IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Burke v. Red Barn at Mattick's Ltd.,* 2023 BCSC 367

Date: 20230313
Docket: 18 0545
Registry: Victoria

Between:

Jennifer Burke and Mallory Colter

Plaintiffs

And:

Red Barn at Mattick's Ltd. and Matthew Schwabe

Defendants

Brought under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Plaintiffs:	S. Hern, K.C. K. Smith
Counsel for the Defendant Red Barn at Mattick's Ltd.:	N. MacLean J. Bank
Defendant Matthew Schwabe:	Not present
Place and Date of Hearing:	Victoria, B.C. October 24 – 27, 2022
Place and Date of Judgment:	Victoria, B.C. March 13, 2023

[1] The plaintiffs, Jennifer Madill (née Burke) ("J.M.") and Mallory Fulmore (née Colter) ("M.F.") seek to certify this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. The proposed class members are:

> [I]ndividuals who Matthew Schwabe surreptitiously videotaped or photographed while using the washroom or staff room at Red Barn at Mattick's Ltd.'s ("RBM") grocery store, located at Mattick's Farm shopping plaza, 5325 Cordova Bay Road, Saanich, British Columbia.

[2] The facts that have propelled the plaintiffs' claim and their application for certification are not in dispute: while employed as an assistant manager at Red Barn at Mattick's Ltd. ("RBM"), the defendant Matthew Schwabe surreptitiously took photographs or images of the plaintiffs in a state of undress or semi-undress while using the washroom, then downloaded those images to pornographic websites. Eventually, the images were observed on these websites, prompting the Saanich Police to begin an investigation into Matthew Schwabe's activities.

[3] In February 2016, Ms. Burke and Ms. Colter attended the Saanich Police Station and identified explicit images of themselves taken in the RBM washroom, as well as images of other young women that they recognized as other store employees. Eventually six individuals were identified and contacted by Saanich Police.

[4] In June 2016, a search warrant was executed at Matthew Schwabe's residence. Matthew Schwabe was subsequently charged with several offences pursuant to the *Criminal Code*, R.S.C. 1985, c. C-46, which related to the taking and downloading of these explicit images. He eventually entered a plea of guilty and received a jail sentence of 15 months followed by a period of probation for two years.

[5] While Ms. Burke and Ms. Colter have consented to having their names published in this litigation, I will refer to them as J.M. and M.F.

Evidentiary background

[6] The plaintiffs supported their motion for certification with affidavit evidence outlining their experiences as RBM employees. The plaintiff J.M. was hired by RBM as a cashier in October 2007, when she was 15 years of age. She worked there until December 2012.

[7] J.M. deposed that some time in 2009, new owners purchased the Red Barn stores. One of the owners was Samuel Schwabe, Matthew Schwabe's father. J.M. deposed that Matthew Schwabe commenced employment at the Mattick's Red Barn grocery store as the assistant produce manager sometime in February 2011, working there until May 2014, before being transferred to another Red Barn store.

[8] The plaintiff M.F. was hired by RBM in May 2012, when she was 17 years of age. She worked there as a cashier until May 2014. She deposed that in addition to her duties as a cashier, she worked in the produce department alongside Matthew Schwabe. M.F. deposed that she observed Matthew Schwabe acting in a supervisory capacity in the produce department, closing the store after the cashiers left for the evening, and delegating tasks to other employees in the produce department.

[9] Both plaintiffs deposed to what they described as inappropriate and sexualized behaviour directed not only to themselves, but other female employees at RBM. J.M. deposed that she observed Matthew Schwabe "flirt and attempt to ask young women out on dates. If the women did not reciprocate, he would become rude and often would be very vocal about them, calling them names such as 'bitch'." M.F. deposed that she observed similar conduct on the part of Matthew Schwabe.

[10] J.M. recalled that Matthew Schwabe would "very often" say that "he could not help" making comments about the clothing and appearances of female workers due to the fact he was "surrounded by a bunch of hot young girls in tight pants."

[11] To further support their application, the plaintiffs filed an affidavit from C.J., another RBM employee who worked in the delicatessen. C.J. deposed she

overheard Matthew Schwabe commenting on the female employees' appearances and described his conduct as "flirtatious". A significant and undisputed incident, given the nature of the plaintiffs' claim, occurred on March 12, 2013. C.J. deposed that while she and Matthew Schwabe were opening the store in the early morning hours, Matthew Schwabe approached her and attempted to converse with her while exposing his penis. C.J. tried to "seem busy" and walk away, but Matthew Schwabe "remained standing, blocking the only entrance and exit" and tried to converse with her for another five minutes or so with his penis exposed.

[12] C.J. reported this alarming conduct to the delicatessen manager, who according to C.J., was dismissive and said, "boys will be boys". C.J. then deposed that the manager, without the knowledge of C.J., gave Matthew Schwabe her phone number. C.J. says Matthew Schwabe then called her and attempted to convince her not to report this incident, conduct which the plaintiffs suggest is "totally unacceptable managerial conduct." The plaintiffs say this inappropriate conduct was exacerbated the next day when C.J. told the deli manager that giving him her phone number was inappropriate. C.J. deposed the manager "reacted aggressively", said she had heard C.J. "was a poor worker", and threatened her with a "write-up" if she heard any more complaints from C.J. about Matthew Schwabe.

[13] Unhappy with this response, C.J. went further up the chain of command, reporting the exposure incident to the general manager. C.J. deposed that the only thing that happened as a result of her further report was that her hours of employment were systematically reduced over the next year, until she was simply taken off the work schedule altogether.

[14] Further evidence the plaintiffs say illustrates how the toxic and misogynist environment was condoned in the workplace culture at RBM came from Mr. Montegue-Rippner, a butcher in the RBM meat department. He recounted an incident where one of the RBM owners commented about the appearance of a 16-year-old young woman who worked in the meat department.

[15] Mr. Montegue-Rippner recalled observing this owner watching her from behind as she bent over, and with a grin asking Mr. Montegue-Rippner, "Wow, how can you handle working around that?" Mr. Montegue-Rippner mentioned this to the young woman, who reported the incident. A little later, the owner told Mr. Montegue-Rippner he did not appreciate being "'ratted out'".

