# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reichert v. Attorney General of Canada,* 2024 BCSC 2131

Date: 20241122
Docket: S158405
Registry: Vancouver

Between:

**David Reichert and Derrick Ross**

Plaintiffs

And

**The Attorney General of Canada, The Minister of Justice and Attorney General of British Columbia, Bob Paulson, Craig Callens, Maxine Schwartz, Paul Darbyshire, Brad Hartl, Roland Bowlman, Isabelle Fieschi, Daniel Dubeau, Ray Bernoties, Judy Le Page, Jane Doe, John Doe, Among Others**

Defendants

Before: The Honourable Justice Thomas

## Reasons for Judgment

| | |
|---|---|
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| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>October 7-11, 2024 |
| Place and Date of Judgment: | Vancouver, B.C.<br>November 22, 2024 |

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## Overview

[1] This is an application to have the action certified as a class proceeding.

[2] Mr. Reichert and Mr. Ross are the proposed representative plaintiffs.(the "plaintiffs"). They are members of the RCMP (the "defendant"). Between 2007 to 2012, the plaintiffs received care from Dr. Mike Webster, a registered psychologist, through the RCMP's health benefit plan.

[3] In or about 2011, the RCMP internally raised concerns about Dr. Webster. Subsequently and unbeknownst to the plaintiffs, the RCMP accessed the plaintiffs' health information in order to make a complaint against Dr. Webster to the College of Psychologists of British Columbia (the "College"). The RCMP then disclosed their health information to the College as part of the complaint process.

[4] The plaintiffs allege that the complaint was for an improper purpose, such that the RCMP's use and disclosure of their health information was unlawful and actionable.

[5] They bring these claims on behalf of other RCMP members who received care from Dr. Webster through the RCMP whose health information was improperly accessed in order to make the complaint and/or disclosed to the College as part of the complaint process.

[6] They also allege that the RCMP improperly accessed their health information and disseminated it throughout the RCMP, outside of the complaint process.

## Certification Requirements

[7] Section 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] lists the requirements to be met for certification of a class proceeding:

> **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.



[8] If all of the requirements in s. 4(1) are met, the court must certify the action. Certification of an action as a class proceeding is not a comment on the merits of the claim, but rather, a determination of whether the action can appropriately move forward as a class proceeding: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102 [*Pro-Sys*]. As a certification application is not a test of the merits of the claim, it is largely procedural in nature: *Chow v. Facebook, Inc.*, 2022 BCSC 137 at para. 9 [*Chow*]. Certification criteria are evaluated generously, with the aim of furthering the principal goals of class actions: behaviour modification, judicial economy and access to justice: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 109, Justice Karakatsanis dissenting, citing *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 14–15 [*Hollick*].

[9] Justice Francis summarized the legal principles governing the certification analysis 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 subsection 4(b) – (e), the plaintiff must show "some basis in fact" to establish that the certification requirements have been met. In determining whether this standard has been met, the court

> should not engage in any detailed weighing of evidence at the certification stage but should confine itself to whether there is some basis in the evidence to support the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43.

[10] While a plaintiff must demonstrate a cause of action that is not bound to fail and must show some basis in fact to establish the remaining s. 4(1) criteria, "a deep dive into the evidence is neither necessary nor warranted": *Chow* at para. 9. However, while certification is generally a low hurdle, it is nonetheless a hurdle and must be a "meaningful screening device": *Pro-Sys* at para. 103. A judge hearing a certification application has an important gatekeeping role to ensure that only claims in the common interest of class members are advanced: *Chow* at para. 10.

[11] The proposed representative plaintiffs must show that they are able to represent the class fairly and adequately, has a workable plan for advancing the proceeding, and will represent the interest of the class vigorously and without any conflict of interest on the common issues: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 27 [*Finkel*].

**Section 4(1)(a) – Cause of Action**

[12] The representative plaintiffs put forward the following causes of action against the defendants:

a) breach the proposed class members' privacy rights in violation of the *Privacy Act*, R.S.B.C. 1996, c. 373;

b) the common law tort of breach of privacy; and

c) the common law tort of negligence.

[13] The plaintiffs also claim that they, and the class, suffered not only a breach of privacy, but individualized harm resulting in general damages and loss of income.

**Section 1 of the *Privacy Act* – Violation of Privacy**

***Sufficiency of Pleadings***

[14] I note there is an abundance of authority stressing that at this stage in the proceedings, parties ought not to be precluded from the opportunity to advance a case on the merits because of technical deficiencies in the pleading, where otherwise the intent to advance a proper cause of action is evident or can be inferred: *James v. Johnson & Johnson Inc*., 2021 BCSC 488 at para. 110, aff'd 2022 BCCA 111; *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 24.

