COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Reichert v. Canada (Attorney General),* 2026 BCCA 9

Date: 20260113
Docket: CA50327

Between:

David Reichert and Derrick Ross

Appellants
(Plaintiffs)

And

The Attorney General of Canada, the Minister of Justice and Attorney General of British Columbia, Bob Paulson, Craig Callens, Maxine Schwartz, Paul Darbyshire, Brad Hartl, Roland Bowman, Isabelle Fieschi, Daniel Dubeau, Ray Bernoties and Judy Le Page

Respondents
(Defendants)

Before: The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated November 22, 2024 (*Reichert v. Attorney General of Canada*, 2024 BCSC 2131, Vancouver Docket S158405).

Counsel for the Appellants: C.M. Tribe

Counsel for the Respondents: F. Paradis
M.J. Huculak
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Place and Date of Hearing: Vancouver, British Columbia
October 2, 2025

Place and Date of Judgment: Vancouver, British Columbia
January 13, 2026

Written Reasons by:
The Honourable Justice Mayer

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Mr. Justice Butler

Summary:

The appellants challenge a chambers judge's refusal to certify the underlying action as a class proceeding. The judge determined a class proceeding is not the preferable procedure. The appellants argue the judge erred by failing to conduct the preferable procedure analysis through the lens of the three principal goals of class proceedings (judicial economy, access to justice and behaviour modification), by failing to turn his mind to whether exceptional circumstances justified considering limitation issues at the certification stage, and by reducing the test for preferability to the question of whether individual issues predominated over common issues.

Held: Appeal dismissed. The judge made no errors in his preferable procedure analysis justifying appellate intervention. The judge appropriately considered the three goals of class proceedings. He did not err in considering the limitation issue without it having been brought as a preliminary issue. Finally, the judge did not err in considering whether individual damages assessments would make a class proceeding more or less advantageous than the alternatives.

Reasons for Judgment of the Honourable Justice Mayer:

[1] This appeal concerns the dismissal of an application for certification under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50 [*CPA*], on the basis that a class proceeding is not the preferable procedure.

[2] Between 2007 and 2012, Dr. Michael Webster, a registered psychologist, provided members of the RCMP with psychological treatment through the RCMP's health benefit plan.

[3] In or about 2011, the RCMP began to have concerns about the clinical effectiveness of Dr. Webster's care. On August 2, 2012, the RCMP filed a complaint against him with the College of Psychologists of British Columbia ("the College"), alleging professional misconduct. In support of this complaint, in August and November 2012, the RCMP accessed and then disclosed redacted copies and later unredacted copies (upon receiving a request from the College) of one-or two-page

summaries of clinical progress reports of seven members who were patients of Dr. Webster.

[4] In July 2013, the appellants and three other RCMP members whose progress report summaries had been disclosed, filed a complaint with the Office of the Privacy Commissioner of Canada. In a decision dated November 24, 2014, the Privacy Commissioner found the disclosure was contrary to the *Privacy Act,* R.S.C. 1985, c. P-21 [*Federal Privacy Act*], because, in summary, the College did not explicitly cite their statutory authority and provide justification when it requested unredacted copies. The Privacy Commissioner did not find the review of progress report summaries by other RCMP psychologists, nor the use of them within the RCMP in preparing the complaint to the College, to be contrary to the *Federal Privacy Act*.

[5] The appellants, David Reichert and Derrick Ross, commenced the underlying action on October 9, 2015, on behalf of themselves and other RCMP members who received care from Dr. Webster. They allege the RCMP made its complaint to the College as part of its efforts to retaliate against Dr. Webster for publicly criticizing the RCMP. They also allege the RCMP's access to and disclosure of their confidential medical records, as part of the College complaint process and outside it, was unlawful and actionable. They seek compensatory damages for psychiatric injury, loss of income, and moral damages for violation of their privacy rights.