[16] The plaintiffs provided further affidavit material from K.B. She described an encounter with Samuel Schwabe, one of the four owners, where he approached her and asked for her phone number, suggesting that they "could text outside of work hours and maybe hang out." K.B. said that she was concerned about their age difference, as Samuel Schwabe was in his late 40's and she was approximately 19. She went on to summarize the atmosphere at RBM as "a sexualized environment", with the owners and male managers "commenting on young women's bodies and generally making sexualized remarks" or "innuendo", adding that Samuel Schwabe made "lewd comments about younger girls".

[17] A male employee, A.N., described the culture at RBM as "'locker room' talk", including "off-colour jokes, sexual banter, and comments about the physical appearances of female employees or women generally."

[18] In summary, the plaintiffs describe the workplace atmosphere as follows:

> …this evidence, combined with the evidence of management's response to [C.J.'s] complaint and the evidence of the [*sic*] Ms. Colter and Ms. Madill, points to a broader problem at RBM. It suggests not just that Matthew Schwabe's employment was the result of improper hiring decisions motivated by nepotism, but that his wrongful actions towards the plaintiffs were influenced or enabled by the workplace culture at RBM, and that that [*sic*] this workplace culture, as well as Matthew Schwabe's sense of impunity, might have been furthered by Sam Schwabe. It raises questions about why Sam Schwabe suddenly announced he was departing from the business in March 2014, and whether his behaviour at the store with young women employees contributed to that departure.

[19] Given this evidentiary background, the plaintiffs' claim against Matthew Schwabe is for breach of privacy. At the same time, the plaintiffs claim RBM should be vicariously liable for its employee's misconduct. The plaintiffs also advance a stand-alone claim against RBM in negligence.

Certification process

Test for certification

[20] Section 4(1) of the *CPA* sets out the criteria for certification:

> 4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[21] Section 7 of the *CPA* is also relevant when considering an application for certification:

> 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[22] When considering an application to certify, the following comments of Justice Perell in *Doucette v. The Royal Winnipeg Ballet*, 2018 ONSC 4008 are instructive:

> [14] A certification motion is an interlocutory and procedural motion, and it is not about the truth or the ultimate merits of the claims and defences. A certification motion typically involves a considerable use of hearsay evidence, and, as described below, the evidentiary standard for a certification motion is the distinctive, eccentric, and meagre (low bar) "some-basis-in-fact" standard.

[23] In *Doucette*, Perell J. further described what is required at the certification stage:

> [66] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers. On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding. The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources.
>
> [67] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim. However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action. The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.
>
> [68] In particular, there must be a basis in the evidence to establish the existence of common issues. To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members. The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification. Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.
>
> [Footnotes omitted.]

[24] The evidentiary standard for certification was described by Justice Francis in *Sharifi v. WestJet Airlines Ltd.*, 2020 BCSC 1996 rev'd on other grounds 2022 BCCA 149 as follows:

> [15] Subsection 4(1)(a), the requirement that the pleadings disclose a cause of action, is assessed by means of the same test that would apply to a motion to strike. A plaintiff will satisfy this requirement unless, assuming all the facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of success: *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 63 [Pro-Sys].
>
> [16] With respect to the remaining subsections 4(b) – (e), the plaintiff must show "some basis in fact" to establish that the certification requirements have been met. In determining whether this standard has been met, the court should not engage in any detailed weighing of evidence at the certification stage but should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.
>
> …

[25] While the evidentiary standard on a certification application is low, in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 31, the Court of Appeal underscored that the certification stage serves an important gate-keeping function:

> Section 4(1) of the *CPA* establishes the statutory requirements for certification of a class action. When these requirements are met, the proceeding must be certified. The merits of a claim are not determined on a certification application and the threshold for certification is low. Nevertheless, certification serves as a "meaningful screening device", and the court performs "an important gatekeeping role by screening out those claims destined to founder at the merits stage of the proceeding*": Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 103–104 [*Pro-Sys Consultants*]; *Sherry* at para. 22. Thus, the standard for assessing evidence at certification requires more than a "superficial level of analysis into the sufficiency of the evidence" and more than "symbolic scrutiny*": Pro-Sys Consultants* at para. 10.

Do the pleadings disclose a cause of action

[26] The cause of action against Matthew Schwabe is for violation of the plaintiffs' privacy contrary to s. 1 of the *Privacy Act*, R.S.B.C. 1996, c. 373. That section provides as follows:

> **1** (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
>
> (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
>
> (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
>
> (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

[27] The plaintiffs submit that the claim as pleaded satisfies the elements of this tort; it alleges that the plaintiffs had a reasonable expectation of privacy in the Red Barn washroom and staff room, and Matthew Schwabe violated that reasonable expectation of privacy by surreptitiously recording them.

[28] Given the cause of action against Matthew Schwabe is for violation of the plaintiffs' privacy while they were employed at RBM, the plaintiffs allege RBM is vicariously liable for Matthew Schwabe's invasion of their privacy. The plaintiffs also say they have a legitimate claim against RBM in negligence, alleging management knew or should have known about Matthew Schwabe's "inappropriate sexualized conduct" at the RBM workplace which ultimately evolved into criminal activities.

[29] Matthew Schwabe has declined to respond to the action or participate in any way. RBM, however, has advanced extensive submissions opposing the plausibility of the claims against it for the simple reason the pleadings do not disclose a cause of action. RBM says there is no basis to find it is vicariously liable, as Matthew Schwabe's unlawful activities were unforeseeable - none of his duties and

responsibilities as an assistant produce manager "related to or enhanced the risk" he would engage in such conduct while employed at RBM. Similarly, RBM says the pleadings do not disclose a claim in negligence because the "type of harm," the breach of the plaintiffs' privacy because of Matthew Schwabe's secret recordings, was not reasonably foreseeable.

[30] As noted in *Sharifi*, the standard to be applied in determining whether the pleadings disclose a cause of action is the same as an application to strike under R. 9-5 of the *Supreme Court Civil Rules* [*Rules*], namely whether it is "plain and obvious" that the claims as pleaded are doomed to fail. The difference is that in a class proceeding, the burden is on the plaintiffs to demonstrate affirmatively that a cause of action is properly pled.