[15] Notwithstanding these principles, the causes of action advanced by the plaintiffs in their pleadings and various amendments, and further specified in their certification materials, evolved throughout the hearing. Although in my view the filed materials were inadequate, appropriate steps were taken such that it was possible to assess the action being advanced by the plaintiffs in the hearing.

[16] The defendants are to be commended for their patience and adaptability under difficult conditions that were not of their making.

[17] During the hearing, it became apparent that the action being advanced consisted of the following facts:

a) the proposed class members were receiving treatment by Dr. Webster through the RCMP;

b) the RCMP wished to retaliate against Dr. Webster for his public comments that were critical of the RCMP;

c) part of the retaliation involved a complaint being made against Dr. Webster to the College; and

d) in order to make the complaint, the RCMP reviewed the class members' health information and then disclosed the information to the College.

[18] The plaintiffs say that the review and disclosure of their information to the College was for an improper purpose such that the conduct violates s. 1 of the *Privacy Act*:

> **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.

[19] Section 1 establishes a statutory tort requiring proof of the following elements:

a) a person;

b) willfully;

c) without a claim of right; and

d) violated the privacy of another.

***A Person***

[20] The *Privacy Act* does not define the meaning of a “person”, and as such, I look to the *Interpretation Act*, R.S.B.C. 1996, c. 238. Section 29 of the *Interpretation Act* provides that a “person” includes “a corporation, partnership or party, and the personal or other legal representatives of a person to whom the context can apply according to law”. Thus, there is no issue that the RCMP and their employees constitute a person under the *Privacy Act*.

***Wilfully***

[21] Lambert J.A. assessed the meaning of the term “wilfully” as used in s. 1 of the *Privacy Act* in *Hollinsworth v. BCTV* (1998), 59 B.C.L.R. (3d) 121, 1998 CanLII 6527 (B.C.C.A.) [*Hollinsworth*]:

> [29] I turn first to the word "wilfully". In my opinion the word "wilfully" does not apply broadly to any intentional act that has the effect of violating privacy but more narrowly to an intention to do an act which the person doing the act knew or should have known would violate the privacy of another person.

[22] Our courts have not drawn a parameter around the definition of “willfully” as used in the *Privacy Act*: *G.D. v. South Coast British Columbia Transportation Authority*, 2024 BCCA 252 at para. 87 [*South Coast*]. It must, however, be interpreted “not in the abstract, but in relation to the alleged violation of privacy”: *South Coast* at para. 116.

***Without Claim of Right***

[23] In *Hollinsworth*, the Court of Appeal affirmed that “a claim of right” means “an honest belief in a state of facts which, if it existed, would be a legal justification or excuse”: at para. 30.

[24] In *Situmorang v. Google, LLC*, 2024 BCCA 9, the Court of Appeal accepted that, per Rule 3-7(17) of the *Supreme Court Civil Rules*, simply pleading that a defendant acted “without a claim of right” was sufficient to establish this element of the cause of action: at para. 84. This is because Rule 3-7(17) provides that “[i]t is sufficient to allege malice, fraudulent intention, knowledge or other condition of the mind of a person as a fact, without setting out the circumstances from which it is to be inferred” (emphasis added). A “claim of right” involves an “honest belief”, and is therefore, a “condition of the mind” captured by the rule.

[25] The plaintiffs have pleaded in their further amended notice of civil claim (“FANOCC”) that:

> 10. …the Defendants unlawfully reviewed and disclosed their private and confidential psychological counselling records for an improper purpose and without their prior knowledge and consent...

[26] Further particulars are set out in paras. 67 and 71 of the FANOCC. Paragraph 67 sets out the following under the heading of negligence by the RCMP:

> (a) unlawfully reviewing and using the Plaintiff's private confidential psychological counselling records and information for a purpose other than that for which they were disclosed to the Defendants without the Plaintiffs' knowledge and express consent or as otherwise permitted by law;
>
> (b) unlawfully disclosing the Plaintiffs' private, confidential medical records and information to the College and others, including within the RCMP and media, without the Plaintiffs' knowledge and express consent or as otherwise permitted by law;
>
> (c) failing to adequately and properly supervise its employees, agents or servants;
>
> (d) failing to have and implement adequate legislation, policies, procedures, Code of Conduct and guidelines to ensure the Plaintiffs' and Class Members' privacy rights were upheld and that the confidential records and information were stored securely and not subject to unlawful use and disclosure by the Defendants;
>
> (e) failing to properly investigate allegations of privacy breaches in the workplace in a thorough, timely and impartial manner; and
>
> (f) failing to take any steps at all to remedy the alleged privacy breach in a timely and meaningful manner; or, in the alternative, by failing to take all reasonable steps to remedy the alleged privacy breach in a timely and meaningful manner.