[6] At a certification hearing in October 2024, after a number of procedural steps, the appellants applied to have the action certified as a class proceeding. In reasons pronounced November 22, 2024, (indexed at 2024 BCSC 2131) (the "Chambers Reasons"), a chambers judge dismissed the application. He concluded the claims of

the proposed class would be better addressed through the RCMP pension scheme and then, if necessary, through individual actions.

On Appeal

[7] The appellants contend the chambers judge erred in principle or in law by (a) failing to conduct a preferable procedure analysis through the lens of the three principal advantages of class proceedings; (b) considering limitation issues at the certification stage; and (c) unduly focussing on whether individual issues predominated over common issues.

[8] For the reasons that follow, I would dismiss the appeal. In my opinion, the judge made no errors in his analysis of preferable procedure justifying appellate intervention.

Certification Requirements

[9] Section 4(1) of the *CPA* makes it mandatory for a court to certify a proceeding as a class proceeding on application if the following requirements are satisfied:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> > (i) would fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> [Emphasis added.]

[10] Only s. 4(1)(d) is at issue in this appeal.

[11] In analyzing preferability, s. 4(2) requires the court to consider all relevant factors 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; and
>
> (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.

[12] To satisfy the s. 4(1)(d) requirement, a proposed representative plaintiff must show some basis in fact that the proposed class action would be: (a) a fair, efficient and manageable method of advancing the claim; (b) preferable to other reasonable available means of resolving the claim; and (c) facilitate the principal goals of class proceedings, being judicial economy, access to justice, and behaviour modification: *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22–23, 48.

The Chambers Reasons

[13] In his analysis of preferable procedure, after referring to s. 4(1)(d), the judge acknowledged the s. 4(2) factors must be considered through the lens of the three principal goals of class proceedings, citing *Hollick v. Toronto (City),* 2001 SCC 68 at para. 27.

[14] The judge first considered the ability of potential class members to seek compensation for their alleged injuries through the RCMP pension scheme, under

the *Pension Act,* R.S.C. 1985, c. P-6. He referred to the following list of benefits of pursuing this method of recovery described by the respondents: the lack of both a limitation period for claims and a requirement to establish fault; legal assistance is available at no cost; all reasonable inferences are drawn in favour of the applicant and credible uncontradicted evidence is to be accepted; compassionate awards may be available where pension benefits are refused; and additional benefits may be available in excess of what is recoverable in tort.

[15] The judge concluded there was no evidence that advancing a claim through the RCMP pension scheme had any inefficiencies when compared with the court system. He also concluded there was no evidence that it would be more onerous for the representative plaintiffs to advance a pension claim or proceeding than a class proceeding.

[16] Although it was uncertain whether compensation for moral damages would be available under the *Pension Act*, the judge concluded that those who received a disability pension for injuries arising from the action would be prohibited from seeking “ancillary damages” not covered by their pension, referring to *Sarvanis v. Canada,* 2002 SCC 28 at paras. 28–29.

[17] The judge acknowledged compensation under the RCMP pension scheme would not be available for class members who had not suffered a disability or aggravation of an underlying condition. He considered the class proceeding had been crafted to compensate potential class members for psychiatric injuries resulting in loss of income, as opposed to compensation solely for moral injuries. He

concluded it was likely that the proposed class members who suffered an alleged injury, which caused a loss of income, would be entitled to pension benefits.

[18] The judge next considered two potential barriers to a class proceeding. The first was a potential bar pursuant to s. 9 of the *Crown Liability and Proceedings Act,* R.S.C. 1985, c. C-50 [*CLPA*], which provides that "no proceedings lie against the Crown or a servant of the Crown in respect of a claim if a pension or compensation has been paid or is payable …". He noted the respondents are entitled to bring an application for a bar (that is, to seek dismissal of the claim) pursuant to s. 9 of the *CLPA* or for a stay under s. 111(2) of the *Pension Act.* If an application is brought under s. 111(2), where an action is not barred by s. 9 of the *CLPA,* the action is stayed until the claimant makes an application for a pension, pursues it in good faith, and a decision has been made that no pension is payable (ss. 111(2)(a) and (b)). On the apparent assumption that an application for a bar or stay would be brought, the judge concluded if the class proceeding was certified, individual pension applications and assessments would have to be made before any damage assessments for the proposed class members could occur.