Vicarious liability

[31] In advancing their claim against RBM for Matthew Schwabe's violation of their privacy, the plaintiffs rely on the test for vicarious liability set out in *Bazley v. Curry*, [1999] 2 S.C.R. 534; namely, that employers are responsible for 1) employees' acts authorized by the employer, as well as 2) "unauthorized acts so connected with authorized acts that they may be regarded as modes (albeit improper modes) of doing an authorized act": para. 10. The plaintiffs assert that it is appropriate to affix vicarious liability to RBM for the following reasons:

> Here, it is not alleged that the surreptitious recording itself was authorized, but rather that the conduct occurred at the workplace, that the workplace supplied Matthew Schwabe with sufficient authority and opportunity to commit the wrongful acts, and that the workplace culture at RBM effectively condoned sexually charged and inappropriate behaviour among owners and managers, including by Matthew Schwabe which gave him tacit authorizations that extended beyond his formal duties.

[32] While the plaintiffs do not suggest that Matthew Schwabe's surreptitious recording was authorized by RBM, they do state that there were "structural elements" in the employment relationship that supported his ability and opportunity to carry out the surreptitious recording and create the required nexus between the harm suffered and RBM. In this analysis, the plaintiffs acknowledge RBM's

submission that mere opportunity will not attract liability against an employer. However, the plaintiffs state that the circumstances here are such that when one considers the workplace culture at RBM, the corporate entity "effectively normalized and arguably encouraged inappropriate sexualized behaviour", especially when one notes the misogynist atmosphere allegedly tolerated by ownership.

[33] RBM resists the claim for vicarious liability and says it should fail on the foreseeability analysis as outlined in *Bazley*.

[34] In *Bazley* at para. 37, the Court succinctly stated:

> The question…is whether there is a connection or nexus between the employment enterprise and that wrong that justifies imposition of vicarious liability on the employer for the wrong…

[35] In this regard, RBM says that in assessing whether there is a sufficient connection, the court must consider whether the harm suffered was foreseeable: *Bazley* at paras. 39, 41. Foreseeability of risk in the context of vicarious liability refers to the foreseeability of the broad risks incident to a whole enterprise: para. 39. Connections incidental to the employment enterprise, including time and place (without more), will not be enough for a sufficient connection: para. 41. At para. 41, the Court sets out factors that courts may consider when determining whether there is a sufficient connection between the employer's creation or enhancement of the risk and the wrong complained of:

> (a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[36] With respect to the question of opportunity, RBM refers to the majority reasons in *E.B. v. Order of the Oblates of Mary Immaculate in the Province of British Columbia*, 2005 SCC 60, which emphasize that the "'mere opportunity'" to commit the wrongful act "does not suffice" to attract liability on the employer: paras. 3, 25. Rather, there must be a "strong connection" between what the employer was asking the employee to do and the wrongful conduct: paras. 2, 22. RBM refers to the majority's conclusion that after examining "the powers, duties and responsibilities conferred on" the employee by the employer, such a connection was not established.

[37] As confirmed in *Bazley*, to establish vicarious liability, the issue is whether the circumstances establish a connection between "the employment enterprise" and the employee's wrongful act, such that the employment enterprise has created or materially enhanced the risk of harm: paras. 39 and 41.

[38] RBM submits that the most that can be said in the present situation is that RBM offered Matthew Schwabe the opportunity for contact with young women and to act in the way that has been described by the plaintiffs in their affidavit material. However, RBM maintains "[t]here is no basis to impose liability for wrongs which were unknown, unauthorized, unforeseen and unforeseeable by [RBM]."

[39] In the end, RBM says there is no "strong connection" between what RBM authorized Matthew Schwabe to do and his wrongful conduct. RBM says what they did authorize Matthew Schwabe to do, in addition to other duties, was clean the bathroom, not place recording equipment there in order to surreptitiously record young women in various states of undress.

[40] In addition, RBM submits that even though the plaintiffs "may have been vulnerable in the general sense, as young women", "vulnerability does not itself provide the 'strong link' between the enterprise and the [wrongful conduct] that imposition of no-fault liability would require": see *Ivic v. Lakovic*, 2017 ONCA 446, leave to appeal to SCC ref'd, 37718, citing *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570 at para. 86.

[41] Ultimately, RBM submits that the secret videotaping was "not an essential part of Matthew Schwabe's job, nor was it a necessary part of RBM's operation" and that RBM should not be vicariously liable for the invasion of the plaintiffs' privacy by Matthew Schwabe.

[42] The plaintiffs criticize RBM's approach, submitting RBM analyzes the circumstances at this stage of the proceeding as if it was a trial on the merits. Instead, the plaintiffs submit "these are matters to be resolved in light of a complete evidentiary record at trial, not at the stage of determining if a cause of action has been pled."

[43] The plaintiffs submit that the foreseeability argument advanced by RBM "fails to frame its analysis of the vicarious liability plea within the 'plain and obvious' test applicable at certification". They say instead that RBM argues the case as if it is to be decided on the merits, based on the pleadings alone.

[44] Having regard to the totality of the circumstances, I am satisfied the plaintiffs have demonstrated that the cause of action for vicarious liability is properly pled and supported by the evidence that has been presented. I agree with the plaintiffs that RBM's submissions in resisting this claim go beyond the plain and obvious test applicable at this stage of the proceeding. I am satisfied the plaintiffs' pleadings disclose a cause of action for vicarious liability on the part of RBM that meets the plain and obvious test.

Negligence

[45] The plaintiffs also advance a claim against RBM in negligence, the four elements of which were summarized by Justice Iyer in *Campbell v. Capital One Financial Corporation*, 2022 BCSC 928, as follows:

> [47] The four elements of a negligence claim are (1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached the standard of care; (3) the plaintiff suffered compensable damages; and (4) the defendant's breach caused the plaintiff's damages in fact and law: *1688782 Ontario Inc.* v. *Maple Leaf Foods Inc.*, 2020 SCC 35 at para. 18; *Mustapha* v. *Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

[46] The plaintiffs submit that when one analyses the sufficiency of the evidence pursuant to the plain and obvious evidentiary test, all these elements are set out with sufficient particularization in the further amended notice of civil claim filed 11 July 2022 and that the pleadings disclose a valid cause of action.