[27] Paragraph 71 of the FANOCC sets out the following under the heading of negligence by members, Crown employees, and agents:

> (a) engaging in a practice that deprived and comprised [*sic*] the Plaintiffs and Class Members of their right to privacy;
>
> (b) failing or neglecting to adhere to the requisite legislation, policies, procedures, Code of Conduct and guidelines with regards to Members' access to health care, and the corresponding obligations regarding the use and disclosure of confidential medical records;
>
> (c) failing to adequately investigate the allegations of privacy breaches in a thorough, timely and impartial manner;
>
> (d) failing to comply with s. 37 of the *RCMP Act*;
>
> (e) failing to hold accountable those found to be in breach of the legislation, policies, procedures, Code of Conduct and guidelines;
>
> (f) failing to adequately supervise Members, RCMP officers, managers and employees; and

> (g) targeting and harassing the Plaintiffs because they were under the care of Dr. Webster, whose contract for services had been terminated by the RCMP.

[28] In my view, these pleadings are sufficient to satisfy the wilfully without claim of right elements of the *Privacy Act*.

***Violation of Privacy***

[29] The defendants say the plaintiff's information was provided to the RCMP by Dr. Webster and that some of the information has been made publicly available by the plaintiffs. Therefore, the information is not private because it was disclosed to the RCMP by a third party and some of the information was already public.

[30] This argument overlooks the purposive and contextual approach required to assess privacy under the *Privacy Act*. Section 1(2) of the *Privacy Act* provides that the "nature and degree of privacy to which a person is entitled … is that which is reasonable in the circumstances, giving due regard to the lawful interests of others." Further, s. 1(3) requires the court to consider "the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties" when determining whether a defendant's conduct violates someone's privacy.

[31] The Court of Appeal affirmed in *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331 [*Ari*] that the contextual approach required to assess privacy violations under the *Privacy Act* prohibits the court from simply finding that prior disclosure of some information to some persons means that no privacy interests remain in the control of that information: at para. 87. The ability to control the nature and degree of any potential further disclosure may appropriately fall within one's reasonable expectation of privacy: *Ari* at para. 88. The fact that information is publicly available is merely relevant to—not determinative of—the violation of privacy analysis: *Ari* at para. 89. The court must consider all relevant circumstances.

[32] In this case, the information is clearly personal health information which in my view is *prima facie* private. Even if this were not the case, a contextual approach is necessary. The purpose for which the information was provided, how and for what

purpose the defendants used the information, and the lawful interests of others in controlling the information, among others, are all also important considerations in this analysis.

[33] It is conceded that the RCMP had policies and guidelines enacted to ensure that the information provided was kept private and would only be accessed for limited purposes. In this case, the plaintiffs allowed their health information to be provided to the RCMP pursuant to the RCMP policy and guidelines. The pleadings allege a violation of the policy and guidelines that the RCMP established to keep health information private.

[34] In my view, this is sufficient to satisfy the violation of privacy element of the *Privacy Act*.

***Statutory Exceptions***

[35] There are a number of potential statutory defences available to the defendants. Although they may ultimately provide a complete defence to some or all of the allegations, they are not relevant to the viable cause of action analysis in these circumstances. There are defences that, if established, may ultimately impact the success of the plaintiffs' action. These defences, however, are not sufficient to offset the viability of the cause of action.

***Damages***

[36] In addition to pleading damages for the breach of privacy, the plaintiffs also advance the following claims under the *Privacy Act*: general damages for psychiatric conditions caused or aggravated by the breach of privacy; and pecuniary damages for loss of income, opportunity to earn income and expenses.

[37] At this stage of the proceedings, it appears that these damages form a part of a viable cause of action. At para. 54 of *Campbell v. Capital One Financial Corp.* , 2024 BCCA 253 [*Campbell*], the Court of Appeal recognized that general or compensatory damages are available under the *Privacy Act*. This issue was also considered by this court in *Watts v. Klaemt*, 2007 BCSC 662.

**Breach of Confidence**

[38] The three elements of a breach of confidence claim are that the information shared was:

a) confidential;

b) communicated in confidence; and

c) misused by the party receiving it to the detriment of the party who communicated it.

*Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 1989 CanLII 34 at 608.

[39] The defendants concede the first two elements but argue that the plaintiffs have insufficiently pleaded the third element. In my view, however, the previously referred to pleading with respect to damages are sufficient to establish this aspect of the claim.

**Negligence**

[40] The four elements of a negligence claim are that: (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.

[41] The defendants concede that the plaintiffs disclosed a cause of action on negligence with respect to the review and disclosure of the plaintiffs' information to the College. This cause of action in negligence is consistent with the findings of this court in *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 rev'd in part 2020 BCCA 246.

[42] I note that the defendants concede only the cause of action for the allegations that a claim in negligence exists for the class members whose unredacted health information was accessed and disclosed to the College in 2012. In my view, however, I see no reason to treat this aspect of the claim differently from those whose information was accessed but not disclosed to the College.

