, lines 3 – 4:**

Q: Why or how did they [AHS] make the decision of paying overtime for hours in excess of 44?

[OBJECTION]: I'm going to object to that question on the same ground of ...

**Page 191, lines 11 – 12:**

Q: And how did they [AHS] come to decide to pay overtime retroactively for the six months?

[OBJECTION]: Counsel, that – you might refer the witness to the affidavit, which I think answers that question.

[31] These two questions do not seek, at least on their face, privileged information. They simply follow up reasonably on factual statements that Mr. Hondas has made in paragraph 65 of his affidavit (reproduced above in paragraph 19 of this Decision). They also do not, on their face, seek information about the merits of Mr. Salamh's claims. They simply ask for further detail about what Mr. Hondas has said in his affidavit.

[32] During the hearing on June 20, 2025, the parties advised me that Mr. Hondas had recently answered the majority of his outstanding undertakings. The only undertakings that were objected to or taken under advisement and that remain unanswered are undertakings 36 and 53, and the portions of other undertakings in which Mr. Salamh has asked for the contact details of the Requested Witnesses.

[33] Undertaking 36 seeks privileged information, so Mr. Hondas does not have to answer it. However, he must answer undertaking 53. It asks for an explanation of a statement made in an email by Dr. Belanger that "Clinical Assistants have not been eligible to receive regular overtime payments". AHS objected to this undertaking on the basis that the email speaks for itself. I disagree. Mr. Hondas must make reasonable inquiries of the author of the email, Dr. Belanger, to find out what he meant by that statement. Like the two objected-to questions that I am compelling

Mr. Hondas to answer, undertaking 53 does not, on its face, seek information about the merits of Mr. Salamh's claims. It just follows up reasonably on information that Mr. Hondas has put in evidence.

[34] I will address the undertakings that seek the contact details of the Requested Witnesses below.

### **C. Should Mr. Salamh be Allowed to Question the Requested Witnesses?**

[35] Rule 6.8 allows parties to question witnesses under oath for the purpose of obtaining a transcript that the party that can then use at an application. Mr. Salamh wants to question the Requested Witnesses, who are various current and former AHS employees, and use the transcripts of their evidence at the Certification Application. He has explained his rationale for this request in his written submissions, as follows:

The Plaintiff also seeks, through R. 6.8 questionings, to elicit the evidence of the inner workings and mindset of AHS from the very individuals at AHS, referenced in the AHS Affidavit, who reviewed, analyzed, devised and implemented the decision to deny overtime pay and regulated maximum work hours to the CAs and CSAs, as a group, in the 2013-2023 time period.

[36] Based on the evidence before me and the circumstances of this case, I find that at present the "evidence of the inner workings and mindset of AHS" is only relevant and material to the merits of Mr. Salamh's claims against AHS. It is not relevant and material to the certification requirements under section 5(1) of the *CPA*. Therefore, this evidence is not necessary for the Certification Application and Mr. Salamh's request to question under Rule 6.8 is denied.

[37] Mr. Salamh's requests for the contact details of the AHS employees is also denied. That information is not relevant and material to the certification requirements and it is unnecessary for the Certification Application.

### **IV. Conclusion**

[38] In conclusion, Mr. Hondas must answer the two objected-to questions set out in paragraph 30 above, and he must also answer undertaking 53. The balance of Mr. Salamh's application is dismissed.

[39] I must make some clarifying remarks about what I am deciding and not deciding in this application. Obviously, my ruling on the Disputed Questions and Undertakings is based only on their relevance and materiality to the issues that will be argued and decided at the Certification Application. I make no decision about their relevance and materiality to the issues that will be disputed and ultimately decided later, regarding the merits of this action. It would be improper for me to do so at this time and also impossible, since AHS has not yet filed a Statement of Defence and the pleadings have not closed.

[40] Similarly, while I have decided that three of the Disputed Questions and Undertakings must be answered, I am not ruling on any follow-up questions that Mr. Salamh may ask, based on the answers he receives to those Disputed Questions and Undertakings, or the other undertakings that

Mr. Hondas has answered or will answer. I hope that I have provided sufficient guidance on what evidence will be relevant and material at the Certification Application, to allow the parties to conclude their questioning efficiently and without having to make further court applications.

[41] If the parties cannot agree on the costs of this application, they can make written submissions to me, no longer than 5 pages each.

Heard on the 20<sup>th</sup> day of June, 2025.

**Dated** at the City of Calgary, Alberta this 25<sup>th</sup> day of June, 2025.

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**C.D. Simard**  
**J.C.K.B.A.**

**Appearances:**

Robert Erickson, Chris Erickson and Ariel Breitman  
for the Plaintiff

Jon Faulds KC, Mark Jackson KC and Francesca Ghossein  
for the Defendant