[47] In this regard, the plaintiffs have pleaded that RBM owed two duties of care:

a) To ensure that the washroom and staff room would be a safe and secure environment, free from risk of being surreptitiously recorded; and

b) To hire and supervise its employees so that other employees and members of the public were not put in harm's way, including by being surreptitiously recorded in the washroom or elsewhere and having their images misused.

[48] In contesting this aspect of the plaintiffs' claim, RBM once again says that no duty of care is established in the amended claim because the type of harm suffered by the plaintiffs was not reasonably foreseeable.

[49] RBM relies on foreseeability in relation to both whether a duty of care exists and whether the harm suffered is so remote as to be excluded from the causation analysis: *Plante v. Mackenzie*, 2021 BCSC 2468 at para. 39. In reply, the plaintiffs again assert that much of RBM's submission is an argument on the merits, as if the evidence has been heard at trial, and not an assessment on the plain and obvious test as to whether a cause of action is present.

[50] The *prima facie* duty of care analysis has two stages: (1) identifying whether the alleged duty of care or an analogous duty has already been established in the case authority, and if not, (2) applying the second stage of the *Anns/Cooper* test to determine whether a novel duty of care is present: see *Rankin (Rankin's Garage & Sales) v. J.J.,* 2018 SCC 19 at para. 18. To establish a *prima facie* duty of care, "the plaintiff must provide a sufficient factual basis to establish that the harm was a reasonably foreseeable consequence of the defendant's conduct in the context of a proximate relationship": para. 19. In this regard, the plaintiffs say the two duties of

care they have pleaded, "or an analogous duty", have already been established in prior case authority.

[51] As far as this first stage of the duty of care analysis is concerned, RBM's position is straightforward. RBM says that there is no applicable precedent case that it is aware of establishing the existence of a duty of care in similar circumstances to the case at bar, that is, where an employer owes a duty of care and has been held responsible for an employee's unauthorized surreptitious recording of female employees in a washroom or staff room on the employer's premises.

[52] RBM goes further and says "even stated more broadly, there is no case where the courts have recognized a duty of care owed by a business to someone whose privacy was breached through secret recordings made in a bathroom on the business's premises."

[53] Turning to the second duty of care, to hire and properly supervise its employees so as to not put other employees in harm's way, RBM simply reiterates that there is no precedent case "establishing the existence of a duty of care in circumstances sufficiently similar to this case," such that no duty of care exists. That is, there is no precedent that has held that a business owes a duty of care to supervise employees so as to ensure individuals will not have their privacy invaded through secret recordings made in a bathroom on the business' premises.

[54] Conversely, the plaintiffs submit it is not necessary to find a case with exactly the same set of circumstances. Instead, the plaintiffs submit that the duties of care pleaded in the amended claim have been established or are "sufficiently analogous" to previous cases.

[55] With respect to the first pleaded duty, the plaintiffs say it is well settled that a business owes customers a duty of care to maintain its washrooms in a safe condition: see *Dashwood v. Pillars Club & Lounge*, 2002 NBQB 92 at paras. 14–38. The plaintiffs submit that extending that duty to employees using the washroom is "not controversial" and that while a customer was the complainant in *Dashwood*, there is no reason the established duty would not apply to all permitted users of the

washroom. While obviously the nature of the harm experienced in the present case is not physical injury from slip and fall hazards, as was the case in *Dashwood*, the plaintiffs submit the analogy is reasonable—a safe washroom environment includes being free from surreptitious recording or "peeping toms", adding that the expectation of privacy is real; users of the washroom expect to be partially nude and engaged in private business. The plaintiffs submit that if an employee or manager responsible for a premises found a hidden camera in one of its washrooms, there is no doubt it would be removed as something that presents a hazard to users of the washroom. The plaintiffs say the same applies by analogy to a staff room, provided the plaintiffs can establish on the evidence a reasonable expectation of privacy exists when employees are in the staff room.

[56] As to the second pleaded duty of care, the plaintiffs of course disagree with RBM and argue that RBM has a duty to hire and supervise employees so that employees and members of the public are not put in harm's way, including, but not limited to, surreptitious recording (or any other kind of sexual misconduct). As with the duty to provide a safe washroom, the plaintiffs submit it is well established that employers owe a duty of care to employees and customers to train and supervise their employees in a manner that is not negligent, citing numerous authorities, all of which are noted in their written submissions.

[57] As a result, the plaintiffs submit that their negligence pleadings are based on established duties of care, and there is thus no need to conduct a full *Anns/Cooper* analysis to determine whether a novel duty of care should be recognized. Once again, they acknowledge that foreseeability will clearly be a triable issue, but this fundamental question will have to be canvassed in light of all of the evidence that is eventually produced at trial. Even though the circumstances in the present are relatively unique or novel, with no prior precedents addressing the exact same fact situation, given the modest "some basis in fact" evidentiary standard applicable on an application for certification, I agree with the plaintiffs that the negligence pleadings are based on established analogous duties of care, alleviating the necessity to resort to an analysis of the second stage of the *Anns/Cooper* test.

[58] Nevertheless, for the sake of completeness, I will respond to the extensive submissions the parties made on this issue. In this regard, the plaintiffs submit that if stage two of the *Anns/Cooper* test is necessary, the required threshold has been met. The plaintiffs point out that in applying this step in the *Anns/Cooper* analysis, the court considers whether the asserted duty of care in the pleading is one that reflects reasonable foreseeability of harm and a sufficiently proximate relationship to support liability in negligence. The plaintiffs further submit that RBM's argument is based solely on foreseeability, and it does not argue that the relationships in this pleading are not sufficiently proximate. With respect to foreseeability, both the plaintiffs and RBM rely on the following from *Rankin* at para. 24:

> When determining whether reasonable foreseeability is established, the proper question to ask is whether the plaintiff has "offer[ed] facts to persuade the court that the risk of the type of damage that occurred was reasonably foreseeable to the class of plaintiff that was damaged"...This approach ensures that the inquiry considers both the defendant who committed the act as well as the plaintiff, whose harm allegedly makes the act wrongful. As Professor Weinrib notes, the duty of care analysis is a search for the connection between the wrong and the injury suffered by the plaintiff...
>
> [Emphasis in original.]