[43] The pleadings are sufficient to establish this claim as a viable cause of action as well.

### Claims for Additional Disclosure and Dissemination of Health Information

[44] In addition to the allegations arising from the review and disclosure of records associated with the complaint against Dr. Webster, the plaintiffs allege that the defendants accessed and then disseminated their health information throughout the RCMP for improper purposes.

[45] The plaintiffs did not plead any specific circumstances. The plaintiffs provided some evidence of a discrete incident, in which personnel from the RCMP's Health Services Office (the "HSO") suggested that the supervisor of a potential class member had contacted the HSO about whether travel was appropriate for said member. The plaintiffs suggest that this incident shows that the health information for the member may have been disseminated to one member of the RCMP. I do not see how this example could be applied to the proposed class of individuals.

[46] In my view, the pleadings for additional disclosure and dissemination of health information within the RCMP do not have a sufficient concrete factual basis upon which a class action may be grounded. The plaintiffs have had more than ample opportunity to provide a sufficient factual basis. They have failed to do so.

[47] Even at this certification stage, where I recognize that the criteria are to be evaluated generously and a deep dive into the merits of the case are unwarranted, pleadings must still consist of more than bare allegations unsupported by material facts. In *K.O. v. British Columbia (Ministry of Health)*, 2022 BCSC 573, aff'd 2023

BCCA 289 [*K.O.*], Justice Baird dismissed an application for certification on multiple grounds, one of which was that the pleadings were inadequate. The pleadings in *K.O.*, which is reproduced in part at paras. 14–17, consisted of broad and generalized claims about the state of healthcare in British Columbia, unsubstantiated experiences with barriers to healthcare, and inadequate treatments.



[48] In dismissing the application in *K.O.*, Baird J. stated as follows:

> [23] I am not obliged to assume that bare allegations or conclusory statements are true: *Stephen v. British Columbia (Ministry of Children and Family Development)*, 2008 BCSC 1656 at paras. 49 and 60; *Sidhu v. Canada (Attorney General)*, 2016 YKCA 6 at paras. 15-17. The pleadings must disclose a concrete factual basis upon which the defendant could be said to have failed K.O. in the discharge of the legal obligations alleged. It is not enough to assert without resort to subjective material facts that a given state of affairs exists and then to propose that it gives rise to an actionable claim for personal injury, infringement of individual *Charter* rights, and compensatory damages: see, for example, *Canadian Bar Assn. v. British Columbia*, 2008 BCCA 92, especially at paras. 50-51.
>
> [24] With all due respect, the pleadings do not reveal a case analogous to *Rumley v. British Columbia*, 2001 SCC 69, or *Fullowka v. Pinkerton's of Canada Ltd.*, 2010 SCC 5, in which specific tortious acts were alleged to have been committed by identified persons who were enabled in their wrongdoing by the failure of reasonably diligent oversight by a defendant who owed a duty to provide it. The present pleadings instead make a generalised, abstract claim that the healthcare system comprehensively fails to serve all mentally ill British Columbians without exception. While I do not doubt that mental healthcare in this province could be improved and even dramatically so, the legal reality in a private lawsuit is that systemic failures such as those alleged here must be linked to concretely pleaded factual allegations of fault, causation and harm.

[49] The pleadings in this matter do not reach that same degree of conclusory statements and bold pronouncements on systemic matters as in *K.O.*, but they do suffer from the same fatal defect; they lack a sufficient factual basis for certification.

[50] The inadequacy in the pleadings also creates the same flaw as Chief Justice Hinkson (as he then was) identified in *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371, namely, that broad allegations require the pleadings to be adequately specific and clear to guide the defendants and the court: at paras. 146–147, 196.

[51] As such, I do not find that the plaintiffs have sufficiently pled this claim.

**Punitive Damages**

[52] The defendants say the claim for punitive damages must be pleaded with particularity. They argue that the plaintiffs' pleadings are too broad and conclusory to support a claim for punitive damages, and as a result, this claim is bound to fail.

[53] At the certification stage, it is generally inappropriate to comment about the range of possible findings of the trial judge following a common issues trial. The plaintiffs have pleaded that the defendants improperly and unlawfully accessed and disseminated their information to make a complaint against Dr. Webster to the College. Further particulars could be provided should the litigation progress.

[54] If the trial judge finds that an identifiable subset of class members did not suffer such a loss, the trial judge can exclude those members from participating in the award of damages. See *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at paras. 153–157.

[55] In my view, within this context, the plaintiffs have sufficiently pled the claim for punitive damages.

**"Some Basis in Fact"**

**Legal Requirement**

[56] The plaintiffs must show there is some basis in fact to establish that the remaining certification requirements set out in ss. 4(1)(b) to (e) have been met.

