IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MacKinnon v. Pfizer Canada Inc.,*
2023 BCSC 2223

Date: 20231218
Docket: S187485
Registry: Vancouver

Between:

Taylor Janet MacKinnon and Alysa McIntosh

Plaintiffs

And

Pfizer Canada Inc. and Wyeth Canada

Defendants

Before: The Honourable Justice J. Hughes

Reasons for Judgment

Counsel for the Plaintiffs:	H.M. MacDonald A. Leoni S.J. Roxborough
Counsel for the Defendants:	R. Sutton K. Smiley
Place and Date of Hearing:	Vancouver, B.C. April 17, 2023
Place and Date of Judgment:	Vancouver, B.C. December 18, 2023

Table of Contents

Overview

[1] This is a multi-jurisdictional class proceeding that has been certified under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*Class Proceedings Act*] on behalf of all persons resident in Canada who were prescribed and ingested the oral contraceptive Alesse 21 or Alesse 28 (collectively, "Alesse") between January 1, 2017 and April 30, 2019.

[2] The principal basis of the claim is that alleged manufacturing defects in Alesse reduced its efficacy in preventing pregnancy. More specifically, the plaintiffs allege that the defendants Pfizer Canada Inc. ("Pfizer") and Wyeth Canada ("Wyeth") failed to take reasonable steps to ensure that Alesse was safe and effective for its intended use.

[3] The plaintiffs say, in brief, that the product monograms provided by the defendant Pfizer indicated that both Alesse 21 and Alesse 28 contained levonorgestrel and ethinyl estradiol tablets, in the amounts of 100 mcg and 20 mcg respectively (the "Content Representation"). The plaintiffs also say that the product monographs further stated that combination birth control pills are more than 99 percent effective when the pill is taken as directed and the amount of estrogen (ethinyl estradiol) is 20 mcg or more (the "Efficacy Representation"). The plaintiffs plead that the defendants' conduct constitutes deceptive acts and practices, including the misrepresentations they made that Alesse contains 20 mcg of estrogen and that Alesse is more than 99% effective in pregnancy. The plaintiffs further plead that the defendants' deceptive acts and practices also includes their failure to disclose all material facts regarding the risks of using Alesse.

[4] In reasons for judgment indexed at 2021 BCSC 1093 [*Certification BCSC*], Justice Horsman (as she then was) certified common issues relating to negligence, and claims under the British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*] and the *Health Care Costs Recovery Act*, S.B.C. 2008, c. 27 [*HCCRA*]. *Certification BCSC* was largely upheld on appeal. While multiple grounds of appeal were advanced, the appeal was allowed only with respect

to setting aside the order certifying punitive damages as a common issue: 2022 BCCA 151.

[5] The background facts underlying this application are thoroughly canvassed in paras. 6-26 of *Certification BCSC*. With respect to certification of claims under consumer protection legislation in other jurisdictions, Horsman J. concluded as follows:

> [69] The parties provided limited submissions on the issue of the existence of a cause of action under other provincial and federal consumer protection legislation. The plaintiffs simply assert, without supporting analysis, that, for the purpose of the common issues, the legislation in other jurisdictions is identical to the *BPCPA*. For the purpose of assessing the sufficiency of the pleading, I am not persuaded this is so. I have already highlighted some of the material differences in the legislation. Given those differences, I cannot find that that the Second Amended NOCC discloses a cause of action for each of the "competition, consumer, and trade practices" statutes listed in para. 37b. It may be that some of the statutes are, as the plaintiffs maintain, sufficiently similar to the *BPCPA* that the Second Amended NOCC, as presently drafted, discloses a cause of action. However, in the absence of more fulsome submissions from the parties on the elements of the causes of action under the various statutes, it is impossible to reach firm conclusions on that point.
>
> [70] In these circumstances, I consider it appropriate, pursuant to s. 5(6) of the *CPA*, to adjourn the plaintiffs' application to certify a common issue in relation to the other consumer protection legislation. In the interim, I will also grant leave to the plaintiffs to further amend their Second Amended NOCC, as necessary, to plead material facts to support a cause of action under the other legislation. I note that a similar remedy was granted by Justice Iyer in *Bhangu* (at para. 61) to address the same problem. Both parties will have an opportunity to provide further submissions when this aspect of the certification application is rescheduled.

[6] As contemplated in *Certification BCSC*, in December 2022, the plaintiffs filed a Third Amended Notice of Civil Claim (“Third Amended NOCC”) and now seek to certify additional common issues regarding consumer protection legislation in jurisdictions other than British Columbia, namely:

a) Alberta, under the *Consumer Protection Act,* R.S.A. 2000, c. C-26.3 [Alberta *CPA*];

b) Saskatchewan, under the *The Consumer Protection and Business Practices Act,* S.S. 2013, c. C-30.2 [Saskatchewan *CPBPA*];

c) Manitoba, under the *The Business Practices Act,* C.C.S.M. c. B120 [Manitoba *BPA*];

d) Ontario, under the *Consumer Protection Act,* S.O. 2002, c. 30 [Ontario *CPA*];

e) Québec, under the *Consumer Protection Act,* C.Q.L.R., c. P-40.1 [Québec *CPA*];

f) Newfoundland and Labrador ("Newfoundland"), under the *Consumer Protection and Business Practices Act,* S.N.L. 2009, c. C-31.1 [Newfoundland *CPBPA*];

g) Prince Edward Island ("PEI"), under the *Business Practices Act,* R.S.P.E.I. 1988, c. B-7 [PEI *BPA*]; and

h) under the federal *Competition Act*, R.S.C. 1985, c. C-34

(collectively, the "Other Jurisdictions").

[7] The plaintiffs also seek certification of an additional common issue with respect to remedy under the *BPCPA*, namely whether "some or all of the class members [are] entitled to restoration or damages pursuant to ss. 171 and 172 of the BPCPA" (at para. (i) of Schedule "A" to these reasons), and similar common issues as to entitlement to remedy under consumer protection legislation in the Other Jurisdictions. The additional common issues that the plaintiffs now seek to have certified on this application are set out in paras. (i)–(y) of their revised proposed common issues, which are appended as Schedule "A" to these reasons.

Issues

[8] In *Certification BCSC*, Horsman J. determined that the plaintiffs' claims in negligence, for breach of the *BPCPA*, and under the *HCCRA*, met the requirements

for certification: paras. 3-5. This application thus focusses on whether the additional proposed common issues arising out of the claims pleaded in the Third Amended NOCC ought to be certified pursuant to s. 4(1) of the *Class Proceedings Act*.

[9] In this regard, the plaintiffs must establish that:

a) the Third Amended NOCC discloses a cause of action as required by s. 4(1)(a) of the *Class Proceedings Act* for each of the additional proposed common issues they now seek to have certified, namely the remedy under the *BPCPA* and the breaches and corresponding remedies under the consumer protection legislation in the Other Jurisdictions; and

b) there is "some basis in fact" that the remaining requirements of s. 4(1)(b)–(e) of the *Class Proceedings Act* are met.

[10] The defendants oppose certification of all of the plaintiffs' proposed additional common issues. First, the defendants say that the Third Amended NOCC does not properly plead causes of action as required by s. 4(1)(a) of the *Class Proceedings Act* because:

a) privity of contract is required under the applicable consumer protection legislation in Ontario and PEI, but a contractual relationship is not and cannot be pleaded here because pharmaceutical products are not sold directly to consumers but rather dispensed through pharmacists;

b) the plaintiffs' claim under the Québec *CPA* is bound to fail because the purchase of prescription medication does not give rise to a "consumer contract" as required under the Québec *CPA*;

c) the plaintiffs' claims under the Ontario *CPA*, Alberta *CPA* and PEI *BPA* are bound to fail on account of the plaintiffs' failure to give notice in accordance with the applicable statutes; and

d) the Third Amended NOCC does not properly plead a claim under the *Competition Act*, particularly with respect to the defendants knowingly or recklessly making the alleged false or misleading misrepresentations.

[11] Second, the defendants say the additional proposed common issues lack commonality and thus cannot be decided as a class as required by s. 4(1)(c) of the *Class Proceedings Act*. In this respect, the defendants assert that the provisions in the consumer protection legislation from British Columbia, Saskatchewan, and Newfoundland that speak to loss and/or damages, as well as in the *Competition Act*, all require proof of a causal element that must be determined on an individual basis. Accordingly, the defendants say that the proposed common issues as to breach of the statutes that require reliance are not suitable for determination on a class wide basis.

[12] Finally, the defendants say the Third Amended NOCC exceeds the scope of amendments permitted by *Certification BCSC*. In particular, the defendants take issue with the plaintiffs' attempt to now certify a common issue regarding entitlement to a remedy under ss. 171 or 172 of the *BPCPA*, and remedies of equitable relief and disgorgement under consumer protection legislation in the Other Jurisdictions.

[13] The plaintiffs did not pursue proposed amendments seeking to certify common issues regarding whether the defendants made unconscionable representations contrary to s. 15 of the Ontario *CPA* or s. 8 of the Newfoundland *CPBPA*. For their part, the defendants abandoned the position that privity of contract is required under the Newfoundland *CPBPA*, and did not take the position that this Court is precluded from granting relief under consumer protection legislation in Other Jurisdictions.

Section 4(1)(a) – Does the Third Amended Notice of Civil Claim Plead Reasonable Causes of Action?

[14] The requirements for certification under s. 4(1) of the *Class Proceedings Act* and the applicable legal principles are comprehensively set out at paras. 41–45 of *Certification BCSC* and need not be repeated at length here. Of particular note, the

court plays an important gatekeeping role in certification applications: *Jiang v. Peoples Trust Co*., 2016 BCSC 368 at para. 39, rev'd in part 2017 BCCA 119.

[15] The pleadings test under the *Class Proceedings Act* is the same as that used on an application to strike under Rule 9-5(1) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009: *Live Nation Entertainment, Inc. v. Gomel,* 2023 BCCA 274 [*Gomel BCCA*] at para. 61. The relevant question is whether, assuming the facts pleaded are true, it is plain and obvious that the plaintiff's claim has no reasonable prospect of success: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63; *Atlantic Lottery Corp. Inc. v. Babstock,* 2020 SCC 19 at para. 14; *Gomel BCCA* at para. 61. The standard is low; even novel claims should be permitted to proceed if they have any chance of success or if an amendment would resolve a pleadings problem: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17 [*Finkel BCCA*].