[59] Applying this test, RBM says the plaintiffs are unable to establish the necessary connection. Relying again on the question of foreseeability, RBM says it could not have reasonably foreseen the type of damage occasioned by Matthew Schwabe's unlawful conduct. RBM argues that the foreseeability element requires the plaintiffs to show that the specific mechanism of the harm Matthew Schwabe caused to the plaintiffs was foreseeable, citing *McCormick v. Plambeck*, 2022 BCCA 219, where it was determined there must at least be foreseeability of a "general mechanism" of injury. RBM submits that the type of harm from the previous incidents (sexual harassment through inappropriate comments and a single exposure incident) is different from the type of harm alleged in this case (breach of privacy through secret recording in a bathroom) and was not reasonably foreseeable. RBM acknowledges that while Matthew Schwabe's act of exposing his genitals and his inappropriate comments could be said to create a risk of further unwanted sexual advances and harassment, this conduct does not create or enhance the further risk

that he would secretly record someone in the bathroom. In other words, "it is not enough to say that some previous 'sexualized behaviour' makes any and all future 'sexualized' behaviour reasonably foreseeable."

[60] RBM argues that it is incumbent on the plaintiffs to allege something specific that would indicate a risk of "secret recording" by Matthew Schwabe, such as actually being caught attempting to do so or that he "expressed a desire to engage in voyeurism", then it was not reasonably foreseeable or even a "possibility" that Matthew Schwabe's other "unaddressed" misconduct would result in him videotaping female employees in the bathroom.

[61] In this analysis, RBM relies on *Rankin* and *McCormick* in submitting that the plaintiffs must show an inferential chain that connects the alleged failures to the type of harm, such that:

> (i) the risk of sexual misconduct by Matthew Schwabe was reasonably foreseeable; and (ii) if that sexual misconduct was not addressed, the risk of secret videotaping was reasonably foreseeable; and (iii) the attendant risk of breach of privacy to the proposed class was then reasonably foreseeable.

RBM says "as pleaded the inferential chain of reasoning is too weak".

[62] RBM argues that as pleaded, foreseeability of the specific type of harm (breach of privacy through illegal, secret recording) cannot be tied to the general mechanism (failing to address the aforementioned issues with Matthew Schwabe). In short, Matthew Schwabe's illegal secret recording of individuals in the bathroom was not a natural or probable result of RBM's alleged failures. RBM submits that as pleaded the plaintiffs have failed to establish "that anyone at RBM ought to have foreseen Matthew Schwabe would engage in such pre-meditated and calculated acts and breach the plaintiffs' privacy."

[63] In response, the plaintiffs submit that, to establish liability, it was not necessary for RBM to foresee the precise mechanism of injury that would result; RBM only needed to identify that Matthew Schwabe presented a risk of causing the type of harm that occurred here, which, according to the plaintiffs, "was a form of

sexual misconduct—voyeurism, and theft of nude and partially nude images for sexual gratification and abusive purposes." Specifically, the plaintiffs say the wrongful act here was that RBM failed to take steps even though, on the case as pleaded, it had reason to know that the combination of Matthew Schwabe's conduct at the store and the overall workplace environment gave rise to a serious risk of sexual misconduct to female employees, "that could manifest in a wide range of foreseeable potential incidents, including voyeurism."

[64] The plaintiffs also submit that RBM's characterization of the type of harm for the purposes of the foreseeability analysis is "far too specific and inconsistent with the authorities." To the contrary, the plaintiffs argue that their characterization of the type of harm as "sexual misconduct" is consistent with the authorities, and rely on the following statement by the Court in *McCormick* summarizing the caselaw:

> [38] …In each case, foreseeability was not tied to the precise sequence of events, or to the extent of the injury or damage resulting. But foreseeability was tied to a general mechanism of injury: an open fire, paraffin lamps, dangerous operation of a motor vehicle, a careening riderless snowmobile.

[65] The plaintiffs say the wrongful act in the present case is RBM's failure "to take steps in the face of evidence that its employee behaves badly around women and is sexually inappropriate. What happened as a result was in the range of foreseeable possibilities… that he was going to amplify his behaviour and cause harm by committing sexual misconduct of some kind or other". While I appreciate "mere possibility" does not mean something is reasonably foreseeable, as noted in *Rankin*, I accept the plaintiffs' submission that it was reasonably foreseeable Matthew Schwabe's inappropriate conduct would evolve into more intrusive activities.

[66] The plaintiffs submit that, in this case, "sexual misconduct was the general mechanism of the harm." According to the plaintiffs, it would be "highly problematic" for liability for the supervision of employees who demonstrate a risk of sexual misconduct to be "limited to predicting their particular propensities and predilections". Such a level of particularization, say the plaintiffs, "would undermine the purposes of tort law in ascribing liability in a way that reduces the likelihood of harm being suffered by one's 'neighbours'."

[67] In the end, given the totality of the evidence marshalled by the plaintiffs, they say that leaving an employee with Matthew Schwabe's predilection for sexualized behavior "in a management role among young women employees and customers was very likely going to result in Matthew Schwabe engaging in further and amplified sexually inappropriate conduct." Moreover, the plaintiffs submit that "[i]nstead of mitigating that risk, RBM fostered in him a sense of impunity and gave him the keys to the store."

[68] While time will tell, after a full evidentiary presentation at trial, whether or not the "inferential chain of reasoning" is as weak as RBM submits, I am not satisfied the claim is bound to fail. At this stage of the proceeding, I am persuaded that it is not plain and obvious that the type of harm suffered by the plaintiffs as a result of RBM's alleged negligence was not reasonably foreseeable. Accordingly, pursuant to the second stage of the *Anns/Cooper* analysis, I am satisfied the plaintiffs have established a *prima facie* duty of care *vis-à-vis* their negligence claim against RBM.

An identifiable class

[69] The next element for certification is whether, given the proposed class definition, there is an identifiable class of two or more persons. In *Jiang v. Peoples Trust Company,* 2017 BCCA 119, the Court reviewed and summarized the jurisprudence on identifiable class as follows:

> [82] In sum, the principles governing the identifiable class requirement may be summarized as follows:
>
> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

> [Emphasis in original.]