[57] The trier of fact must ensure that there is a minimum factual foundation to support the certification order. The level of evidence required is highly fact-specific, but it is a low threshold that can be best understood as being in contrast to "no basis in fact": *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187 at paras. 100–104, leave to appeal to SCC ref'd, 38784 (19 December 2019).

**Evidence Provided**

[58] Due to the nature of the affidavit evidence and improper application materials, the evidence in exhibits attached to the affidavits was limited and confined to evidence set out in Exhibit A.

[59] There are three areas of dispute as to whether there is some basis in fact:

a) that the complaint was made for an improper purpose;

b) that additional members' health information was reviewed during the complaint process and was disclosed to the College; and

c) that health care information was accessed and disseminated throughout the RCMP on a class-wide basis for improper purposes outside of the complaint process.

***Improper Purpose***

[60] There is evidence that:

a) The RCMP had received a number of complaints from members about public statements critical of the RCMP made by Dr. Webster and stating that he should no longer be employed by the RCMP for making these statements;

b) The RCMP shared these concerns with Dr. Webster;

c) Dr. Webster was advised that he had been removed from the list of psychologists because of statements that were critical to RCMP management and front-line RCMP members;

d) The complaint to the college focused on public statements made by Dr. Webster critical of the RCMP; and

e) Dr. Webster's patients were vulnerable, their clinical condition might deteriorate and some might even become suicidal if the RCMP pursued their complaint and termination of Dr. Webster's services.

[61] The defendants' say this evidence:

a) is taken out of context;

b) can be explained; and

c) has alternative explanations consistent with good faith conduct.

[62] In my view, these are all issues that can be fully explored should the action proceed. The evidence that I have summarized forms a basis in fact for their allegations that their health care information was accessed for an improper purpose; namely to retaliate against Dr. Webster for publicly criticizing the RCMP.

***Number of Member's Information Reviewed for the Complaint***

[63] The plaintiffs rely on handwritten notes obtained through an access to information application from which one could infer that at the time of the complaint, all of Dr. Webster's patients within the RCMP would be reviewed going back five years and that as of August 2, 2012 he was currently seeing seven patients.

[64] In addition, Dr. Rowland, a regional psychologist with the RCMP, had access to members' health care information as part of his role within the RCMP. He provides affidavit evidence that during the complaint process:

a) he accessed seven members' health information and provided some of their unredacted health information to the College;

b) he had access to the other RCMP members' health information who had received treatment by Dr. Webster during the complaint process; and

c) he does not recall if he reviewed other members' health information or if he relied upon his pre-existing familiarity with the health information contained in the RCMP records.

[65] In my view, a reasonable and logical inference to make at this stage is that Dr. Rowland required either access to, or knowledge of, more than the records of the

seven members whose information was disclosed to the College in researching and drafting the complaint.

[66] Considering Dr. Rowland's evidence in light of the information contained in the notes, in my view there is some basis in fact to support the allegation that more than the seven members' health information was directly accessed in the complaint process.

[67] In addition, in my view, the question of whether using knowledge initially obtained with an appropriate purpose for a subsequent inappropriate purpose constitutes a violation of the *Privacy Act,* breach of privacy, or negligence, is a question that requires a complete factual analysis. I would not preclude this possibility at this stage of the proceedings. Under this analysis, Dr. Rowland's evidence alone is sufficient to provide some basis in fact that other RCMP members' information was reviewed as part of the complaint process.

### *Information Accessed and Disseminated Outside of the Complaint Process*

[68] The plaintiffs have provided some evidence where individual information was accessed in discrete circumstances and dissemination within the RCMP outside of the complaint process. This does not support their allegation of class-wide conduct against other potential class members, or even that such conduct occurred with respect to the representative plaintiffs. The plaintiffs have provided no evidence which would satisfy the "some basis in fact" criteria for access and dissemination of health information for an improper purpose throughout the RCMP outside of the complaint process that would support a class proceeding.

[69] I have found that the broader allegations of improper access and dissemination of health information throughout the RCMP outside of the complaint process have not been properly pled for purposes of a class action. If I was mistaken on this finding, in my view there is also no basis in fact supporting these broader allegations.

## Section 4(1)(b) – Class Description

### General Principles

[70] As Chief Justice Bauman (as he then was) outlined in *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82, the principles governing the identifiable class requirement of s. 4(1)(b) are 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.]

### Proposed Classes

[71] The representative plaintiffs propose the two class descriptions:

> Members of the RCMP who were patients of Dr. Webster from 2007 to 2012 and whose confidential medical records were reviewed for the purpose of the complaint made against Dr. Webster to the College; and
>
> Members of the RCMP who were patients of Dr. Webster from 2007 to 2012 and whose confidential medical records were sent to the College for the purpose of the complaint made against Dr. Webster.

### Concerns Raised by the Defendants

[72] The defendants say the former class description is inappropriate because potential members do not know whether their health information was reviewed by the RCMP during the complaint process. They note that even Dr. Rowland does not know what information was directly accessed.