[16] A plaintiff must plead the material facts necessary to support each element of the cause of action they seek to certify. The court must in turn assume that all pleaded facts are true, but is not required to take allegations that are "manifestly incapable of being proven" or are based on assumptions or speculation, as true: *Gomel BCCA* at para. 62. Sufficient material facts must be pleaded to make out each cause of action; the court will not "infer" facts from bald legal conclusions: *Bhangu v. Honda Canada Inc*., 2021 BCSC 794 at para. 25 [*Bhangu #1*], citing *Ladas v. Apple Inc.*, 2014 BCSC 1821 at para. 63.

[17] The pleadings must be read generously with a view to accommodating inadequacies in form attributable to deficient drafting: *Gomel BCCA* at para. 63, citing *Finkel BCCA* at para. 17. If the pleading does not plead sufficient material facts to disclose a cause of action, it may nonetheless be in the interests of justice to permit the plaintiff to amend. The factors to be considered in this regard include the length of time the plaintiff has had to "get it right" and whether the deficiencies are fundamental rather than merely technical: *Bhangu #1* at para. 26, citing *676083 B.C. Ltd. v. Revolution Resource Recovery Inc*., 2021 BCCA 85 at paras. 59–60.

[18] Finally, a claim will not be struck merely because it is novel or complex: *Gomel BCCA* at para. 63, citing *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959 at 980, 1990 CanLII 90. The absence of jurisprudence fully settling an issue may be good reason to exercise restraint in striking a claim at the pleadings stage: *Gomel BCCA* at para. 63.

Is privity of contract required under the Ontario *CPA* and PEI *BPA*?

[19] The plaintiffs concede that a contractual relationship is not and cannot be pleaded on the present facts because Alesse is not sold directly to consumers but rather dispensed through pharmacists by way of a prescription. By consequence, if privity of contract is required under the Ontario or PEI consumer protection statutes, the plaintiffs' claims under those statutes are bound to fail and the associated proposed common issues cannot be certified.

[20] The requirement for privity of contract under some consumer protection regimes has been recognized as an important difference across jurisdictions. As Justice Perell noted in *Hoy v. Expedia Group Inc.*, 2022 ONSC 6650:

> [132] There are important differences in the consumer protection statutes across the country. For example, unlike the other provinces and territories, in Ontario, Prince Edward Island, and Newfoundland and Labrador, privity of contract is required for claims of unfair practices under the consumer protection statutes.

[21] Whether privity of contract is required under consumer protection legislation in Ontario and PEI raises some uncertainty given the existence of conflicting jurisprudence regarding the same. Thus, at the certification stage, to determine whether it is plain or obvious that privity of contract is required, "there must be a 'decided case directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected'": *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 44.

[22] While not traditionally binding in the same way as vertical *stare decisis*, decisions of coordinate courts should generally be followed as a matter of judicial

comity: *R. v. Sullivan*, 2022 SCC 19 at para. 65. Per *Sullivan* at paras. 75–79 and 85, a decision is not binding on a subsequent court of the same level and province if:

a) the two decisions can be distinguished on their facts;

b) the subsequent court has no way of knowing that the prior decision exists (e.g. the prior decision is not yet published); or

c) the prior decision satisfies an exception set out in *Re Hansard Spruce Mills Ltd.*, 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.) [*Spruce Mills*], specifically:

   i. the rationale of the prior decision has been undermined by subsequent appellate decisions;

   ii. the prior decision was reached *per incuriam* (“‘through carelessness’ or ‘by inadvertence’”); or

   iii. the prior decision was not fully considered (e.g. made in exigent circumstances without the opportunity to consult authorities fully).

[23] The *Spruce Mills* criteria, as affirmed in *Sullivan*, set a high bar to depart from a decision of a coordinate court. Previously, courts have disregarded prior decisions of the same level of court when they are deemed “plainly wrong” or where there is “good reason” to do so; however, “mere personal disagreement between two judges is not a sufficient basis to depart from binding precedent”, and a court may not “decide a question of law afresh where there are conflicting decisions”: *Sullivan* at para. 74; see also para. 83.

Ontario

[24] Two decisions of this Court have concluded that privity of contract is required under the Ontario *CPA*: *Krishnan v. Jamieson Laboratories Inc.,* 2021 BCSC 1396 [*Krishnan BCSC*], aff’d on other grounds *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72 [*Krishnan BCCA*], leave to appeal to SCC ref’d, 40694 (9 November 2023)

and *Bhangu v. Honda Canada Inc*., 2021 BCSC 2381 [*Bhangu #2*]. Both decisions follow the Ontario Divisional Court's decision in *James Richardson v. Samsung Electronics Canada Inc*., 2019 ONSC 6845 (a Divisional Court appeal affirming 2018 ONSC 6130) [*Richardson*], which held that privity of contract was required to advance a claim under s. 18 of the Ontario *CPA*:

> [11] The Motions Judge also found that the pleadings did not disclose a viable cause of action as there was no contractual privity between the Plaintiffs and the respondent, Samsung. She properly relied on *Singer v. Schering – Plough Canada Inc.* 2010 ONSC 42 for the proposition that there must be contractual privity to advance a claim under s. 18 of the *Class Proceedings Act, 2002*. Similarly, privity was required to advance a claim under the *Sale of Goods Act*. She noted that no contractual privity was pleaded nor was the fact that the vendors of the Note7's were agents of Samsung. We are not satisfied that the Motions Judge erred in coming to this conclusion.
>
> [Emphasis added.]

[25] In *Krishnan BCSC*, Justice Branch noted that the Ontario *CPA* follows a somewhat different framework than other consumer protection statutes because of the finding in *Richardson* that contractual privity is necessary to advance a claim: para. 86. In *Bhangu #2*, Justice Iyer cited *Krishnan BCSC* on this point, among other Ontario authorities including *Richardson*, and concluded as follows:

> [22] The law in Ontario is that privity of contract is required for claims of unfair practices, misrepresentations, breach of express or implied warranty, and design or manufacturing defects under the Ontario CPA: *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 85; *Williams v. Canon Canada Inc*., 2011 ONSC 6571 at paras. 190 and 206; *James Richardson v. Samsung Electronics Canada Inc*., 2019 ONSC 6845 at para. 11. In *Bhangu #1* at para. 59, I referred to the requirement of privity in Ontario: see also [*Krishnan BCSC*] at para. 86.
>
> [23] The plaintiff relies on a comment made by Perell J. in *Carter v. Ford Motor Co. of Canada, Ltd*., 2021 ONSC 4138 at para. 139, that the Ontario CPA does not require privity "in some circumstances". Justice Perell does not say what those circumstances are. The case before him was a claim for breach of warranties. In my view, this passing remark cannot reasonably be construed as overturning settled law.

[26] In my view, *Bhangu #2* and *Krishan BCSC* constitute that which is required by *Trotman* to determine whether it is plain and obvious that a claim is bound to fail:

decided cases directly on point, from the same jurisdiction, demonstrating that the very issue has been squarely dealt with and rejected.

[27] Further, and in the absence of a British Columbia Court of Appeal decision on privity under the Ontario *CPA*, the principles of judicial comity apply: see generally *The Owners, Strata Plan BCS 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988 at paras. 63–65.

[28] Applying the *Sullivan* framework to *Bhangu #2* and *Krishnan BCSC* does not lead to a different conclusion. *Bhangu #2* has not been overturned directly or undermined through other decisions by the British Columbia Court of Appeal, nor is there any indication that the Court was faced with exigent circumstances. *Bhangu #2* was not, in my view, reached *per incuriam*, as Iyer J. considered the appropriate statutory provisions and the case law supporting the proposition, namely, *Singer*, *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3692 (Div. Ct.), *Richardson*, and *Krishnan BCSC*: para. 22. Justice Iyer also assessed the case law supporting the opposite conclusion that privity is not required, including *Carter v. Ford Motor Co. of Canada, Ltd.*, 2021 ONSC 4138, and *Rebuck v. Ford Motor Company*, 2018 ONSC 7405, but found that it "cannot reasonably be construed as overturning settled law": *Bhangu #2* at paras. 23 and 26.

[29] Similarly, in *Krishnan BCSC*, Branch J. was aware of the conflicting Ontario case law on privity, evidenced by his reference to *Rebuck* on a different point: para. 85. However, on the privity requirement, Branch J. took *Richardson* to be the relevant authority: para. 86. It thus cannot be said that the Court in *Krishnan BCSC* "failed to consider some authority such that, had it done so, it would have come to a different decision because the inadvertence is shown to have struck at the essence of the decision": *Sullivan* at para. 77.

[30] The plaintiffs submit that *Krishnan BCSC* and *Bhangu #2* ought not to be followed because they rely on *Richardson*, which in turn relied on *Singer*—a decision the plaintiffs say was incorrectly decided. The plaintiffs also assert that *Drynan v. Bausch Health Companies Inc*., 2021 ONSC 7423 runs contrary to *Singer*, creating

uncertainty as to whether privity is required in Ontario such that it is not "plain and obvious" that their claim under the Ontario *CPA* is bound to fail.

[31] While Ontario case law is merely persuasive in British Columbia (*Sullivan* at para. 61; *R. v. Vu*, 2004 BCCA 230 at paras. 26–27), Ontario court decisions that interpret their own legislation ought to be highly persuasive. Ensuring consistent interpretation of the Ontario *CPA* across jurisdictions supports stability and predictability—the principles that underlie the theory of horizontal *stare decisis*: *Sullivan* at para. 66.

[32] In my view, *Richardson* remains the governing Ontario authority on whether privity is required under the Ontario *CPA*. As an intermediary appellate court, the Divisional Court is generally bound by *stare decisis*: *Duggan v. Durham Region Non-Profit Housing Corporation*, 2020 ONCA 788 at para. 52, *Fernandes v. Araujo*, 2015 ONCA 571 at para. 45. Based on the principle of vertical *stare decisis* (see e.g. *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paras. 42, 44; *R. v. Sinnappillai*, 2020 ONSC 7038 at para. 29), the Divisional Court in *Richardson* was not bound by the lower-court decisions *Rebuck* and *Kalra v. Mercedes Benz,* 2017 ONSC 3795 that suggest privity is not required. In my view, *Rebuck* and *Kalra* were overruled by *Richardson.*

[33] Further, recent Ontario jurisprudence interprets *Richardson* (and by extension, *Singer* and *Williams*) as binding on the privity requirement: see e.g. *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180 at para. 145; *Palmer v. Teva Canada Ltd.*, 2022 ONSC 4690 at para. 247–248; and *Hoy* at para. 132. Both *Palmer* and *Marcinkiewicz* include nearly identical statements that the Divisional Courts' conclusions on privity are binding, notwithstanding *Rebuck*, *Drynan*, and *Kalra*: *Palmer* at para. 248, *Marcinkiewicz* at para. 145(i). As noted in *Palmer*:

> [248] *Richardson v. Samsung Electronics Canada Inc*., which was affirmed by the Divisional Court, *Williams v. Canon Canada Inc*, which was affirmed by the Divisional Court, and *Singer v. Schering-Plough*, are authority that consumers who do not have a contractual relationship with the supplier do not have a claim for unfair practices under Ontario's *Consumer Protection*

> *Act, 2001*. Until the above line of cases is expressly overturned by the Court of Appeal, they are binding decisions. I, therefore, cannot and do not follow the lower court decisions that assert that the point remains unsettled. While I agree with the Plaintiffs' argument that I can depart from *stare decisis* and reconsider "settled rulings" of higher courts where a new legal issue is raised; however, the proper interpretation of Ontario's *Consumer Protection Act, 2001* is not a new legal issue.
>
> [Emphasis added.]