[70] As previously noted, the proposed class definition in this application is:

> [I]ndividuals who Matthew Schwabe surreptitiously videotaped or photographed while using the washroom or staff room at [RBM's] grocery store, located at Mattick's Farm shopping plaza, 5325 Cordova Bay Road, Saanich, British Columbia.

[71] The plaintiffs say this proposed definition is sufficiently clear to allow a court to rule whether a person is in the class or not: if there is evidence that establishes on a balance of probabilities that they were recorded in the washroom or staff room by Matthew Schwabe, they are in the class. If there is no such evidence, they are not.

[72] RBM does not suggest there is not an identifiable class of the six individuals who have been identified. What it does focus on is the modest size of the class, at the most 13 persons (the six individuals identified and contacted by Saanich Police, and seven "potentially identifiable" persons).

[73] In this regard, while RBM acknowledges that the identity or precise number of class members need not be known in advance, it says "there must be a way of ascertaining whether a person is, in fact, a class member." RBM says that because the seven "unidentified individuals" are still unknown, and cannot "self identify" using the proposed class definition "at this juncture" they have no claim against RBM and should not be included in the class definition. As a consequence, the size of the class is at most six identified individuals.

[74] RBM also says there is no way the seven "potentially identifiable" persons can self-identify, given the proposed class definition. RBM says these as of now unidentified persons do not have a claim against RBM, and so should not be included in the class definition.

[75] Even though the plaintiffs say RBM's submission on this point matters not because there is clear evidence there is at least two persons who can self-identify as class members, the plaintiffs point out that the Saanich Police possess the images of the other seven individuals who are in the proposed class. They say that the fact that

Inspector Morgan of the Saanich Police Department has deposed that these seven individuals are "potentially identifiable" undermines RBM's submissions. According to the plaintiffs, RBM seems to suggest that any unidentified individuals should come forward prior to certification and notification. The plaintiffs submit that this position is "inconsistent with practically every class action", and that no issue arises from the fact that the identity of the currently unknown class members may not be determined until a later stage of the proceeding, sometime after circulation of notice and after the arrangement of a process for accessing the records from the Saanich Police Department. On this point, the plaintiffs rely on Chief Justice Bauman's explanation in *Jiang* at para. 100:

> … whether a particular individual may, as a matter of fact, be found to be within the class definition may require further inquiry in the administration phase of this class proceeding. But that in no way detracts from the fact that this class definition establishes objective criteria by which membership in the class may be determined.

[76] On this point I agree with the plaintiffs that this case is akin to *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, as referenced in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 where the Court observed that "even if class membership is not immediately evident to potential class members based on the class definition," extrinsic evidence "would serve to identify them as part of the identifiable class." (*Sun-Rype Products* at para. 62.) The plaintiffs submit that if the potentially identifiable individuals were shown the relevant images now in possession of the Saanich Police, they could self-identify with certainty as members of the class. I agree.

[77] In conclusion, I agree with the plaintiffs that the class definition meets the four criteria set out in *Jiang*, when determining whether the identifiable class requirement has been established. Notably, that the evidence adduced by the plaintiffs establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class, there is evidence before the court: that two or more persons (in this case, six) have individually suffered the harms pleaded; that other "potentially identifiable" persons fall within the

class definition; and there is a procedure whereby those "potentially identifiable" persons may be identified. Finally, the appropriate place to consider the size of the identifiable class is in the preferable procedure analysis.

[78] I find that there is an identifiable class of two or more persons.

The claims raise common issues

[79] Section 1 of the *CPA* defines "common issues" as:

> a) Common but not necessarily identical issues of fact, or
>
> b) Common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[80] The principles that inform the common issues component of the test for certification were summarized in *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361, where Justice Dickson noted at para. 22 that "the common issues requirement is often controversial". However, that is not the case here; during the certification hearing, RBM and the plaintiffs eventually agreed on the common issues, which are included in the plaintiffs' proposed terms of the certification order under Schedule A.

The preferable procedure

[81] In my view, the most compelling argument advanced by RBM in resisting the plaintiffs' application for certification is whether a class proceeding is the preferable procedure. In this regard, in *Finkel*, Dickson J. summarized the preferability analysis as follows:

> [24] The preferable procedure requirement is animated by the goals of class proceedings: behaviour modification, judicial economy and access to justice. It is governed by s. 4(2) of the *Class Proceedings Act*:
>
> > (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
>
> [25] Two questions predominate in a preferability analysis: (a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims and (b) whether a class proceeding would be preferable compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives. As to the first question, the common issues must be considered in the context of the action as a whole and their relative importance taken into account when preferability is determined. As to the second, the impact of a class proceeding on class members, the defendants and the court must be considered and a practical cost-benefit approach applied: *AIC* at paras. 21, 23; *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230; affirmed 2015 BCCA 252; leave to appeal dismissed [2015] S.C.C.A. No. 326 (S.C.C.).
>
> [26] In *AIC*, Justice Cromwell explained the analytical approach to the preferability issue from the access to justice perspective. In doing so, he noted that the preferable procedure requirement has interconnected substantive and procedural aspects. The substantive aspect is concerned with whether class members will receive a just and effective remedy if their claims are established; the procedural with whether they will have access to a fair process, bearing in mind the existence of economic and other possible barriers. As Chief Justice Strathy stated in *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, *AIC* requires the court to consider the barriers to access to justice; the potential of a class action to address those barriers; and the alternatives to a class action, including the extent to which the alternatives address the relevant barriers and how the two proceedings compare: *AIC* at paras. 4, 24, 27, 37-38; *Fantl* at para. 27.

[82] The plaintiffs say that in this case, the common issues that can be resolved in a common issues trial will move each of the plaintiff's claims "a long way forward" and these predominate over any questions that might affect only individual members, suggesting the determination of the common issues will essentially resolve the main elements of the liability inquiry: see *Pearson v. Inco Ltd.* (2006), 78

O.R. (3d) 641 (C.A.) at para. 71, leave to appeal to SCC ref'd, 31249 (29 June 2006). The plaintiffs say the issue is straightforward: RBM will be liable in negligence or pursuant to vicarious liability, or it will not.