[73] In my view, there is no merit to this objection. Potential members can self-identify through knowledge that their health information was provided to the RCMP by Dr. Webster within the specified time period.

[74] The issue of which members' information was accessed during the complaint process is an issue of fact that is solely within the purview of the defendants. It may be that this subclass has to be further defined after discoveries or a ruling on whether direct or indirect access to the information is required to establish a cause of action.

[75] In my view, there is some evidence in fact to support the ability of potential members to self identify as class members and later prove they are members of the class.



## Section 4(1)(c) – Common Issues

### General Principles

[76] Section 4(1)(c) requires that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 65 [*Kirk*]. A common issue "is one whose resolution will avoid duplication of fact-finding or legal analysis" and "need not be determinative of liability and may leave many individual issues to be decided, provided that its resolution advances the litigation for (or against) the class": *Kirk* at para. 65. An issue is not common if it is "dependent upon individual findings of fact that have to be made with respect to each class member": *Kirk* at para. 65.

[77] The test can be applied flexibly, and a "common question may require nuanced and varied answers based on the individual members": *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 46. Nonetheless, the plaintiffs must still provide "some evidence that the proposed common issue can be answered on a class-wide basis": *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22 at para. 57.

### Concerns Raised by the Defendants

[78] The defendants say that an assessment of damages under all viable causes of action are not suitable as a common issues.

***Damages Sought are Inherently Individualized***

[79] There is no question that the damages sought in the negligence action cannot be assessed on an aggregate basis and will require an individual assessment. This is essentially conceded in the proposed common issues.

[80] With respect to damages sought for breach of the *Privacy Act* and the tort of breach of confidence, these are not the typical claims brought under these causes of action. The damages sought here extend beyond “moral damages” and include individualized claims for compensatory damages for harm and loss of income. I refer to moral damages as defined by our Court of Appeal in *Campbell* at paras. 49–54.

[81] Although moral damages can be assessed on an aggregate basis for common breaches of privacy; given the paucity of jurisprudence surrounding claims advancing damages for moral, general and pecuniary damages inclusively under these causes of action; in my view, it would be inappropriate to assess moral damages on an aggregate basis in these circumstances given the potential interrelationship with other damages sought.

## Section 4(1)(d) – Preferable Procedure

### General Principles

[82] Section 4(1)(d) requires a class proceeding to be the preferable procedure for the fair and efficient resolution of the common issues. In making this determination, the court must consider all relevant matters, including the following factors listed in s. 4(2):

> (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.

[83] The court must consider these factors through the lens of the three principle objectives of class proceedings—that is, judicial economy, access to justice and behaviour modification: *Hollick* at para. 27.

[84] The preferability analysis requires the court to consider whether a class proceeding would be a fair, efficient and manageable method of advancing the claims when compared with other realistically available means for their resolution. As a result, this analysis warrants a practical cost-benefit approach: *Finkel* at para. 25.

[85] Justice Blake recently discussed how to balance the importance of resolving individual issues with the preferability of class proceedings in *Lam v. Flo Health Inc.*, 2024 BCSC 391:

> [227] Even if there are important individual issues for resolution, a class action proceeding may still provide significant advantages in judicial economy and efficiency. In the right circumstances, they may provide simplified structures and procedures for resolving those individual issues, as compared to a multiplicity of individual civil actions: *Scott v. TD Waterhouse Investor Services (Canada) Inc.,* 2001 BCSC 1299 at paras. 116, 137–140. Section 27 of the *CPA* sets out how individual issues may be determined, and s. 27(3) directs the court to "choose the least expensive and most expeditious method of determining the individual issues that is consistent with justice to members of the class or subclass".

**Factors Considered in the Analysis**

***Alternative Procedure***

[86] RCMP members are entitled to a disability pension if they suffer from a diagnosed medical condition resulting in a disability (related to their service), or if they are receiving a disability pension for an underlying medical condition and the disability increases (related to their service), they are entitled to an increase in their disability pension.

[87] The defendants say that the disability pension process, which would occur under the *Pension Act*, R.S.C. 1985, c P-6, would be a preferable means for the plaintiffs and the proposed class of plaintiffs to receive compensation for injuries alleged to have been suffered in the actions. They note there are several advantages to pursuing this route, including:

a) there is no limitation period to seek compensation;

b) there is no requirement for establishing fault;

c) legal assistance is available at no cost;

d) every reasonable inference shall be drawn in favour of the applicant and credible uncontradicted evidence shall be accepted;

e) a compassionate award may be made for a person refused a benefit under the pension scheme; and

f) additional benefits may be available in excess of what is recoverable in tort.