[34] Similarly, by reason of vertical *stare decisis, Drynan*'s conclusion on privity is called into question by the Court's reliance on *Rebuck* and *Kalra* and it's failure to consider whether it was bound by *Richardson*. In this respect, *Rebuck*, *Kalra*, and *Drynan* are not authoritative, as they are contrary to the Divisional Court's findings in *Richardson*. Thus, *Richardson* remains the leading decision of the Divisional Court on the issue of privity.

[35] Finally, the plaintiffs assert that the appeal of Justice Belobaba's decision in *Rebuck v. Ford Motor Company*, 2022 ONSC 2396 [*Rebuck Summary Judgment*], would determine "whether the *Singer* or *Drynan* interpretation is the correct one" and that accordingly, "until the Ontario Court of Appeal resolves the matter, it cannot be said that consumer protection claims against manufacturers are doomed to fail". I do not find this submission persuasive.

[36] In *Rebuck Summary Judgment*, Belobaba J. granted the defendants' motion for summary judgment and dismissed the class action in its entirety: at paras. 95–96. The issue on appeal as it pertained to the claim under the Ontario *CPA* was whether certain marketing materials were false or misleading, pursuant to ss. 14 and 17 thereof. The Ontario Court of Appeal issued its decision dismissing the appeal on February 24, 2023, months prior to this application coming on for hearing, upholding Belobaba J.'s finding that the plaintiff had not established that any of the representations were false: *Rebuck v. Ford Motor Company*, 2023 ONCA 121 at paras. 29–33, leave to appeal to SCC ref'd, 40698 (2 November 2023) [*Rebuck ONCA*]. The privity issue was not discussed on the motion for summary judgment nor on appeal. *Rebuck ONCA* thus does not assist the plaintiffs.

[37] By consequence of the above analysis, I find that *Bhangu #2* and *Krishnan BCSC*—and by extension, *Richardson*, *Singer*, and *Williams*—are authoritative on the point of whether privity of contract is required for a claim under the Ontario *CPA*. I am not persuaded that there is any basis to depart from *Bhangu #2* and *Krishnan BCSC*. To the contrary, judicial comity requires consistency with those decisions.

[38] In the result, I conclude that it is plain and obvious that privity of contract is required for a plaintiff to access remedies under the Ontario *CPA*. The plaintiffs' claim under the Ontario *CPA* is thus bound to fail.

[39] The plaintiffs also abandoned their application to have a common issue certified in respect of whether the defendants breached the prohibition on unconscionable acts under the Ontario *CPA*. Accordingly, their plea under s. 15 of the Ontario *CPA* is struck and no common issue certified as to whether the defendants breached that provision.

[40] Paragraphs 29(i), 33(e), 41(d), 42(c), of the Third Amended NOCC are struck and I decline to certify proposed common issues (p) and (q). I grant the plaintiffs leave to amend para. 44 of the Third Amended NOCC to remove reference to Ontario.

PEI

[41] The plaintiffs assert that privity is not required in PEI on the basis that s. 2 of the PEI *BPA* makes no mention of privity, and s. 3 provides that "no person" shall engage in an unfair practice. I disagree.

[42] The findings on privity in *Engen v. Hyundai Auto Canada Corp*., 2021 ABQB 740, aff'd on appeal 2023 ABCA 85 and *Bhangu #2* run contrary to the plaintiffs' submission. In *Engen*, A.C.J. Rooke interpreted ss. 1–4 of the PEI *BPA* as requiring privity of contract, and on that basis, held that the pleadings in the case before him were inadequate:

> [27] First, there are some provinces and territories where the SGAs are applicable *without* privity of contract, thus, *without* naming the seller as a defendant: namely, all except AB, ON, PEI and NL. Likewise, for some

> provinces and territories, the CPAs are applicable without naming the supplier as the defendant (Hyundai RB, para 67): QC, BC, SK and MB. Thus, the failure to name the sellers/suppliers for class members resident, or who purchased/leased vehicles, in these Provinces, there is no bar to claims under the SGAs/CPAs and such causes of action are eligible for certification, as Hyundai acknowledges (Jan 15/20 TR 7/32-39). Hyundai advises (para. 68 of the Hyundai RB, footnote 54) that the CPAs for Nova Scotia and the Northwest Territories "do not deal with practices that are unfair, unconscionable or of a similar nature". Thus, it is only Alberta (for the AB SGA only, not the CPA), Ontario, Prince Edward Island, and Newfoundland and Labrador, where proposed class members have a privity of contract requirement, for which I find that Engen's pleadings are not adequate for claims under the SGAs or CPAs, and thus for which there are no causes of action that could proceed to certification.
>
> [Italicized emphasis in original; underlined emphasis added]

[43] Justice Iyer subsequently cited *Engen* in *Bhangu #2*, and struck the pleadings under the PEI *BPA* on the basis that privity was required, reasoning as follows:

> [28] Honda objects to all paragraphs (152-179) pleading Prince Edward Island's *Business Practices Act*, R.S.P.E.I. 1988, c. B-7 [PEI *BPA*], on the basis that the statute requires privity between consumer and supplier, and Honda did not sell any Vehicles to the plaintiff class. In *Engen* at para. 27, Rooke A.C.J. referred to the PEI *BPA* as requiring privity of contract. Both parties advised me that they had been unable to find a PEI decision addressing this issue.
>
> [29] From my reading of the PEI *BPA*, it is apparent that the primary remedy, set out in s. 4, is rescission of any agreement entered into by a consumer who was induced to do so by an unfair practice, as defined in s. 2. Although the statute does not expressly say that recovery is only available against parties to the contract, that is the fundamental premise of rescission: see, for example, *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423. Accordingly, I strike the pleadings under the PEI *BPA*, paragraphs 152-179.

[44] I agree with Iyer J.'s reasoning and interpretation of the PEI *BPA* in *Bhangu #2* to the effect that while privity of contract is not expressly required, it is nonetheless the fundamental premise underpinning the primary remedy of rescission contemplated in s. 4. The potential availability of other remedies under s. 4, which the plaintiffs submit are akin to "benefit of the bargain" damages available under s. 18(2) of the Ontario *CPA*, does not change the analysis. As the language of s. 4 makes clear, such remedies are contemplated as alternatives when rescission is not possible due to factors other than the lack of privity:

> 4. (1) Any agreement, whether written, oral or implied, entered into by a consumer after a consumer representation that is an unfair practice and that induced the consumer to enter into the agreement, may be rescinded by the consumer and the consumer is entitled to any remedy therefor that is at law available, including damages, but where rescission is not possible because restitution is no longer possible, or because rescission would deprive a third party of a right in the subject-matter of the agreement that he has acquired in good faith and for value, the consumer is entitled to recover the amount by which the amount paid under the agreement exceeds the fair value of the goods or services received under the agreement or damages, or both.
>
> [Emphasis added].

[45] The plaintiffs also note that Branch J. certified a claim under the PEI *BPA* in *Krishnan BCSC* and submit it ought to be followed rather than *Bhangu #2*. I do not accede to this submission. *Krishnan BCSC* predates both *Bhanghu #2* and *Engen* and did not address the issue of whether privity of contract was required under the PEI *BPA*. Regardless, Branch J. concluded that based on the pleadings before him—which notably included a plea of agency—a claim under the PEI *BPA* was properly pleaded: *Krishnan BCSC* at paras. 89 and 91. I am not persuaded that *Krishnan BCSC* provides any basis to depart from *Bhangu #2* or *Engen*, both of which expressly considered the issue of privity and concluded it is required under the PEI *BPA*.

[46] In the result, I conclude that it is plain and obvious that privity of contract is required for a plaintiff to bring a claim for unfair business practices under ss. 2–3 of the PEI *BPA*. The plaintiff's claim under the PEI *BPA* is thus bound to fail.

[47] Paragraphs 29(l), 33(h), 41(g), and 42(f) of the Third Amended NOCC are struck and I decline to certify proposed common issues (v) and (w).

Did the plaintiffs fail to give notice as required under the Ontario *CPA,* Alberta *CPA* and PEI *BPA*?

[48] The defendants say that the plaintiffs' claims under the Ontario, Alberta and PEI statutes are bound to fail because the plaintiffs do not plead facts establishing that they gave notice in accordance with those statutes.

[49] Section 7.1(1) of the Alberta *CPA* provides that if a consumer wishes to cancel a consumer transaction or seek recovery if cancellation is not possible, the consumer must give notice within one year of a supplier having engaged in an unfair practice related to that transaction. Section 7.1(2) permits notice to be given in any manner so long as it indicates the consumer's intention to cancel the transaction or seek recovery and the reasons for seeking cancellation or recovery. Notice must be delivered to the supplier with whom the consumer entered into the consumer transaction: Alberta *CPA*, s. 7.1(3) and (4). Finally, if a consumer has delivered notice and not received a satisfactory response with in the prescribed period, the consumer may then commence an action in the Alberta Court of King's Bench: Alberta *CPA*, s. 7(5).

[50] Sections 18(3)-(8) of the Ontario *CPA* are to similar effect. A consumer must give notice within one year after entering into a consumer agreement if they seek to rescind that agreement or, if rescission is not possible, seek recovery: s. 18(3). The notice must indicate the consumer's intention to rescind the agreement or to seek recovery where rescission is not possible and the reasons for doing so: s. 18(4). If a consumer has delivered notice and has not received a satisfactory response within a prescribed period, the consumer may commence an action in the Ontario Superior Court of Justice: ss. 18(8) and (9).

[51] Finally, under the PEI *BPA*, a consumer may seek a remedy under s. 4(1) of that act, namely rescission of an agreement or damages in lieu, "by the giving of notice of the claim by the consumer in writing to each other party to the agreement within six months after the agreement is entered into": s. 4(5). Section 4(8) further provides that "this section applies notwithstanding any agreement or waiver to the contrary".