[19] Second, the judge noted the matter arose from alleged breaches of the proposed class members' privacy rights in 2012, which may be subject to the two-year limitation period under the *Limitation Act,* S.B.C. 2012, c. 13. He noted the action was commenced in October 2015, giving rise to a limitation defence. He concluded this defence would require disclosure, possible discovery, and possible individual adjudication on the issue.

[20] The judge then considered the size of the potential class. Although he recognized the proposed class was small, he was not satisfied that a joint action would necessarily be less economical or efficient than a class proceeding, solely due to the number of potential members. He acknowledged there could be a number of potential class members whose identities would not be uncovered in pension proceedings, and it was not clear that a joined action on behalf of named plaintiffs would do so.

[21] Next, the judge addressed the relative costs of a class proceeding compared with individual or joint actions. He noted the appellants had led evidence that prosecuting actions individually would not be economically feasible. He also noted the appellants had not led evidence regarding the "internal compensatory scheme"—that is, the cost of seeking redress under the RCMP pension scheme.

[22] The judge considered that seeking to resolve the claims of potential class members solely through the RCMP pension scheme would not allow allegations of serious misconduct by members of the RCMP to be investigated. He set out his findings, on what he described as additional considerations, that there was no evidence that a significant number of potential class members had a valid interest in individually controlling the prosecution of separate actions, and there were no other claims involving the same or similar subject matter that are the subject of other proceedings.

[23] The judge was of the view that the focus of the claims—being the impact of the breach of potential class members' privacy rights arising from the complaint made against Dr. Webster to the College—created individual issues and a potential

limitation defence. The individual issues included the assessment of damages and whether there was a pension entitlement and resulting bar or stay of class proceedings.

[24] Given the number and significance of individual issues, the judge concluded a class proceeding would not advance the litigation or provide economies of expense or efficiency. He considered the individual issues to outweigh the benefits of a class proceeding to achieve the three principal goals. He determined the preferable procedure would be for potential plaintiffs to seek redress through the RCMP pension scheme and then, if necessary, by individual actions.

Analysis

[25] While s. 4(1) of the *CPA* requires a judge to certify the proceeding as a class action if the criteria are satisfied, the judge has discretion in applying the criteria in s. 4(1)(b)–(e). A certification judge's decision on preferable procedure under s. 4(1)(d) is subject to special deference because it involves weighing and balancing a number of factors: *AIC* at para. 65. Unless the judge erred in principle or was clearly wrong in his or her exercise of discretion, this Court will not reweigh the evidence and substitute its own conclusion for that of the judge: *Kirk v. Executive Flight Centre Fuel Services Ltd.,* 2019 BCCA 111 at para. 40.

[26] With this standard of review in mind, I turn to the issues raised in this appeal.

Did the judge err in principle by failing to conduct a preferable procedure analysis through the lens of the three principal advantages of class proceedings?

[27] The appellants contend the judge erred in principle by failing to consider the advantages of a class proceeding, relative to the alternatives, to achieve the goals of access to justice and behaviour modification.

[28] Access to justice has both procedural and substantive components. The procedural component is concerned with whether claimants have access to a fair process to resolve their claims while the substantive component is concerned with whether claimants will receive a just and effective remedy for their claims if established: *AIC* at para. 24. A class action will serve the goal of access to justice if (1) there are access concerns that a class action could address, and (2) these concerns remain even where alternative avenues of redress are considered: *AIC* at para. 26.