[88] Unlike in *Thomas v. Canada (Attorney General)*, 2024 FC 655 and *Greenwood v. Canada*, 2020 FC 119 [*Greenwood*], there is no evidence in this case that the pension system has any inefficiencies in comparison to the court system. Although the plaintiffs are claiming for psychiatric injuries, I do not see evidence of the following: that the representative plaintiffs or proposed class members could not readily make, and have a determination of, a pension claim; or that the pension scheme would be more onerous than the class action which would require participation of members, at a minimum, for an assessment of damages.

[89] Although a compassionate award may be made under the disability pension scheme, it is uncertain that compensation for moral damages would be made to potential class members under the *Pension Act*. However, the people who received a disability pension for injuries arising from the action would be prohibited from seeking ancillary damages not covered by the pension: see *Sarvanis v. Canada* 2002 SCC 28 at paras. 28–29.

[90] Compensation under the pension scheme would not be available for potential class members that did not suffer from a disability or an aggravation of an underlying medical condition for which they are receiving a disability pension due to injuries suffered in the actions. However, the class action has been specifically crafted to compensate potential class members for psychiatric injuries resulting in loss of income as opposed to compensation solely for moral injuries. In my view, it is likely that the people who suffered an injury which causes a loss of income due to injuries allegedly suffered in the proposed actions would also be entitled to pension benefits.

[91] This distinguishes this case from *Greenwood* where the claim was based on systemic bullying, intimidation, and harassment within the RCMP that the plaintiffs claimed caused career limitations, physical and psychological injuries, and financial losses. The Federal Court noted:

> [25] In *Vaughan*, the Supreme Court of Canada held that, generally, the Court should decline to exercise its residual jurisdiction in disputes arising from regulation-conferred benefits when the enabling Act sends "an unambiguous signal" that the decision of the Deputy Minister or his or her designate should be final (*Vaughan* at paras 17 and 34).
>
> [26] In *Lebrasseur*, the Court concluded that as the plaintiff's claim had the same factual basis as her successful pension claim, it was caught by s. 9 of the *Crown Liability and Proceedings Act* (*CLPA*) which barred claims for which a pension or compensation had been paid out (*Lebrasseur* at para 31).
>
> [27] In *Desrosiers*, where the relevant legislation gave grievance officers the ability to grant damages and declaratory relief, the Court held that the plaintiffs' application was premature as it was possible that their claim could be resolved through internal mechanisms (*Desroriers* at paras 36 and 37).
>
> [28] In *Galarneau*, the Court found that there was an internal procedure for the plaintiff's occupation health and safety grievance and the statutory scheme excluded the Court's jurisdiction over the claim (*Galarneau* at para 70).
>
> [29] Having considered the above cases as against this proposed claim, I am not convinced the circumstances are comparable. It is not immediately apparent that the proposed claims are compensable through a regulation-conferred benefits program (*Vaughan*), or a pension (*Lebrasseur*). Further, I am not satisfied that the claims could be fully adjudicated through the available internal mechanisms within the RCMP (*Desrosiers* and *Galarneau*).

***Stay of Proceedings***

[92] Class members entitled to a disability pension, or an aggravation of an injury for which they are receiving a disability pension due to injuries suffered in the actions, could be barred from participating in the action pursuant to s. 9 of the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50 [*CLPA*].

[93] The fact that an application has not been made does not circumvent the prohibition, as the defendants are entitled to bring an application to stay such actions pursuant to s. 111(2) of the *Pension Act*.

[94] The defendants say that once the pension status of the representative plaintiffs is determined through the discovery process, they will be able to bring an application pursuant to s. 9 of the *CLPA* or s. 111(2) of the *Pension Act*, and that similar stays or bars would be sought against all proposed class members before any damage assessment could occur.

[95] This would necessitate the representative plaintiffs and all members of the class to make an application under the *Pension Act* for disability benefits or an increase in disability benefits depending on their injuries and current pension status. Thus, individual pension applications and assessments would have to be made on behalf of the representative plaintiffs and class members before any damage assessment could occur.

***Limitation Period***

[96] This matter arises from an alleged breach that occurred in 2012. The actions have a two-year limitation period which commences after the claim has been discovered: *Limitation Act*, S.B.C. 2012, c 13.

[97] On July 31, 2013, the representative plaintiffs along with three of the other five members whose information was provided to the College by the RCMP made a complaint with respect to a breach of their privacy. The complaint contains essentially the same factual information that is set out in the notice of civil claim,

which was filed on October 9, 2015, more than two years after the complaint was filed.

[98] Given that the notice of civil claim was filed three years after the disclosure and more than two years after the complaint all members of the proposed class face a limitation defence which will require disclosure, possible discovery and possible individual adjudication on the issue.

***Unknown Plaintiffs and Size of Class***

[99] The defendants say that the class size is relatively small and that either a pension application, joint proceedings or individual actions would be more economical and efficient than a class proceeding.