Service of July 2018 notice of civil claim as effective notice

[52] The Second Amended NOCC that was before the Court on *Certification BCSC* did not plead any material facts asserting notice was given as required under

the Alberta *CPA* or Ontario *CPA*. The Third Amended NOCC contains the following pleading in Part 3, Legal Basis:

> 44. With respect to Alberta and Ontario, the [p]laintiffs provided notice of their intent to seek recovery by the filing and service of the Notice of Civil Claim in July 2018, being less than one year of their purchase of Alesse. Alternatively, the [p]laintiffs see waiver of any notice requirements pursuant to section 18(15) of the Ontario CPA and 7.2(13) of the Alberta CPA because it is in the interests of justice to do so, particularly since the defendants have concealed the actual state of affairs from Class Members.

[53] This assertion is set out in the legal basis section of the Third Amended NOCC, not Part 1 thereof. This assertion thus does not constitute pleading material facts in support of the claims advanced. The material facts contained in Part 1 of the Third Amended NOCC do not include any facts capable of establishing effective service in accordance with the Alberta and Ontario *CPA*s. Nor does any part of the Third Amended NOCC address the notice requirements of the PEI *BPA*. Failure to plead material facts in support of a claim is not a mere technical defect: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.,* 2021 BCCA 362 at paras. 12, 20–23 [*Mercantile*].

[54] The issue of statutory notice requirements under the Ontario *CPA* and Alberta *CPA* also arose in *Bhangu #1*, wherein the plaintiff advanced similar claims to those in the present case. Justice Iyer concluded that those claims were bound to fail where the underlying notice of civil claim did not plead facts establishing that potential class members in Ontario and Alberta gave notice to the defendant that they were seeking recovery under the applicable statutes: *Bhangu #1* at paras. 59–60.

[55] The finding in *Krishnan BCSC* at para. 87 is to the same effect. There, Branch J. declined to certify a claim under the Ontario *CPA* where no material facts were plead to meet the notice requirement of s. 18(3): para. 205. While leave to amend was granted in *Krishnan BCSC*, the defect in the pleading in that case was characterized as a slip or omission: *Krishnan BCSC* at paras. 87, 91, and 205–206; *Krishnan BCCA* at paras. 82-83. The same cannot be said here, where Horsman J.

expressly identified the defects in the claim as it pertains to notice requirements in *Certification BCSC* at para. 67.

[56] Regardless, I am of the view that this defect in the pleading would not be cured even if para. 44 of the Third Amended NOCC was plead as a material fact in Part 1. In *McKercher v. The Renovation Store Ltd*, 2015 ABQB 748 at para. 51, the Court expressed doubt as to whether service of pleadings could constitute notice under the Alberta *CPA*. Notably, the circumstances in *McKercher* were similar to those at bar in that the pleading alleged to constitute effective notice made no mention of unfair practices or the applicable consumer protection legislation (*Fair Trading Act*, RSA 2000, c. F-2). Similarly, in *1314058 Alberta Ltd. v. Albers*, 2018 ABQB 9 [*Albers*], the Court characterized the legislative notice requirement as comprising a two-step process—notice given followed a lack of satisfactory response from the supplier, and thus was "not convinced that a pleading, filed months after the contract [had] been terminated for other reasons, [could] satisfy the legislative notice requirement": at para. 52.

[57] Both s. 7.1(5) of the Alberta *CPA* and s. 18(8) of the Ontario *CPA* provide that a right of action does not arise until a consumer has made a demand and not received a satisfactory response from the supplier within a prescribed time. Section 4(1) of the PEI *BPA* requires "notice of the claim by the consumer" be given. The plaintiffs' July 2018 notice of civil claim cannot, in my view, be construed as giving notice in accordance with these provisions given that it did not plead claims under any of the applicable statutes.

[58] Construing the notice provisions of the Alberta and Ontario *CPA*s in a manner that requires compliance with the notice requirements as a prerequisite to accessing the statutory regime is also consistent with *Hoy.* In *Hoy*, the Court considered the notice requirements of the Ontario *CPA* in the context of considering a limitations issue, and characterized compliance with s. 18(3)□—i.e. giving notice—as a "prerequisite" to bringing an action for damages under that statute: at para. 253.

[59] I am cognizant that paragraph 48 of *Bowman v. Kimberly-Clark Corporation,* 2023 BCSC 1495 could be interpreted as suggesting that the language “having been found to have engaged in an unfair practice” in s. 7.1(1) of the Alberta *CPA* to require a finding to be made by the court prior to the notice requirement being operative. In my view, I am not bound to follow *Bowman* on this point, and I do not accede to such an interpretation of s. 7.1(1) of the Alberta *CPA*.

[60] First, it does not appear that the Court in *Bowman* was referred to either *Albers* or *Hoy*. Accordingly, the Court did not have the opportunity to consider the point fully in light of the applicable authorities.

[61] Second, interpreting s. 7.1(1) as effectively requiring a liability determination to be made before the notice requirement becomes operative would result in an absurdity. A consumer would first need to bring a claim to seek a finding of liability, then give notice of that finding, then wait out the prescribed period for the supplier to provide a satisfactory response, and if no such response is forthcoming, then commence a second proceeding to obtain a remedy. Such a process would be impractical, inefficient and redundant in that the supplier would have notice of the alleged unfair practice by way of presumably having been a party to the initial liability proceeding.

[62] Accordingly, I find that it is plain and obvious that pleading service of the July 2018 notice of civil claim does not constitute notice as contemplated under the statutory regimes in Ontario or Alberta because that notice of civil claim did not plead claims under either of those statutes. In my view, service of a pleading that does not advance a claim under a particular statute cannot be considered notice of a claim being brought so as to invoke the statutory regime. Granting leave to amend to plead materials facts regarding notice in accordance with the PEI *BPA* would yield the same result.

Waiver of notice in the interests of justice

[63] In the absence of being able to plead material facts alleging notice was given in accordance with the Alberta and Ontario *CPA*s, the plaintiffs point to s. 18(15) of

the Ontario *CPA* and s. 7.2(13) of the Alberta *CPA*, which permit the court to waive notice where doing so would be in the interests of justice. No such provision is contained in the PEI *BPA*. The plaintiffs say that notice ought to be waived here because the defendants "concealed the actual state of affairs from Class Members".

[64] In this respect, the plaintiffs rely on *Bernstein v. Peoples Trust Company*, 2019 ONSC 2867, to assert that:

a) notice would be superfluous as the plaintiffs' claims in negligence do not require notice;

b) the potential for waiver of notice renders it not plain and obvious that the Ontario and Alberta CPA claims would be dismissed for lack of notice; and

c) any "technical defects" in notice are not a bar to finding the claim discloses a reasonable cause of action pursuant to the Ontario and Alberta *CPA*s.

[65] I am not persuaded by the plaintiffs' submissions. None of the arguments advanced suffice to overcome the defects in their claim as they relate to the notice requirements of the Alberta or Ontario *CPA*s. Nor, and unlike *Bernstein* where waiver of notice was certified as a common issue, the present plaintiffs do not seek to certify a common issue pertaining to waiver of notice under either the Alberta or Ontario *CPA*s.

[66] Notably, *Bernstein* was not a certification application; it was an application for summary judgment in a certified class proceeding involving prepaid credit cards. In addition to claims for breach of contract and unjust enrichment, the plaintiff claimed that the defendant card issuer had breached a regulation pertaining to gift cards enacted under the Ontario *CPA* and perpetrated unfair practices contrary to s. 17 thereof by charging fees that had not been contracted for. One of the certified common issues was whether the class was required to give notice under the Ontario *CPA* for recovery or rescission and, if so, whether it was entitled to a declaration waiving the notice provisions in s. 18 of the Ontario *CPA*: at para. 4. *Bernstein* is thus distinguishable on its facts in multiple respects from the present case.

[67] Moreover, in *Bernstein*, the Court had already determined on the merits that the defendant perpetrated unfair practices, and in those circumstances found that the interests of justice favoured waiving the notice requirement: at paras. 288–291. In so concluding, the Court relied on the right to commence a claim under s. 100 of the Ontario *CPA* not being subject to a notice requirement: at para. 289.

[68] *Bernstein* also does not appear to have directly considered ss. 18(8) and (9) of the Ontario *CPA*, which is the section pleaded by the plaintiffs here. The right to commence a claim under s. 18 contains an express notice requirement: "If a consumer has delivered notice and has not received a satisfactory response within the prescribed period, the consumer may commence an action" (emphasis added): s. 18(8).

[69] Section 18(9) in turn provides that "If a consumer has a right to commence an action under this section, the consumer may commence the action in the Superior Court of Justice" (emphasis added). Accordingly, the right to commence an action under s. 18 is expressly contingent on notice being given, unless it has been waived by a court under s. 18(15). This is consistent with *Hoy,* where the Court said this at para. 253:

> Section 18(3) of the Act requires a consumer to give notice of his or her intention to rescind an agreement pursuant to s. 18(1) of the Act, which is a prerequisite to a claim for damages under s. 18(2) within one year of the alleged unfair practice.
>
> [Emphasis added].

[70] Second, the fact that notice is not required for the plaintiffs' negligence claim does not in my view render notice superfluous in respect of the statutory claims under the Alberta and Ontario *CPA*s. Consumer protection statutes represent exhaustive statutory regimes that regulate consumer transactions and provides remedies in the result of a supplier's breach: *Hoy* at para. 150, *Koubi v. Mazda Canada Inc.,* 2012 BCCA 310 at para. 63. Accordingly, whether notice is required to advance a negligence claim is in my view immaterial to the necessity of meeting notice requirements prescribed by statute as a precondition to accessing a statutory

regime. The fact that the plaintiffs' claim in negligence has been certified does, however, illustrate that prospective class members in Alberta, Ontario and PEI will not be left without a remedy if the statutory claims are not certified for those jurisdictions.

[71] The plaintiffs' proposed interpretation of *Bernstein* would also, in my view, render the notice requirements contained in s. 18 of the Ontario *CPA* meaningless in any case where a claim under the Ontario *CPA* is advanced in tandem with a claim for which notice is not required. Such an expansive treatment would run contrary to the well-settled principles of statutory interpretation as outlined above by effectively negating statutory notice requirements in any case where a claim under the Ontario *CPA* claim is advanced alongside claims for which notice is not required.