[29] In *AIC* at paras. 27–38, Justice Cromwell set out a series of questions as helpful guidance in determining whether both these elements are present: (1) what are the barriers to access to justice; (2) what is the potential of the class proceedings to address those barriers; (3) what are the alternatives to class proceedings; (4) to what extent do the alternatives address the relevant barriers; and (5) how do the two proceedings compare?

[30] Behaviour modification is facilitated by encouraging wrongdoers to account for the harm they cause or may cause to others: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 13.

[31] With respect to access to justice considerations, the appellants submit the judge failed to consider the barriers to access to justice, the potential of a class action to address those barriers, and the extent to which any alternatives address the relevant barriers. In particular, the appellants submit the judge did not consider the advantage of a class proceeding in identifying potential plaintiffs, who in the absence of a class proceeding would not know their privacy rights had been breached. They say alternatives such as individual pension proceedings would not address this barrier. The appellants also contend the judge did not consider that in an individual pension proceeding, a claimant would likely not be able to pursue damages for a breach of their privacy rights under the *Privacy Act,* R.S.B.C. 1996, c. 373, s. 1 [*BC Privacy Act*].

[32] The appellants also submit the judge did not consider additional access to justice barriers including the following: the inability of potential class members to individually pursue pension benefits due to their mental and emotional state in the context of their relationship with the RCMP; the potential that no form of damages is available under pension proceedings; and the cost of undertaking pension proceedings.

[33] Finally, with respect to behaviour modification, the appellants contend the judge did not address the extent to which a class proceeding would or would not serve that goal, relative to the alternatives.

[34] I do not agree the judge failed to consider, as an access to justice issue, the inability of yet unidentified class members to discover that their confidential health information had been disclosed through a pension proceeding. The judge concluded

there was some basis in fact to believe the private health information of more than the seven members of the RCMP had been improperly accessed. He recognized a disadvantage of individual pension proceedings was that the process would not uncover the identity of other potential claimants, and it was not clear that a joined action would do so.

[35] Similarly, the judge was aware pension proceedings might not provide compensation for moral damages arising from a breach of the *BC Privacy Act* and was not satisfied that all potential claimants would be entitled to these damages. He appropriately referred to *Sarvanis* at paras 28–29, in considering whether individuals who received a disability pension for injuries arising from a breach of their privacy rights would be prohibited from seeking ancillary damages not covered by their pension.

[36] With respect to moral damages, the judge was concerned about the potential overlap between a claim for moral damages and a claim for compensatory damages for psychiatric injury and income loss. Significantly, in the common issues portion of his reasons, he concluded, "[a]lthough moral damages can be assessed on an aggregate basis for common breaches of privacy; given the paucity of jurisprudence surrounding claims advancing damages for moral, general and pecuniary damages inclusively under these causes of action … it would be inappropriate to assess moral damages on an aggregate basis …" (para. 81).

[37] The judge's preferable procedure analysis demonstrates he considered the focus of the appellants' claim to be on compensatory damages. He stated, "… the class action has been specifically crafted to compensate potential class members for

psychiatric injuries resulting in loss of income as opposed to compensation solely for moral injuries" (para. 90). A plaintiff's particular claim and the issues raised by that claim are central to a preferability analysis: *Lewis v. WestJet Airlines Ltd.,* 2022 BCCA 145 at para. 60. As well, as was set out in *AIC,* "… [a]n alternative process need not necessarily decide the precise legal and/or factual questions raised by the common issues provided that it effectively resolves the class members' claims" (para. 19). In my view, the judge did not err by focussing on the compensatory aspects of the appellants' claims in this case.

[38] With respect to the appellants' contention the judge failed to consider the emotional state of the proposed class members and their willingness to pursue individual pension proceedings, the respondents say no evidence was before the judge on this point. The absence of any basis in fact regarding this potential barrier to access to justice in a pension proceeding means it was not necessary for the judge to consider it in his analysis.