[83] The plaintiffs emphasize that if liability is established, the only remaining individual issues will be the assessment of damages for each class member, including whether aggravated and punitive damages are warranted for some of the class members, a process that is "not unusual in class proceedings": *Pearson* at para. 77. On this point, I agree with the plaintiffs when they say that, although some variation will likely exist in individual trauma and outcomes in regard to the individual assessments of damages, "the facts underlying the damages claims are unlikely to be in dispute as they will turn on the police evidence of what recordings were made and what was done with them. As such, the assessments will centre on individual experiences and legal arguments as to the appropriate range of damages."

[84] With reference to s. 4(2)(c) of the *CPA*, these claims have not been the subject of any other civil proceedings, apart from a claim filed by one victim against Matthew Schwabe only (and not RBM) in small claims court shortly after this action was filed. The claim was then "suspended" or stayed a few months later, presumably due to Matthew Schwabe filing for bankruptcy.

[85] With reference to s. 4(2)(d) of the *CPA*, the only alternative to a class proceeding would be individual trials. Only the plaintiffs and four other victims from the criminal case would be capable of bringing individual trials at this point because the other seven victims have not been identified. The plaintiffs submit a class proceeding presents the only realistic way to protect and advance the claims of the currently unidentified parties.

[86] The plaintiffs acknowledge that the one factor that "potentially detracts" from the preferability of certification is that there are only 13 potential class members, assuming the police evidence that there are seven "potentially identifiable" persons who have had their images surreptitiously recorded by Matthew Schwabe is

accurate, in addition to the six who were identified for the purposes of the criminal prosecution.

[87] The plaintiffs maintain however that, although 13 is a small number of members for a class action, a class action would be the preferable procedure for the fair and efficient resolution of the common issues in these particular circumstances.

[88] In this regard, the plaintiffs acknowledge that where a proposed class is small, the court's concern is that the case might not justify employing the "'machinery' of a class proceeding", relying on *Ward-Price v. Mariners Haven Inc*. (2002), 36 C.P.C. (5th) 189. In that particular case, Justice Nordheimer stated:

> [39] … It is inherently problematic, in my view, to contemplate unleashing the full panoply of procedural requirements which arise in a class proceeding for the purpose of determining the claims of a small group of proposed class members. I refer in this regard to the notice requirements, the opting out process, the restrictions on discovery rights and like matters. Simply put, the smaller the membership of the proposed class, the more difficult it is to see a class proceeding as accomplishing the goal of judicial economy.
>
> [40] Having said that, I am nonetheless mindful of the fact that section 5(1)(b) expressly states that an action may be certified as a class proceeding if there is an identifiable class "of two or more persons". It may be taken from that provision that the Legislature contemplated that there might be class proceedings where the number of members of the class would be fairly small but concluded that that fact, by itself, should not pose a barrier to certification. My concerns nevertheless remain on this point, mainly because there remains the prospect that the class may shrink even further as a result of opt outs. On balance, however, I have concluded that the mere possibility of that occurring is an insufficient reason to deny certification. If it should turn out that, after the number of opt outs are known, the size of the class has been significantly reduced, the defendants have the right to move to decertify the proceeding under section 10 of the Act.
>
> [41] In the end result, the determination of the common issues on behalf of all twenty-four members of the proposed class still realizes an economy over having those issues determined individually. I am satisfied therefore that the goal of judicial economy is met through a class proceeding.

[89] To this point, the plaintiffs submit as follows:

> In the case at bar, the full panoply of procedures referred to by Justice Nordheimer, being "the opting out process, the restrictions on discovery rights and like matters" are not particularly onerous. As can be seen in the litigation plan, the primary challenge will be notifying and identifying the seven unidentified class members as a result of the position taken by the [Saanich

> Police Department]. That issue militates in favour of a class proceeding: the likely alternative *without* the "machinery" of a notification stage is that the currently-unidentified class members would *never* be identified. Apart from that issue, however, the common issues trial followed by damages assessments will be relatively straightforward in terms of procedure. There appear to be no subclasses, the case does not engage other jurisdictions and there will be no need for a class action administrator to be appointed. The common issues will determine liability as against RBM and it appears the claims against Mr. Schwabe will be resolved by default. In large part, the difference in procedure between a class proceeding and ordinary actions will be the separation of the common issues trial from the individual assessments. Weighed against potentially having 13 separate trials, the class proceeding is considerably less burdensome on the civil justice system. Weighed against an outcome whereby all or some of the unidentified victims will lose an opportunity for recourse if a class action is not certified, the interests of justice favour a class proceeding.

[90] RBM does not agree. As I have mentioned, the principal concern of RBM is the small size of the proposed class. RBM understandably emphasizes the class currently stands at six individuals, with seven other potentially identifiable individuals who were recorded. As a result, RBM submits that given the small number of potential class members it is hard to imagine why a class proceeding is advantageous in terms of preferable procedure. RBM says that once the relative merits of class and standard proceedings are assessed, certifying this action does not achieve the goals of judicial economy, access to justice, or behaviour modification.

[91] RBM also suggests that if no further individuals are identified, it is almost a foregone conclusion its anticipated future application to de-certify would be successful, thereby incurring further court time and client expense. In response, counsel for the plaintiffs alludes to the possibility the plaintiffs would consent to de-certification if the class remains as the six individuals who have been identified by the Saanich Police and were the complainants in the criminal proceeding. This, however, is certainly not a foregone conclusion. Having secured certification of the proceeding, the plaintiffs could very well resist any de-certification application brought by RBM.

[92] Perhaps most significantly, RBM submits that a class proceeding is not the preferable procedure because any person who had their images taken and distributed can have access to justice by way of an individual action. RBM says those claims could then be joined into a single action, thereby undermining the plaintiffs' submission that without certification there would be several individual trials, as opposed to one proceeding.

[93] RBM submits the *Rules* provide a straightforward solution to the plaintiffs' concerns about access to justice, noting that by joining any individual actions under R. 6-2(7), the potential for several separate trials would be eliminated. RBM emphasizes that is a procedure specifically contemplated in *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, aff'd 2015 BCCA 252, leave to appeal to SCC ref'd, 36584 (17 March 2016).