[72] I am not persuaded that the plaintiffs' allegation of concealment is sufficient to support waiver of notice requirements on the basis that the interests of justice so require: see e.g. *Hoy* at para. 254 and *Magill v. Expedia, Inc*., 2013 ONSC 683 at paras. 99-103. The Third Amended NOCC does not plead material facts as to what information that should have been disclosed was known to the defendants at what points in time or how that information was concealed from class members. Nor, and unlike *Bernstein*, have the plaintiffs sought certification of any common issues regarding waiver of notice in respect of their claims under the Alberta or Ontario *CPA*s.

[73] The defendants' characterization of the concealment plea as a bald allegation is apt. Despite the notice issue being squarely raised as a defect in the plaintiffs' pleading in *Certification BCSC* (at para. 67), the Third Amended NOCC nonetheless fails to plead any material facts capable of establishing that either notice was given in accordance with the Alberta or Ontario *CPA*s or PEI *BPA*, or in support of their alternative position that it is in the interests of justice to waive notice in Alberta or Ontario based on a bald, unparticularized assertion of concealment.

[74] The Third Amended NOCC simply does not plead material facts capable of meeting the notice requirements of the Alberta or Ontario *CPA*s. Accordingly, the

plaintiffs' claims under those statutes are bound to fail: *Bhangu* #1 at paras. 59–60; *Krishnan BCSC* at para. 87.

[75] I have considered whether the plaintiffs ought to be granted a further opportunity to amend to address the deficiencies in their pleading regarding notice under the Alberta and Ontario statutes and concluded that it would not be in the interests of justice to permit further amendments. The plaintiffs have had in excess of four years to properly plead their claims, including those being advanced under consumer protection legislation in the Other Jurisdictions. While it is the case that amendments should be permitted, fairness—including to defendants—requires that the essentials of a cause of action must be pleaded, else the pleadings may be found to be fatally lacking. This includes consideration of the length of time the plaintiff has had to "get it right": *Sandhu v. HSBC Finance Mortgages Inc.,* 2016 BCCA 301 at para. 44.

[76] In particular, Horsman J. expressly identified the defects in the Second Amended NOCC pertaining to the issue of notice under the Alberta and Ontario *CPA*s in *Certification BCSC*, and leave to amend was granted. Despite this, the plaintiffs nonetheless failed to plead sufficient material facts in the Third Amended NOCC to address those deficiencies. This leads inevitably to the conclusion that the plaintiffs are unable to do so. Granting further leave to amend would thus serve no useful purpose.

[77] I therefore conclude that it is plain and obvious that the plaintiffs' claims under the Alberta and Ontario *CPA*s and the PEI *BPA* are bound to fail such that the requirement of pleading a reasonable cause of action under s. 4(1)(a) of the *Class Proceedings Act* has not been met. Accordingly, I decline to certify proposed common issues (j), (k), (p), (q), (v), and (w) of the plaintiffs' Revised Common Issues as set out in Schedule "A" to these reasons on this basis.

Is the purchase of prescription medication a "consumer contract" as required by the Québec *CPA*?

[78] The defendants assert that the plaintiffs' claim under the Québec *CPA* is bound to fail because the purchase of prescription medication does not give rise to a "consumer contract" as required under that statute. The Québec *CPA* applies to "every contract for goods or services entered into between a consumer and a merchant in the course of his business": s. 2. This provision has been interpreted as targeting consumer contracts: *Brosseau v. Laboratoires Abbott limitée*, 2019 QCCA 801 at para. 59, leave to appeal to SCC ref'd, 38745 (9 April 2020).

[79] It is undisputed that Alesse is a prescription drug. Indeed, the certified class is defined by reference to its members being "All persons resident in Canada who were prescribed [Alesse]" (emphasis added) during the class period: *Certification BCSC* at paras. 75 and 84.

[80] Relying on *Brosseau* and *Gagnon v. Intervet Canada Corp*, 2022 QCCA 553, the defendants assert that in Québec, purchases of prescription medication do not give rise to consumer contracts because they result from the existence of a physician or pharmacist's professional judgment: *Brosseau* at paras. 59–71; *Gagnon* at paras. 56–57. The plaintiffs say this is not the case. Rather, *Brosseau* only restricts the application of the Québec *CPA* in cases dealing with failure to warn of side effects; it does not to provide a broad immunity to pharmaceutical manufacturers for manufacturing defects.

[81] *Brosseau* was an appeal of a certification decision of a claim alleging failure to warn of neuropsychiatric side effects of a prescription drug, Biaxin. The certification judge dismissed the lower court action on the basis that the plaintiff had not demonstrated a causal link between taking Biaxin and the neuropsychiatric effects that had been observed concomitantly with use of the medication. The Québec Court of Appeal similarly dismissed the plaintiff's appeal, finding that the respondent had appropriately advised users of the medication's capacity to cause neuropsychiatric effects via the product monographs. As is relevant to the case at

bar, the appellant's action was also based on contractual liability under s. 53 of the Québec *CPA*, which deals with liability for latent defects. The Court considered the nature of the transaction at issue in light of the relevant statutory provisions and concluded that s. 53 of the Québec *CPA* did not apply to the plaintiff's action because the sale of prescription medications by a pharmacist is not a consumer contract giving rise to the manufacturer's liability: at paras. 17 and 55.

[82] In so concluding, the Court first noted that a manufacturer's duty to provide information about risks and dangers of goods under s. 53 arises from the contractual relationship between the consumer and the merchant. Further, the Québec *CPA* targets consumer contracts and applies to "every contract for goods and services entered into between a consumer and a merchant in the course of his business": at paras. 57 and 59. The Court then reasoned as follows:

> [60] To be considered a consumer, one must be a natural person who obtains goods or services for personal, non-business purposes. A merchant, on the other hand, is a person who ordinarily carries on business on his own behalf.
>
> [61] It should be noted that pharmacists [TRANSLATION] "simultaneously [carry on] professional and business activities", activities which, depending on their nature, can give rise to the application of the *Consumer Protection Act*.
>
> …
>
> [65] The sale of prescription medications, as in the case at bar, calls on the professional judgment of a physician, who prescribes medication he considers necessary because of the patient's condition, and that of a pharmacist, who determines and ensures the proper use of medications, particularly to identify and prevent possible pharmacotherapeutic problems.
>
> [66] In my opinion, in this specific context, these health professionals are not acting as merchants within the meaning of the *Consumer Protection Act*. Thus, the sale of prescription medications by a pharmacist is not a consumer contract giving rise to the manufacturer's liability under section 53 of the *Consumer Protection Act*.
>
> [Emphasis added.]

[83] In the result, the Court of Appeal concluded that the appeal as it related to the drug manufacturer's duty to warn was to be resolved by way of the extra-contractual regime set out in the Civil Code of Québec, C.Q.L.R. c. CCQ-1991: *Brosseau* at para. 71.

[84] As is evident from the above, the conclusion in *Brosseau* that the sale of prescription medications is not a consumer contract is not derived from the language of s. 53 alone. Rather, it flows from the language of the Québec *CPA* as applied to the particular transaction in issue—the sale of prescription pharmaceuticals: see e.g. paras. 59–60. This is consistent with *Gagnon*, wherein the Québec Court of Appeal noted that the Québec *CPA* did not apply to the sale of prescription drugs for humans. *Gagnon* involved in part an application for leave to appeal the issue of the application of the Québec *CPA* to veterinary drugs. The lower court relied on *Brosseau* to conclude that the Québec *CPA* did not apply to the sale of a product sold according to a veterinarian's prescription: *Gagnon* at para. 28, citing the lower court decision indexed at 2020 QCCS 3972 at paras. 32–38.

[85] On appeal, the appellants argued the lower court erred in law by deciding at the certification stage that the Québec *CPA* could not apply to the sale of medications for veterinary use. Leave to appeal was granted and the appeal allowed on this point, with the Court concluding as follows:

> [56] I am not convinced that the question of whether the *Consumer Protection Act* applies to the sale of prescription veterinary drugs is a question of pure law to which an answer may be given without evidence having been presented. In *Abbott*, Ruel, J.A., on behalf of the Court, concluded, as the trial judge noted, that this statute does not apply to the sale and distribution of prescription drugs for human use. He reached this conclusion, however, after analyzing the evidence presented on the merits, which proved that "the development of medications for purposes of receiving marketing approval is a highly complex process that requires clinical human trials in its last phases".
>
> [57] It is possible that, as with prescription drugs for human use, the legislature did not want to impose a presumption that veterinary prescription drug manufacturers know a product's potential dangers that might have materialized post-marketing. Firstly, however, an animal is not a human, and evidence has yet to be presented on the process required to market drugs for use in animals, such that it is impossible, at this preliminary stage of the case, to extend to them the exclusion from the scope of this statute that the Court in *Abbott* did with respect to prescription drugs for human use.
>
> [Emphasis added.]

[86] The finding in *Brousseau* was thus undisturbed by *Gagnon*. In light of the above, the law is clear that the sale of prescription pharmaceuticals by a pharmacist

does not give rise to a consumer contract under the Québec *CPA*. *Gagnon* is not, in my view, illustrative of a "narrow" reading of *Brosseau* as advocated by the plaintiffs. Nor does *Gagnon* inject any uncertainty into the law as it relates to the sale of prescription pharmaceuticals for human use.

[87] Accordingly, I find that it is plain and obvious that the plaintiffs' claims under the Québec *CPA* are bound to fail. This is the case not only with respect to the plaintiffs' claim under s. 53 of the Québec *CPA*, but also the remaining sections pleaded, namely ss. 37, 41, 219–221 and 228. The Québec *CPA* targets consumer contracts, but *Brosseau* is clear that no such consumer contract arises in the present context: paras. 55–66.

[88] The requirement under s. 4(1)(a) of the *Class Proceedings Act* that the claim plead a reasonable cause of action is not met in respect of the plaintiffs' claim under the Québec *CPA*. I therefore decline to certify proposed common issues (r) and (s).

Does the Third Amended NOCC properly plead a claim under the *Competition Act*?

[89] In the Third Amended NOCC, the plaintiffs plead a claim under ss. 36 and 52 of the *Competition Act,* which provide a right of recovery for damages for breach of some sections of the *Competition Act* and prohibits individuals from making knowingly misleading representations to promote a product, respectively:

> 36 (1) Any person who has suffered loss or damage as a result of
>
> (a) conduct that is contrary to any provision of Part VI, or
>
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
>
> may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.
>
> …
>
> 52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or

> recklessly make a representation to the public that is false or misleading in a material respect.