[39] In my view, the judge's reasons demonstrate he considered the ability of potential class members to advance the substantive aspects of their claim, as pleaded, through a pension proceeding. The judge specifically referenced the respondent's submissions on the advantages to potential class members pursuing their claims through the pension process. I have already mentioned those at para. 14 above. After referring to these advantages, he found no evidence "that the pension system has any inefficiencies in comparison to the court system" and no evidence "that the pension scheme would be more onerous than the class action which would require participation of members, at a minimum, for an assessment of damages" (para 88).

[40] With respect to the goal of behaviour modification, the judge recognized that the alternatives to a class action may not properly investigate alleged misconduct of the RCMP. The judge would also have been aware of the submissions of the respondents that the goal of behaviour modification had already been addressed. The respondents submitted as follows:

> 129. Behavior modification is more appropriately pursued through the OPC [Office of the Privacy Commissioner] or the College, and complaints have already been made to both the College regarding the conduct of Drs. Bowman and Le Page in the Disclosure, and to the OPC regarding the Disclosure as a whole. Any effect on behavioural modification has already been achieved by the OPC's policy recommendations to the RCMP in its 2014 decision.

[41] Despite the absence of express words addressing the factors identified by the appellants on appeal, reading the judge's reasons as a whole in the context of the record, I am satisfied he considered access to justice barriers and behaviour modification in his preferability analysis. As I said earlier, it is not the role of this Court to reweigh the relevant factors and substitute its own conclusion where an error in principle has not been identified: *Kirk*, at para. 40.

[42] I would not therefore accede to this ground of appeal.

Did the judge err in law by considering limitation issues at the certification stage?

[43] The appellants contend the judge erred in law by considering limitation issues at the certification stage, absent finding that exceptional circumstances justified doing so. In support of this argument, the appellants rely upon the decision of this Court in *Godfrey v. Sony Corporation,* 2017 BCCA 302 at para. 67, aff'd *Pioneer Corp. v. Godfrey,* 2019 SCC 42 [*Godfrey BCCA*] and the decision in *Rorison v. Insurance Corporation of British Columbia,* 2022 BCSC 624 at paras. 91–92*,* for the

proposition that limitation period arguments can only be considered at the certification stage in exceptional circumstances but generally should not. The appellants also contend that no consideration ought to have been given to a limitation defence without it having been brought as a preliminary issue.

[44] In *Godfrey BCCA*, one of the appellants advanced the argument that a certification judge erred in law by finding a limitation period defence cannot be considered under the cause of action criterion at s. 4(1)(a) of the *CPA*. The certification judge had concluded it was not plain and obvious the limitation period could not be extended by applying principles of discoverability or fraudulent concealment: *Godfrey v. Sony Corporation,* 2016 BCSC 844 at paras. 46–48, 59, 62.

[45] On appeal, this Court held that:

> [67] I accept that a limitation period argument can be considered at the certification stage, in exceptional circumstances, but generally should not. In my view, whether or not a limitation period argument can be considered at the certification stage, it would not be appropriate to do so here. The limitation period issue in this case is intimately connected with the facts of the alleged conspiracy.

[46] This Court considered that two potential factors, the discoverability rule and the doctrine of fraudulent concealment, may have applied to toll the statutory limitation period at issue, but the certification stage was not designed to deal with complex, fact-based issues. Because the limitation period issue there was “bound up in the facts”, it was appropriate for the certification judge not to consider it: *Godfrey BCCA,* at para. 68.

[47] In *Rorison*, the certification judge considered a limitation period in determining whether the class definition criterion at s. 4(1)(b) of the *CPA* was satisfied. The judge

concluded this Court's reasons at para. 67 of *Godfrey BCCA* were of general application and "for the present purposes, the existence of a limitation issue in respect of at least some class members is not a bar to certification" (paras. 92, 98). On appeal, this Court found no error in principle in the judge's analysis: *Rorison, v. Insurance Corporation of British Columbia,* 2023 BCCA 474 at paras. 172–174 *[Rorison BCCA]*.