[100] Although the class size is small, I am not satisfied that joint proceedings would necessarily be less economical or efficient solely due to the number of potential members. There is also the issue of a number of potential class members whose identity has not been discovered. The pension proceedings would not uncover their identity, nor is it clear that joined actions on behalf of named plaintiffs would do so.

***Cost***

[101] The representative plaintiffs have led evidence that individually prosecuting the actions are not economically feasible given the expenses associated with establishing liability in relation to the damages that could be recovered on an individual basis. However, they have left no evidence or taken any steps with respect to the internal compensatory scheme.

***Alleged Misconduct***

[102] The allegations raise serious misconduct by the RCMP. An internal memorandum by the RCMP's HSO accepts that some of the members receiving care from Dr. Webster might be at risk of suicide as a result of the steps the RCMP planned to take against Dr. Webster:

> Suicide – Although none of the members identified as clients of Dr. Webster have been assessed as suicide risks, this is a possibility since some of them are emotionally fragile and unstable. There is no specific mitigation of this risk although all member's medical files will be reviewed for suicide risk as part of our action plan.

[103] Resolving this matter solely through the pension scheme would not allow these serious allegations to be investigated.

***Additional Considerations***

[104] I am satisfied that:

a) there is no evidence indicating that a significant number of members of the class have a valid interest in individually controlling the prosecution of separate actions; and

b) there are no other claims involving the same or similar subject matter that are the subject of other proceedings.

**Consideration of These Factors in Accord with the Principal Goals**

[105] The plaintiffs framed the cause of action as a breach of multiple members' privacy rights due to a single event—the making of a complaint against Dr. Webster. The plaintiffs, however, also drafted the action in a manner that focuses on the individual impact that this breach had on each class member.

[106] Focusing the claim on these issues creates individual issues not only for the assessment of damages but also at the beginning of the action as to whether there is a pension entitlement and corresponding bar or stay. The individual nature of the claim is further expanded by the late filing of the notice of civil claim which will require individual assessment of limitation periods for every class member.

[107] Given the number and significance of the individual issues, I do not see how the proposed common issues will advance the litigation or provide economies of expense or efficiency.

[108] I am cognizant that the alternatives to the class action may not properly investigate the alleged misconduct of the RCMP or reveal more information about the number of members whose health information was reviewed by Dr. Roland in the complaint process.

[109] However, in my view, the individual issues outweigh the benefits of commonality that will achieve the goals of judicial economy, behaviour modification and access to justice. The proposed class proceedings are not the preferable procedure to resolve this matter.

[110] In my view the preferable procedure would be through the pension scheme, and then, if necessary, by individual action.

## Section 4(1)(e) – Representative Plaintiff

### General Principles

[111] Mr. Reichert and Mr. Ross are the proposed representative plaintiffs. Section 4(1)(e) requires that:

> (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.

### Potential Conflict of Interest

[112] The defendants argue that both representative plaintiffs have provided affidavit evidence affirming that they suffered a loss of income due to injuries arising from the actions. The first step in advancing the litigation will thus be to conduct a discovery of the representative plaintiffs, in order to determine the nature of their pension or pension entitlement, and then bring an application to bar their action under s. 9 of the *CLPA* or stay their actions under s. 111 of the *Pension Act*.

[113] Furthermore, the defendants argue that both representative plaintiffs were involved in making a complaint to the Office of the Privacy Commissioner in 2013 regarding the disclosure, and as such, they will be discovered on their knowledge of the requisite elements of the actions and a determination will be made whether to bring an application to determine whether their actions are statute barred.

[114] The defendants say that these two issues raise a potential conflict of interest with other members of the class who may not have a pension entitlement or may not have a limitation bar to their claim. There is no evidence of any mechanism in the representative plaintiffs' retainer agreements through which these potential conflicts could be managed or resolved.

**Delay in Proceeding with Certification**

[115] The action was filed on October 9, 2015. On January 7, 2016 the plaintiffs adjourned the case management conference scheduled for January 12, 2016. A notice of intention to proceed and change of lawyer was filed on May 1, 2018. No additional steps to move the matter forward were taken prior to the April 26, 2022 case management conference in which I set a schedule to hear the certification hearing.

[116] The representative plaintiffs have not explained their failure to move this matter forward prior to April 26, 2022. In my view, this delay requires an explanation.

**Conclusion**

[117] Given that I have found that this matter is not appropriate for resolution through a class proceeding I will not undertake a full analysis of whether the proposed representative plaintiffs are appropriate.

[118] If I found that this matter was appropriate for certification, I would have provided leave for the plaintiffs to provide additional evidence to address the concerns raised over potential conflict of interest and to provide an explanation for the delay in proceeding with the certification hearing.

## Disposition

[119] I find the application has not met the requirements for certification.

[120] The application for certification is dismissed.

[121] The parties will schedule a case planning conference to discuss the impact that this order has on the remaining individual actions.

"Thomas J."