[90] In *Certification BCSC*, Horsman J. expressly identified a defect in the plaintiffs' claim under the *Competition Act*, namely that the Second Amended NOCC did not allege that the defendants acted knowingly or recklessly as required by s. 52 thereof: para. 67. In response, the plaintiffs now plead that the defendants had a duty to test under the *Food and Drugs Regulation*, C.R.C., c. 870 and thus knew about or were reckless to the lower levels of Active Pharmaceutical Ingredient ("API") in Alesse. In support of this assertion, the Third Amended NOCC contains the following pleading of material fact:

> 27. None of the Alesse pills tested contained 20 mcg of ethinyl estradiol as advertised by the Defendants on the product monograph. The Defendants were required pursuant to the *Food and Drug Regulation*, C.R.C. 870, s. C.02.018 to test all finished product before it is made available for sale. As such, they knew about, or were reckless with respect to, the lower levels of API in Alesse during the Class Period.
>
> [Emphasis in original.]

[91] The legal basis section of the Third Amended NOCC also contains the following:

> 40. In making the representations described above in paragraphs 7, 8, 36 and 37, the Defendants made deceptive, unfair and/or misleading statements on which the Class Members were likely to rely to their detriment. In making the representations described above, the Defendants breached s. 9 of the *Food and Drugs Act*, R.S.C. 1985, c. F-27, and knowingly or recklessly made materially false or misleading representations to the public.

[92] The defendants note that bare allegations and conclusory legal statements do not suffice as pleadings of material fact in support of a claim: *Situmorang v Google LLC*, 2022 BCSC 2052 at para. 22. In this respect, they submit that the plaintiffs' pleadings under s. 52 of *the Competition* Act are insufficient in that they have simply restated the elements of the cause of action without alleging material facts or particulars as to the defendants' alleged knowledge or recklessness, relying on *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699, at para. 96 [*Gomel BCSC*], rev'd in part in *Gomel BCCA*.

[93] In the *Gomel BCSC* certification decision, the plaintiff broadly alleged that the defendant Ticketmaster's Terms of Use and Purchase Policy contained misrepresentations (that it enforced ticket purchasing limits and "ticket bots" prohibitions) that distorted and caused a general inflationary effect in the secondary market. The plaintiff alleged that this thereby caused widespread loss to secondary market ticket purchasers and resulted in significant financial gain for the defendants. By consequence, professional ticket resellers were able to resell unfairly obtained tickets at a substantial premium. The certification judge certified the plaintiff's deceptive practices and unconscionable practices claims under ss. 5 and 9 of the *BPCPA*, together with common issues related to damages, but not the plaintiff's restoration claim under s. 172 of the *BPCPA*, or his claims under the *Competition Act*.

[94] Both the appeal and cross-appeal were allowed in part. The certification judge was found not to have erred in: accepting what the defendant characterized as the plaintiff's "bare pleading" that its representations amounted to deceptive and/or unconscionable conduct under the *BPCPA*; certifying the claims under the *BPCPA* in the absence of a pleading explaining how the alleged conduct caused any loss to class members; nor in adopting a broad interpretation of "consumer" and "supplier" under the *BPCPA*: *Gomel BCCA* at para. 158. In so concluding, the Court of Appeal noted that it was possible that the plaintiff would be able to prove these allegations; the claims were therefore not doomed to fail. Notably, the Court of Appeal also held that the certification judge erred in declining to certify the plaintiff's *Competition Act* claims, overturning the certification judge's holding that the *Competition Act* claim was a bald, conclusory statement. Thus, the defendants cannot rely on *Gomel BCSC* for the proposition that they have; simply characterizing the plaintiffs' pleading as a "bald conclusory pleading" is not sufficient.

[95] The defendants also assert that reliance is required for a viable claim under the *Competition Act*. The issue was before the Court of Appeal in *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366 [*Valeant*] where Justice Harris held that it was not plain and obvious that a plea of detrimental

reliance is necessary to ground a claim under the *Competition Act*, reasoning as follows:

> [233] I note that *Singer* has been overtaken, and is inconsistent with subsequent Ontario decisions: see *Rebuck v. Ford Motor Company*, 2018 ONSC 7405 at paras. 32-33:
>
> > [32] ... As Defendants' counsel point out, a civil claim under s. 36 of the Competition Act requires that the Plaintiff must show both that the Defendants breached s. 52 and that he suffered damages as a result of that breach. This double-barreled requirement "can only be done if there is a causal connection between the breach...and the damages suffered by the plaintiff": *Singer v Schering-Plough*, 2010 ONSC 42, at para. 107.
> >
> > [33] Although causation has not been dispensed with, reliance in the usual sense of a common law negligent misrepresentation claim is not a necessary ingredient to establish a civil cause of action under s. 36 of the *Competition Act* for breach of s. 52: *Magill v Expedia Canada Corp*, 2010 ONSC 5247, at para. 107. For example, in *Pro-Sys*, at paras. 71, 113, a claim under s. 36 was permitted to proceed and for damages to be calculated on an aggregate rather than an individualized basis. This could not happen under a common law tort claim of negligent misrepresentation with its strict reliance-as-inducement rule: *Hedley Byrne & Co Ltd v Heller & Partners Ltd*. [1964] AC 465, 502-4.
> >
> > [34] This approach suggests that the causal connection between the Defendants' alleged misrepresentations and the Plaintiff's alleged loss is sufficiently pleaded here. That is, the Plaintiff claims that misrepresenting the fuel consumption of the Vehicles has caused buyers and lessees of the Vehicles to spend more on fuel consumption than they were expecting.
> >
> > [35] The Plaintiff need not plead that the misrepresentations induced him to buy his car; that type of detrimental reliance would be a necessary ingredient for a claim based on the common law of negligent misrepresentation. Rather, under s. 36 of the Competition Act what the Plaintiff must plead is that the misrepresentations caused him to acquire less value than he expected to acquire - i.e. to spend more on gas than he thought he would spend when he purchased the Vehicle.
> >
> > [Emphasis added].
>
> [234] I agree with this reasoning. Moreover, I accept that the analysis in *Go Travel Direct Inc. v. Maritime Travel Inc*., 2009 NSCA 42, supports the view that it is not plain and obvious that detrimental reliance by the plaintiff is required to prove causation. In that case, a travel business sued another for losses to it resulting from misrepresentations to the public (but not to the plaintiff). At para. 64 the court said: "Provided Maritime can prove it suffered a loss caused by the misrepresentation, it is not additionally required to prove a consumer relied on and was misled by the 2004 ad."

> [235] Finally, in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*], the Supreme Court of Canada did not find it necessary to discuss reliance when it upheld a claim under s. 36 of the Competition Act for violating s. 52. In *Pro-Sys*, class members could not, on the facts, have relied on Microsoft's misrepresentations. The theory of causation there was that Microsoft made false claims about the nature and timing of the release of one of its products in order to deprive a competitor of the advantage of being the first in the market, thereby allegedly allowing Microsoft to sell its products at a higher price to intermediate corporate resellers.
>
> [236] In conclusion, I am not persuaded that it is plain and obvious the Province must plead that it detrimentally relied on the alleged misrepresentations to ground an independent claim under the *Competition Act*.

[96] *Gomel BCCA* is to similar effect, with the Court noting that while the outcome will depend on the circumstances and nature of the claim, the point of principle is that if there is an alternative means of establishing the causal link required to make out a claim under s. 36 of the *Competition Act*, a plaintiff need not plead and prove detrimental reliance: para. 125. Likewise in *Krishnan BCSC*, Branch J. held that if a product should never have been sold because the label represented something other than what was inside, then it was at least arguable that the representation caused a loss such that reliance may not be required to ground a claim under s. 52: *Krishnan BCSC* at para. 71.

[97] *Bowman* is also to similar effect. The defendants in that case argued that the plaintiff's pleading did not disclose a cause of action pursuant to the *Competition Act* because she had failed to plead the requirements of s. 52, specifically that the defendant made the false or misleading representation knowingly or recklessly. The plaintiff plead that the defendants marketed recalled lots of flushable wipes "…as being safe and suitable for personal use when the Defendants knew or were reckless or willfully blind to the fact that the Recalled Lots were unsafe and unsuitable…" and that the marketing was false and misleading: para. 53. This was found to be an adequate pleading that the defendant made the false or misleading representations knowingly or recklessly: para. 53.

[98] Here, the plaintiffs plead that the defendants had and breached their statutory duties to both to test Alesse before making it available for sale and to refrain from

misrepresenting Alesse's contents and efficacy. These pleadings, if proven, could give rise to actual or imputed knowledge by the defendants of lower levels of API in Alesse during the class period. This pleading is similar to the reliance pleading that was certified in *Krishnan BCSC*: at para. 69. It is in my view sufficient to meet the relatively low bar imposed by s. 4(1)(a) of the *Class Proceedings Act*.

[99] The plaintiffs say the same analysis applies equally here to the extent that Alesse did not contain the required amount of API. This assertion is available on the pleadings. Accordingly, I find that it is not plain and obvious that the plaintiffs are required to plead detrimental reliance to ground their claim under the *Competition Act*.

[100] Moreover, the present circumstances are such that the information necessary to further particularize the plea of knowledge or recklessness is, at this stage of the proceeding, within the defendants' knowledge. The defendants have not yet filed their response to civil claim, and the plaintiffs may well be in a position to plead further particularity following discovery. In this regard, Horsman J.'s conclusion that "it would be unfair and unsafe to resolve the claims on the basis of an evidentiary record that, at this stage, is untested and largely defined by what the defendants have elected to disclose" is apt: *Certification BCSC* at para. 108. This is all the more so the case when one considers that the Third Amended NOCC is to be read generously to allow for inadequacies due to drafting frailties and the plaintiffs' lack of access to key documents and discovery: *Situmorang* at para. 21, citing *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 136–138.

[101] Alternatively, and in any event, the plaintiffs plead in the Third Amended NOCC that they would not have purchased or used Alesse had they been provided with accurate information or warnings about its efficacy and/or content. Thus, even if a pleading of reliance is required, I find that the Third Amended NOCC meets the low bar set by s. 4(1)(a) of the *Class Proceedings Act* and sufficiently pleads a reasonable cause of action under the *Competition Act*.

[102] In the circumstances, I am not satisfied that it is plain and obvious that the plaintiffs' claim under ss. 36 and 52 of the *Competition Act* is bound to fail such that certification ought to be refused under s. 4(1)(a) of the *Class Proceedings Act*. I therefore certify proposed common issue (x) regarding breach of s. 52 of the *Competition Act*.

Conclusion on s. 4(1)(a)

[103] The plaintiffs' claims under the Ontario *CPA*, Alberta *CPA*, PEI *BPA* and Québec *CPA* do not plead a reasonable cause of action under s. 4(1)(a) of the *Class Proceedings Act*. The plaintiffs' application to certify proposed common issues (j) and (k) for Alberta, (p) and (q) for Ontario, (r) and (s) for Québec and (v) and (w) for PEI is dismissed.