[48] The appellants submit, relying on *Rorison BCCA* and *Godfrey BCCA,* that the requirement to find exceptional circumstances before considering a limitation period argument also applies in a s. 4(1)(d) preferability analysis. They contend the judge did not turn his mind to exceptional circumstances before considering a possible limitation period defence and therefore made an error in principle.

[49] *Rorison BCCA* did not endorse a finding that this principle applies with equal force to all s. 4(1) criteria. What the Court considered was whether the certification judge erred in declining to narrow the definition of class members in light of the applicable limitation period: at para. 171. Although the Court accepted as a principle that exceptional circumstances are required (at para. 174), it did so in the context of a s. 4(1)(b) analysis.

[50] In my view, as part of the comparative analysis under s. 4(1)(d), it may be appropriate to consider whether limitation issues may make a class proceeding more or less advantageous than the alternatives, both from an access to justice and judicial economy perspective. This raises different issues from those relevant to an analysis of the cause of action or class definition criteria. Importantly, the

significance of a limitation issue to the preferability question must be assessed in the context of the litigation. There is precedent for this approach.

[51] In *Lewis*, this Court considered how limitation issues raise access to justice considerations (in a comparative preferability analysis) in circumstances where the alternative proceeding, not the class action, created a limitation period as a barrier:

> [129] … But the same questions can be applied to individual barriers to access to justice. Three of those questions are i) What is the potential of the class proceeding to address a limitation period? ii) To what extent do the alternatives address this barrier? and iii) How do the two proceedings compare?

[52] As well, in *Ross v Canada (Attorney General)*, 2018 SKCA 12, the Saskatchewan Court of Appeal considered the question of whether limitation period issues must be resolved on an individual basis to be relevant in a preferability analysis:

> [74] … The existence of limitation period issues and the question of whether they must be resolved on an individual basis are matters relevant to the preferability analysis. But, the ultimate significance of such issues to any such analysis will depend on the particular circumstances of the case at hand. The individualized nature of limitation issues weighs against certification but is not decisive of it.
>
> [Emphasis added.]

This reasoning from *Ross* was applied in this province in *North v. British Columbia (Attorney General),* 2020 BCSC 2044 at para. 96.

[53] The judge noted the claim arose from an alleged disclosure of RCMP members' private medical information in 2012—that is, not from an ongoing series of breaches. He also noted that in July 2013, the appellants and three other members of the RCMP whose information was provided to the College of Psychologists made a complaint to the Privacy Commissioner containing essentially the same factual

information set out in their notice of civil claim. The notice of civil claim was not filed until October 2015, more than three years after the disclosure that gave rise to a limitation defence, which the judge noted "will require disclosure, possible discovery and possible individual adjudication on the issue" (emphasis added).

[54] The judge referred to the respondents' submission that there was no limitation period for seeking compensation under the RCMP pension scheme, along with other advantages. In the context of the record, I am satisfied that the judge considered the presence and absence of a limitation period issue in comparing the advantages of a class proceeding to individual pension proceedings as an access to justice issue. In my view, he did not err in doing so.

[55] Further, I see no error by the judge in considering the limitation issue without it having been brought as a preliminary issue. The judge's case plan order made May 12, 2023, did not require the respondents to bring a limitation period application prior to the certification hearing, but only required them to serve any pre-certification hearing applications they wished to bring by July 31, 2023. Further, as the respondents submit, apart from the appellant representative plaintiffs, the respondents could only have brought applications seeking dismissal of individual claims after class members were added through certification.

[56] I would not accede to this ground of appeal.

Did the judge err in principle by reducing the test for preferability to the question whether individual issues predominate over common issues?

[57] The appellants contend the judge overemphasised the goal of judicial economy in his analysis of preferable procedure and did not sufficiently consider the

goals of behaviour modification and access to justice. They also contend the judge placed undue emphasis on the individual issues he identified, including a possible limitation defence and a possible bar or stay. As they argued with respect to limitation issues, the appellants say a preliminary application should have been brought by the respondents regarding a bar under s. 9 of the *CLPA* or a stay under s. 111(2) of the *Pension Act*. They contend in the absence of such an application and determination, it is speculative to say these provisions necessitate the resolution of individual issues before damages can be assessed.