[94] As far as the question of joinder is concerned, the plaintiffs submit that the process would not be as fluid as RBM suggests. The plaintiffs submit that at best, and "only assuming a series of contingencies which may or may not ever come to pass, joinder might get to the same place as a class proceeding", yet "we are far from that place today."

[95] The plaintiffs suggest there are "procedural and practical hurdles to joinder at this time", including that the plaintiffs must:

- First be identified (which for the unidentified individuals is unlikely without the discovery mechanisms and legal representation that those victims benefit from in a class action while they are unidentified),
- Retain counsel,
- Commence proceedings, and then
- Apply for joinder (which may or may not be contested),

and only then can joinder be ordered by the court.

[96] The plaintiffs state:

> In view of these obstacles, the court should not dismiss this application with the expectation that joinder will be pursued as an alternative. To get there from here would first require this certification application to be dismissed,

> which would turn the claim into an ordinary action with two plaintiffs (Ms. Madill and Ms. Fulmore). The other victims would be left unrepresented and would have to independently determine how they wished to proceed, commence proceedings and perhaps, as a matter of good will and commitment to seeing wrongdoers held to account, incur the cost and effort of trying to locate and identify other victims (because there would be no personal incentive for doing so).
>
> By contrast, within a class action, the victims (identified and unidentified) have their interests protected by the duties placed on the representative plaintiffs, their lawyers and the court, and those protections remain until they either cannot be identified or choose to opt out.

[97] The plaintiffs submit that the prospect of civil justice for the potentially identifiable victims will be greatly enhanced if the action is certified. As the plaintiffs say, "If the action is certified, then there will be a solicitor-client relationship between the class members and class counsel: *Brazeau v. Canada (Attorney General)*, 2021 ONSC 8158." As a result, I agree with the plaintiffs that the case for disclosure of the images in the possession of the Saanich Police will be significantly stronger, given the application would then be advanced by "the unidentified victims own counsel acting on their behalf."

[98] Given the position taken by the police, endorsed by RBM, not to disclose these images, I accept the plaintiffs' assertion that if the action is not certified, there is a significant risk that the unidentified victims will not be identified at all, for the simple reason those images would not be relevant to an ordinary action pursued by J.M. and M.F.

[99] At the same time, as emphasized by Cromwell J. in *AIC*, when considering an application for certification, the court is required "to consider the barriers to access to justice". In this regard, the plaintiffs point out that certification of their action provides protection from adverse costs awards under s. 37 of the *CPA*, "such that they are not exposed to costs through to the end of the common issues at trial, which in this case will dispose of a significant portion of their claims."

[100] The plaintiffs emphasize that even with joinder, given the potential for significant future procedural matters, including examinations for discovery, the cost consequences could be substantial, especially where the proposed class is

comprised of relatively young individuals who likely will have relatively modest financial resources. (See: *Antoniali v. Coquitlam (City)*, 2005 BCSC 1310.)

[101] The plaintiffs emphasize that "joinder introduces the possibility of exposure to costs and other monetary obstacles that are not present in class proceedings and that work against the goal of access to justice": *Kirk v. Executive Flight Centre Fuel Services*, 2021 BCSC 987 at para 46. As the court said in *Jastram Properties Ltd. v. HSBC Bank Canada*, 2021 BCSC 2204, aff'd *LaSante v. Kirk*, 2023 BCCA 28, joinder "burdens the plaintiffs with extensive and expensive discovery prior to trial" (para. 94) and with numerous individual plaintiffs, possibly numerous examinations for discovery.

[102] The significance of the costs issue was clearly recognized by RBM when counsel "agreed" not to seek costs against individual victims of Matthew Schwabe's unlawful activities, if at the end of a regular trial, their claims were not successful.

[103] RBM says this concession goes a long way in undermining the plaintiffs' submission that a class action better suits the pursuit of justice for these persons who have had their privacy invaded. The plaintiffs appreciate the gesture at this juncture, but question the enforceability of the offer in the future, if the matter is not certified and the claims are unsuccessful, stating, "It is by no means clear that waiving rights within a submission in this manner is possible, and while respecting the assurances of counsel, it is also not clear what instrument could make such an assurance enforceable and binding on the individual proceedings that follow the dismissal of certification. It must also be remembered that Mr. Schwabe is also a defendant, and any assurances given in relation to costs by RBM would not be binding as against him, if he subsequently chose to participate."

[104] Finally, RBM submits that while not overwhelming, given the relative lack of complexity in this particular case, there are more procedural steps in a class action than in a regular civil claim. On this point, the plaintiffs suggest both procedures would have some overlap and might not, in and of themselves, favour one proceeding over the other.

[105] Having considered all of the circumstances and the statutorily-mandated factors found in s. 4(2) of the *Act*, I am persuaded that the broader rationale underpinning class proceedings weighs in favour of certification. Specifically, the principles weighing in favour of certification are those of access to justice for these individuals who have had their images surreptitiously recorded and disseminated, as well as the potential for behaviour modification on the part of an employer, *vis-à-vis* the alleged inappropriate sexualized culture in the workplace, even though I appreciate an award of damages in individual actions could promote behaviour modification. In the end, I am persuaded certification will provide all class members with access to a fair and manageable hearing, a just and effective remedy if their claims are established and is preferable to multiple individual actions, whether or not they are joined or consolidated. (*Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 28.)

Suitable representative plaintiffs

[106] Pursuant to s. 4(1)(e) of the *CPA*, the court must be satisfied that the representative plaintiff: (a) would fairly and adequately represent the interests of the class, (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[107] Given the totality of the evidence, I am satisfied both J.M. and M.F. are capable of fairly and adequately representing the interests of the class; they have endeavoured to move this litigation forward by prosecuting the claim and instructing counsel, and have produced a workable plan for advancing the proceeding and giving proper notice to class members. Finally, based on the record, the plaintiffs do not have any conflicts on the common issues, or otherwise, with the interests of the other class members.

[108] There is no doubt J.M. and M.F. are suitable representative plaintiffs.

Conclusion

[109] The plaintiffs' application for certification is allowed.

"The Honourable Mr. Justice B.D. MacKenzie"