[104] The plaintiff's claims under the Saskatchewan *CPBPA*, Manitoba *BPA*, Newfoundland *CPBPA* and *Competition Act as* pleaded in the Third Amended NOCC disclose reasonable causes of action sufficient to meet s. 4(1)(a) of the *Class Proceedings Act*. Common issues as to liability under those statutes are thus potentially capable of certification and may be framed based on the pleadings, but not in the form as presently drafted. The framing of the common issues for these jurisdictions ought to mirror those previously certified under the *BPCPA*. The plaintiffs are thus granted leave to deliver revised proposed common issues as to liability under the Saskatchewan *CPBPA*, Manitoba *BPA*, Newfoundland *CPBPA* and *Competition Act* in accordance with, and within 30 days of, these reasons.

Section 4(1)(c): Commonality

[105] To satisfy the requirement in s. 4(1)(c) of the *Class Proceedings Act*, the plaintiff must show some basis in fact that "the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members". Common issues are defined in s. 1 of the *Class Proceedings Act* 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".

[106] The applicable legal principles are aptly summarized at paras. 85–88 of *Certification BCSC* and need not be repeated at length here. The test for commonality asks whether there is some basis in fact for the proposition that the issue can be determined on a class-wide basis: *Pro-Sys* at para. 99, as cited in *Trotman* at para. 57. In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the proposed common issue and whether there is some evidence supporting it being a common issue across members of the class: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 133.

[107] The requirement that the plaintiff show "some basis in fact" for the common issues does not involve an assessment of the merits of the claim, but rather its viability as a class proceeding: *Certification BCSC* at para. 86, citing *Pro-Sys* at paras. 100 and 104–105. Further, a common issue need not dispose of the litigation. It is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for, or against, the class: *Certification BCSC* at para. 88, citing *Charlton v. Abbott Laboratories, Ltd*., 2015 BCCA 26 at para. 85.

[108] I accept that the plaintiffs have established some basis in fact that the Content Representation and Efficacy Representation were made in common to class members by way of advertising and distribution of the product monographs across Canada. The “some basis in fact” requirement for commonality of issues related to the truth or falsity of the Content and Efficacy Representations—the liability claims under the *BPCPA*—is also met across the class: see e.g. *Certification BCSC* at paras. 141–143. This finding was not disturbed on appeal.

[109] At the initial certification hearing, the plaintiffs only sought to certify common issues regarding liability under the *BPCPA*. In that respect, Horsman J. noted that while the plaintiffs had established some basis in fact for the existence of a common issues under the *BPCPA* and a workable methodology to determine general causation, it was common ground between the parties that any assessment of damages under s. 171 of the *BPCPA* would require determination of individual issues:

> [141] In respect to the common issues under the *BPCPA*, the defendants rely on the same objections that have already been addressed in relation to the common issues in negligence; that is, that there is no evidence that reduced estrogen levels lead to an increased risk in pregnancy, and no workable methodology to establish such a risk. As such, the defendants argue there was nothing deceptive in the labelling or marketing of Alesse, and therefore these issues should not be certified. The defendants argue, in the alternative, that even if liability issues under the *BPCPA* are common across the class, the entitlement to a remedy in damages under s. 171 involves individual issues of causation and damages that cannot be determined on a class basis.
>
> [142] For the reasons already stated, I reject the defendants' arguments that the plaintiffs have not shown some basis in fact for the existence of common issues and a workable methodology for determining general causation. It is common ground between the parties that any assessment of damages under s. 171 will require the determination of individual issues. However, the plaintiffs are not seeking to certify common issues on remedies under the *BPCPA*. The common issues all relate to liability.
>
> [143] In my view, the proposed common issues under the *BPCPA* also raise issues of fact and law that are common to the class, and their resolution on a common issues trial will avoid duplicative litigation. Depending on the outcome of the common issues trial, it may be necessary to have further individual trials on the issue of damages. However, the resolution of the liability issues will substantially advance the claims of class members. I therefore certify the common issues under the *BPCPA* (issues (e) -- (h)). For the reasons already stated, I am not prepared to certify proposed common issue (i), which concerns consumer protection legislation in other jurisdictions, at this time.
>
> [Emphasis added.]

[110] The plaintiffs now assert that *Krishnan BCSC* “considerably advanced the analysis on certification of consumer protection issues across Canada” because it certified common issues as to both breach of consumer protection legislation and “whether a remedy was available under each statute for ‘some or all class members’” (emphasis added). Accordingly, they now seek to certify common issues which they frame as engaging the issue of *entitlement* to remedies—not an assessment of damages—under ss. 171 and 172 of the *BPCPA* and consumer protection legislation in the Other Jurisdictions.

[111] The defendants oppose certification of the common issues pertaining to remedy on two main grounds, namely because: (a) of the inability to assess entitlement to remedy on a class-wide basis and a lack of basis in fact for

commonality given that consumer protection legislation in British Columbia, Saskatchewan, Newfoundland and under the *Competition Act* all require a causal element; and (b) the plaintiffs have exceeded the scope of amendments permitted by the Certification Order made by Horsman J. in *Certification BCSC*.

Does relief sought exceed that permitted by *Certification BCSC*?

[112] The defendants assert that the Certification Order does not permit the plaintiffs to request relief in addition to that which was previously contemplated at the original certification hearing. The defendants did not strenuously press this argument in their oral submissions. In *Certification BCSC*, Horsman J. granted the plaintiffs leave to "amend their Second Amended NOCC, as necessary, to plead material facts to support a cause of action under [consumer protection legislation in the Other Jurisdictions]": at para. 70.

[113] In my view, it is not clear that the plaintiffs' Third Amended NOCC go beyond the amendments contemplated by Horsman J., particularly in light of the purpose of pleadings being to clearly define the issues of fact and law to be determined by the court: see e.g. *Mercantile* at paras. 21-23. The remedy sought is one of those issues: *Johnston v. Rykon Construction Management Ltd.,* 2020 BCSC 572 at para. 8. This is particularly apposite in the context of a class proceeding. If there are deficiencies or inadequacies in the pleadings, a party should be permitted the opportunity to propose amendments that cure the deficiencies: *Sandhu* at para. 44

[114] Further, if new developments raise new possibilities—the scenario that Horsman J. expressly acknowledged in *Certification BCSC*—the remedy is to amend the pleadings to plead the new facts at that time. In the class action context in particular, authorities tend to be generous in making available the possibility of amendments to fine tune the pleadings and to bring clarification to obscure issues: see e.g. *Sandhu* at para. 44, citing *Watson v. Bank of America Corporation,* 2015 BCCA 362 at paras. 87, 106, 140, 197.

[115] As the Court of Appeal noted in *Krishnan BCCA*, chambers judges have the power pursuant to s. 5(6) of the *Class Proceedings Act* to permit amendments to the

pleadings and filing of further evidence: at para. 79, citing *Douez v. Facebook, Inc*., 2018 BCCA 186 at para. 47. Section 5(6) reflects the fact that certification has been described as "a fluid, flexible procedural process": *Krishnan BCCA* at para. 67. The language of s. 5(6) indicates that the power to permit amendments extends to a party's materials generally, not just their pleadings.

[116] Accordingly, I decline to dismiss the plaintiffs' application to certify the proposed common issues as to entitlement to remedy under the consumer protection legislation on the basis that the relief sought exceeds the scope of what was contemplated by Horsman J. in *Certification BCSC*.

Can entitlement to statutory remedies be determined on a class-wide basis post-*Krishnan*?

[117] The plaintiffs assert that the legal question as to entitlement to remedies under consumer protection legislation in the Other Jurisdictions are appropriate for class-wide certification because common issues of a similar nature were certified by this Court in *Krishnan BCSC* and *Gomel BCSC*. At a high level of generality, the plaintiffs submit that following *Krishnan BCSC,* reliance can be inferred from a consumer's purchase of a product such that common issues regarding entitlement to remedy are viable under consumer protection statues that require reliance: *Krishnan BCSC* at para. 200.

[118] In *Krishnan BCSC*, the plaintiff sought to certify a claim pertaining to glucosamine sulfate supplements which were alleged to have been falsely marketed and labelled as containing glucosamine sulfate when they did not. The plaintiff pleaded that this false labelling violated the *Natural Health Products Regulation*, SOR/2003-196, which prohibits the sale of natural health products that do not accurately display the proper name. Accordingly, the plaintiffs alleged that the sale was prohibited as labeled and ought never to have been sold, with the prohibition on sale supplying the causation nexus between the purchase and the loss.

[119] In certifying common issues as to entitlement to remedy, Branch J. noted in *Krishnan BCSC* that it was "at least arguable" that individual detrimental reliance

may not be the only way to establish the necessary causal link between the alleged deceptive act or practice and the consumer's loss:

> [201] The defendants argue that reliance is also required in order to be entitled to a statutory remedy: *Sandoff v. Loblaw Companies Limited*, 2015 SKQB 345 at paras. 50-53, *Clark* at para. 126. However, as discussed above, in B.C. and several of the other provinces, it is at least arguable that individual detrimental reliance is not the only way to establish the necessary causal link between the deceptive act or practice and the consumer's loss: *Finkel*, paras. 71-87, *Rebuck*, at para. 29; *Gomel* at paras. 80-85. I note that to be entitled to a remedy under s. 4(1) of the P.E.I. *Business Practices Act*, a representation must have "induced" the consumer into entering the agreement. It is not clear whether this means "reliance" or something short of that. Given the lack of clarity in the jurisprudence, I find that is an issue that could be argued at trial. Further, I find that the plaintiff's theory that the GS Products should simply never have been distributed creates at least a reasonable prospect that the court could find that the class as a whole is entitled to a remedy under the Provincial Consumer Protection Legislation at the common issues trial. This conclusion was upheld on appeal, with the Court of Appeal concluding that the chambers judge was "not wrong to reject the argument that proof of individual reliance by class members was essential and would overwhelm the class litigation": *Krishnan BCCA* at para. 116.

[120] Common issues as to entitlement to remedies under the *BPCPA*, Alberta *CPA*, Saskatchewan *CPBPA* and Manitoba *BPA* were also certified in *Bowman*. In that case, the plaintiff put forth three theories of causation, one of which advanced a similar claim to that in *Krishnan BCSC* and that being advanced by the plaintiffs here: that the products should never have been offered for sale because it the label did not display the proper name, contrary to the applicable regulation: *Bowman*, at para. 36.