[58] The appellants also contend that determination of the application of a bar or stay relates to a damages assessment only and does not affect the determination of the proposed common issues. They refer to s. 7(a) of the *CPA*, which provides that a court must not refuse to certify a proceeding merely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.

[59] Finally, the appellants contend there is practical utility in deciding the common issues once for the entire class, even if individual issues substantially predominate over the common issues.

[60] I disagree the judge reduced the preferability question to a question of whether individual issues predominate over the common issues.

[61] The judge's reasons demonstrate he considered the statutory criteria set out in s. 4(2) of the *CPA*. He specifically considered and found the criteria set out at ss. 4(2)(b), and 4(2)(c) were satisfied. In addition, reading the chambers reasons contextually, I am satisfied the judge compared the relative benefits of a class

proceeding to the alternatives in terms of their practicality and efficiency (s. 4(2)(d)) and the relative administrative difficulties of each (s. 4(2)(e)).

[62] To the extent the judge put significant weight on the question of whether individual issues predominate over questions of fact and law common to all members of the proposed class, I do not consider he erred in doing so.

[63] To begin with, s. 4(2)(a) of the *CPA* required the judge to consider whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members. The weight to be given to this factor, relative to the other s. 4(2) factors, is a matter of discretion: *Lewis,* at para. 49.

[64] Further, as this Court stated in *Thorburn v. British Columbia (Public Safety and Solicitor General),* 2013 BCCA 480 at para. 48: "… [w]hile the predominance of individual issues over common issues is not determinative of the requirement for a substantial common ingredient in the factual or legal issues among the proposed class members, it is a significant consideration in the preferable procedure analysis" (emphasis added).

[65] In this case, the judge listed three individual issues that predominated over the common issues—damages assessments, possible pension entitlement and a corresponding bar or stay, and a possible limitation defence.

[66] As set out earlier, the judge considered that losses for alleged psychiatric injuries and income loss will have to be assessed on an individual basis. This is not disputed by the appellants. Further, the judge considered that it would not be appropriate to assess moral damages in isolation, on an aggregate basis, given the

potential interrelationship with the other damages sought. In effect, the judge considered that minitrials for all heads of damages for each claimant would be required.

[67] The judge did not err in considering whether individual damages assessments would make a class proceeding more or less advantageous than the alternatives. As was noted by this Court in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at para. 117, leave to appeal ref'd [2019] S.C.C.A. No. 311, "… [w]hether common issues predominate over individual issues will often depend on whether loss on a class-wide basis can be considered a common issue, which would support certification, or whether loss will have to be established individually for the class members, which will likely make a class proceeding unmanageable."

[68] As for the potential bar or stay under s. 9 of the *CLPA* and s. 111 of the *Pension Act*, these factors have been considered in a preferability analysis in other jurisdictions.

[69] For example, in *R. v. Churchill Spurr,* 2009 SKQB 478, an action involving members of the Canadian Forces, the chambers judge considered the impact of individual issues similar to those at issue in this appeal—potential bars pursuant to the operation of a limitation period and the *CLPA,* potential stays pursuant to the *Pension Act,* and assessment of personal injury damages: at paras. 61–67. The judge found that the individual issues overwhelmed the common issues and concluded, "… [i]t is simply not obvious that the individual issues above referred to could be managed within a class action proceeding, and it is not obvious there would be any judicial economy in proceeding by way of class action. The result is a class

action would not be the preferable procedure for the resolution of the common issues" (para. 68). Leave to appeal to the Court of Appeal for Saskatchewan was dismissed on all the factors considered: *R. v. Heidt*, 2010 SKCA 99 at para. 20.