[121] In *Bowman,* common issues as to entitlement to remedies under consumer protection legislation were certified and the Court rejecting a similar argument to that being advanced by the defendants here, namely that the proposed common issues as to entitlement to damages were not common because they had by way of causation being an element of entitlement to damages: at para. 162. In so concluding, Matthews J. reasoned as follows:

> [165] With regard to the *Food and Drugs Act* theory of causation, there is some basis in fact to support a common issue that embeds causation on the basis that the sale of the recalled lots that were contaminated with P. gergoviae was prohibited. The evidence is that Kimberly-Clark knows that

> some of the recalled lots were contaminated but does not know which. Under this theory, Kimberly-Clark should not have sold any of the recalled lots without making that determination. This method of establishing causation is common to all of the Personal Use Purchaser Subclass Members.
>
> …
>
> [169] Some of the proposed common issues pertain to whether the plaintiffs are entitled to damages or a restoration order under the various provisions of provincial consumer protection legislation. Those proposed common issues do not include a determination of the quantum of damages or restoration order for each Personal Use Purchaser Subclass Member. The determination of quantum of damages or restoration for each Personal Use Purchaser Subclass Member raises the issue of the refund program and whether Personal Use Purchaser Subclass Members who received refunds have "residual damages". That determination is not foreclosed by certifying a common issue as to whether there is entitlement to damages because, as explained in *Godfrey v. Sony Corporation*, 2017 BCCA 302 [Godfrey BCCA] at para. 158, certification of a common issue does not create an ultimate right to recovery, it is merely a procedural step that does not change the substantive rights of the parties.
>
> …
>
> [171] I am satisfied that Ms. Bowman's theories of causation are adequately pleaded, that the entitlement to damages or a restoration order arise from the provincial statutes, and both are supported by some basis in fact sufficient to certify proposed common issues 8, 8.1-8.3 and 9.

[122] In both *Krishnan BCSC* and *Bowman*, the court held that there was some basis in fact that the plaintiffs could have found causation in an alleged breach of regulatory requirements. This was sufficient to warrant certification of common issues as to entitlement to damages under provincial consumer protection legislation and the *Competition Act: Krishnan BCSC* at paras. 189–190 and 201; *Bowman*, at paras. 165, 182.

[123] Whether the same result will follow in any given case depends on the facts at hand and the theory of causation being advanced. In the case at bar, the plaintiffs advanced a theory of causation similar to that in issue in *Krishnan BCSC* and *Bowman*, namely that the defendants breached s. 9 of the *Food and Drug Regulation* and as such, the defective lots of Alesse should not have been sold.

[124] In my view, the reasoning in *Krishnan BCSC* and *Bowman* apply equally here given the plaintiffs' theory of causation and the findings as to commonality in

Certification BCSC. Accordingly, I find that the requirement for some basis in fact in s. 4(1)(c) is met to permit entitlement to remedies under consumer protection statutes to be determined in common.

[125] That being said, the plaintiffs have framed their proposed common issues as to entitlement broadly. They conceded in oral argument that the common issues could have been framed in a narrower and more focused manner.

[126] The plaintiffs also acknowledge that the remedies potentially available to the class must be considered in the context of the applicable statutes and that common issues can only be certified in respect of entitlement to forms of relief prescribed by statute. However, with the exception of the Manitoba *BPA* and the *Competition Act*, the proposed common issues regarding entitlement to statutory remedies as presently drafted include the language “other equitable relief”. The plaintiffs say this is permissible because restoration orders are available under the *BPCPA*, and language such as “any remedy that is available in law” in the Ontario *CPA* and “any other order the court considers appropriate” in the Saskatchewan *CPBPA* are sufficient to warrant certification of common issues regarding entitlement to equitable relief in these jurisdictions, despite such relief not being expressly prescribed by statute.

[127] The law is clear that the *BPCPA* provides an exhaustive code regulating consumer transactions: *Koubi* at para. 63. *Hoy* is to the same effect in Ontario. The same may well be the case in the Other Jurisdictions, though this was not addressed by the parties. The inclusion of “or other equitable relief” in my view represents another respect in which the proposed common issues will need to be reconsidered for consistency with available remedies in each jurisdiction, following revision to and particularization of the proposed common issues as to liability.

Conclusion re s. 4(1)(c)

[128] Based on the pleadings and evidentiary record before me, and consistent with the governing jurisprudence, the plaintiffs’ theory of causation is capable of meeting the requirement for some basis in fact required by s. 4(1)(c) of the *Class*

Proceedings Act for certification of common issues regarding entitlement to remedies under consumer protection legislation. However, I am not satisfied that certification ought to follow based on the pleadings and proposed common issues as presently drafted.

[129] Section 12 of the *Class Proceedings Act* permits the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties the terms it considers appropriate." In recognition of the nature of class proceedings and the flexibility afforded in the certification process, rather than to dismiss the plaintiffs' application as it relates to certification of common issues regarding entitlement to remedies, I am adjourning that aspect of the application.

[130] If the plaintiffs wish to pursue certification of common issues regarding entitlement to remedy in the jurisdictions for which they have pleaded a reasonable cause of action as required by s. 4(1)(a) of the *Class Proceedings Act*—namely, under the Saskatchewan *CPBPA*, Manitoba *BPA*, Newfoundland *CPBPA* and *Competition Act*—then revision to the proposed common issues is required to address with particularity to the specific remedies they seek to have certified under each statute, with nexus to the proposed common liability common issues.

Conclusion

[131] The plaintiff's application to certify proposed common issues (j) and (k) for Alberta, (p) and (q) for Ontario, (r) and (s) for Québec and (v) and (w) for PEI is dismissed.

[132] The plaintiff's claims under the Saskatchewan *CPBPA*, Manitoba *BPA*, Newfoundland *CPBPA* and *Competition Act* disclose reasonable causes of action sufficient to meet s. 4(1)(a) of the *Class Proceedings Act*. Common issues as to liability under those statutes capable of certification may be framed based on the pleadings, but not in the form as presently drafted. The plaintiffs are granted leave to deliver revised proposed common issues as to liability under the Saskatchewan

CPBPA, Manitoba *BPA*, Newfoundland *CPBPA* and *Competition Act* in accordance with, and within 60 days of, these reasons.

[133] The plaintiffs' application as it relates to certification of common issues (m), (o), (u) and (y) regarding entitlement to remedies under consumer protection legislation under the Saskatchewan *CPBPA*, Manitoba *BPA*, Newfoundland *CPBPA* and *Competition Act* respectively is adjourned with liberty to the plaintiffs to reapply following revision to the proposed liability common issues for these jurisdictions as contemplated above.

[134] The parties are to schedule a case management conference within 60 days, or at the earliest mutually convenient available dates.

"Hughes J."

Schedule "A"

The Common Issues

Negligence and Failure to Warn Issues

a. Did the Defendants, or any of them, owe a duty of care to class members?

b. Did the Defendants, or any of them, breach a duty of care to class members, and if so, when?

c. In particular, was Alesse distributed and sold within Canada during the Class Period defective or unfit for its intended use of preventing pregnancy?

d. If the answer to question (c) is "yes", is the defective or unfit Alesse confined to Alesse 21 from Lot 2532 and Alesse 28 from Lot A3183 (the "Recalled Lots") or was the Alesse generally distributed by the Defendants within Canada during the Class Period defective or unfit for its intended use of preventing pregnancy?

Consumer Protection Issues

e. Did the Defendants' solicitations, offers, advertisements, promotions, sales and supply of Alesse for personal, family, or household use by class members during the Class Period fall within the meaning of "consumer transaction" under the *Business Practices and Consumer Protection Act* ("BPCPA")?

f. With respect to the supply in British Columbia of Alesse to class members for their personal, family, or household use during the Class Period, are the Defendants, or any of them, "suppliers" as defined in the BPCPA?

g. Are the class members "consumers" as defined by the BPCPA?

h. Did the Defendants, or any of them, engage in conduct that constituted deceptive acts or practices contrary to the BPCPA as alleged in the Third Amended Notice of Civil Claim?

i. If so, are some or all of the class members entitled to restoration or damages pursuant to ss. 171 and 172 of the BPCPA?

j. Did the Defendants breach ss. 6 and/or 7.3 of the Alberta *Consumer Protection Act* ("Alberta CPA")?

k. If so, are some or all of the class members entitled to rescission, damages or equitable relief under ss. 7, 7.2 and 13 of the Alberta CPA?

l. Did the Defendants breach ss. 6-8 and/or 19(d)-(e) of the Saskatchewan's *The Consumer Protection and Business Practices Act* ("Saskatchewan CPBPA")?

m. If so, are some or all of the class members entitled to rescission, damages or equitable relief under s. 93 of the Saskatchewan CPBPA?

n. Did the Defendants breach ss. 2-3 and/or 5 of Manitoba's *The Business Practices Act* ("Manitoba BPA")?

o. If so, are some or all of the Class members entitled to repayment of the purchase price paid for the Defendants' Alesse products, or in the alternative, damages pursuant to s. 23 of the Manitoba BPA?

p. Did the Defendants breach ss. 9(2), 14-15 and/or 17 of the Ontario *Consumer Protection Act, 2002* ("Ontario CPA")?

q. If so, are some or all of the class members entitled to rescission, damages, or equitable relief pursuant to s. 18 of the Ontario CPA?

r. Did the Defendants breach articles 37, 41, 53, 219-221, and/or 228 of the Quebec *Consumer Protection Act* ("Quebec CPA")?

s. If so, are some or all of the Class members entitled to rescission, damages, or equitable relief pursuant to s. 272 of the Quebec CPA?

t. Did the Defendants breach ss. 7-9 of the Newfoundland and Labrador *Consumer Protection and Business Practices Act* ("Newfoundland and Labrador CPBPA")?

u. If so, are some or all of the class members entitled to rescission, damages, or equitable relief pursuant to s. 10 of the Newfoundland and Labrador CPBPA?

v. Did the Defendants breach ss. 2-3 of the Prince Edward Island *Business Practices Act* ("PEI BPA")?

w. If so, are some or all of the class members entitled to rescission, damages, or equitable relief pursuant to s. 4 of the PEI BPA?

x. Did the Defendants breach s. 52 of the *Competition Act*?

y. If so, are some or all of the class members entitled to damages pursuant to s. 36 of the *Competition Act*?

Health Care Cost Recovery Issues **33**

jj. Are class members "beneficiaries" who are entitled to recover from the Defendants for Health Care Services provided by Provincial Health Insurers ("PHIs"), as defined under provincial health and territorial health care cost recovery legislation? In particular, does an unwanted pregnancy constitute "personal injury" in order to warrant such recovery?