[70] Another example is *Dow Chemical Company v. Ring,* 2010 NLCA 20 where the Court of Appeal of Newfoundland and Labrador addressed the potential impact of limitation periods, s. 111 of the *Pension Act*, and s. 9 of the *CLPA*. The Court described the issue in respect of those provisions as "… what impact the legislation has on the discretion to be exercised regarding preferable procedure" (para 117). It commented on how, for most potential class members, there was legislation which: might provide an alternative remedy, with advantages not available in a legal action; might require a stay until the availability of a private action was determined; and prevent the court from exercising jurisdiction if the other remedy was granted: at para. 118. The Court held the s. 9 *CLPA* factor did support the trial judge's view of the manageability of the action as a class action: at para. 119.

[71] In oral submissions before this Court, the appellants referred to the recent decision of the Federal Court of Appeal in *McQuade v. Canada (Attorney General),* 2025 FCA 173. They rely on this decision in support of their submission that the question of pension availability and limitation issues should be dealt with before or after certification—not in a preferability analysis.

[72] In *McQuade,* the Court addressed the issue of whether s. 9 of the *CLPA* barred claims made by members of the RCMP for systemic negligence, over decades, in delivering mental health services to members and for damages for related *Charter* claims. Each of the proposed representative plaintiffs had received a

disability pension. The Court was not satisfied it was plain and obvious s. 9 operates to bar a systemic negligence claim for all proposed class members entitled to receive a disability pension (para. 53).

[73] In my view, *McQuade* has limited application to the issues in this appeal. The Court was considering "reasonable cause of action" criterion set out in Rule 334.16(1)(a) of the *Federal Court Rules,* SOR/98-106, which is equivalent to s. 4(1)(a) of the *CPA,* and not s. 4(1)(d).

[74] I do not agree a preliminary application should have been brought by the respondents to determine the applicability of a bar or stay under the *CLPA* or *Pension Act*—for the same reasons set out above regarding timing of a limitation defence application. It was appropriate for the judge to consider the possibility that this individual issue would arise if the action was certified. Forecasting such a possibility naturally involves a certain amount of speculation and there was a basis for the judge's conclusion that a bar under s. 9 of the *CLPA* or stay under s. 111 of the *Pension Act* may apply.

[75] In addition, I do not agree with the appellants' submission, in summary, that the pension process relates only to the assessment of damages and, therefore, pursuant to s. 7(a) of the *CPA*, it was inappropriate for the judge to deny certification. Section 7(a) provides that a court must not refuse to certify a proceeding as a class proceeding merely because the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues. The judge did not deny certification based solely on the requirement for individual damages assessments. He also considered, for example, the applicability of a complete bar to

litigation for claimants who had received pension benefits, pursuant to s. 9 of the *CLPA*, and the possible applicability of a limitation defence.

[76] Finally, I do not agree that the judge failed to consider, even if the individual issues predominate, that there was some practical utility in deciding the common issues applicable to the entire class. In this respect, the appellants focus on the appellants' claim for moral damages and the related common issues concerning the alleged breach of the *BC Privacy Act*. I start by noting a common issue is one that can serve to advance the resolution of every class member's claim: *Trotman v. WestJet Airlines Ltd*., 2022 BCCA 22 at para. 56, citing *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 46.

[77] The appellants' proposed common issues include, in summary: whether the respondents breached proposed class members privacy rights and if there was a breach, was it willful or negligent or made with reckless disregard for the well-being of the class members. In my view, there is little practical utility in determining the proposed common issues given the possibility that some or all potential class members may be barred from proceeding with the action or have their claims stayed. As well, even if their claims were not ultimately barred or stayed, I note the judge's conclusion, which is not challenged and is owed deference, that it would be inappropriate to assess moral damages on an aggregate basis.

[78] I would not accede to this ground of appeal.

Disposition

[79] In the result, I would dismiss the appeal.

"The Honourable Justice Mayer"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Butler"