IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bowman v. Kimberly-Clark Corporation,* 2023 BCSC 1495

Date: 20230828
Docket: S2010566
Registry: Vancouver

Between:

Linda Bowman

Plaintiff

And

Kimberly-Clark Corporation, Kimberly-Clark Inc. and Kimberly-Clark Canada Inc.

Defendants

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

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Plaintiff:	S. Turner J. Giovannetti
Counsel for the Defendants:	J.S. Yates A. Cocks
Place and Dates of Hearing:	Vancouver, B.C. April 11-14, 2023
Place and Date of Judgment:	Vancouver, B.C. August 28, 2023

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Overview

[1] The proposed representative plaintiff, Linda Bowman, seeks certification of a class action pertaining to flushable wipes manufactured by the defendants Kimberly-Clark Corporation, Kimberly-Clark Inc., and Kimberly-Clark Canada Inc. (collectively, Kimberly-Clark) that were contaminated with a bacteria called *Pluralibacter gergoviae* ("P. gergoviae"). The flushable wipes that were produced on the line that Kimberly-Clark believes contained intermittent contamination have been identified and are described as the "recalled lots".

[2] Ms. Bowman seeks to certify the claim for three potentially overlapping Canadian-wide subclasses, referred to collectively as the Class and Class Members. The first is called the Personal Injury Subclass, consisting of the persons who claim to have suffered a personal injury as a result of using recalled lots. The second is called the Purchaser Subclass and consists of persons who purchased the recalled lots. The third is called the Personal Use Purchaser Subclass and consists of persons who purchased recalled lots primarily for personal, family, or household purposes. Ms. Bowman refers to the second and third subclasses collectively as the "Economic Subclass" and excludes from them any persons who purchased recalled lots for the purpose of resale.

[3] Ms. Bowman advances claims and seeks to certify common issues on behalf of the Personal Injury Subclass sounding in negligence, and subrogated claims pursuant to the *Health Care Costs Recovery Act,* S.B.C. 2008, c. 27. She seeks to advance claims and certify common issues on behalf of the Personal Use Purchaser Subclass sounding in breaches of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*BPCPA*], and similar legislation in other provinces. She seeks to certify claims for the Economic Subclass for breach of the *Competition Act,* R.S.C. 1985, c. C-34. She seeks to certify claims in unjust enrichment for the Class.

[4] A central feature of Kimberly-Clark's opposition to certification is that as soon as it found out about the problem, it recalled the lots that were contaminated (hence the descriptor "recalled lots"), undertook a refund program, and settled claims for

personal injuries. It asserts that the efforts it made and expenses it has incurred to do so address the goals of class proceedings – access to justice, efficient use of judicial resources, and behaviour modification – more effectively than certifying this class action will.

[5] In addition, Kimberly-Clark submits that the claims advanced by Ms. Bowman cannot succeed as pleaded because a claim for economic loss cannot be maintained in negligence, and because Ms. Bowman has not pleaded detrimental reliance despite that the statutory causes of action and unjust enrichment all have reliance embedded in their causation elements. Kimberly-Clark asserts that reliance is also problematic on common issues because the proposed common issues also have causation embedded in them and Ms. Bowman has not demonstrated some basis in fact to support a conclusion that causation can be determined on a subclass-wide basis. Kimberly-Clark asserts the price paid by each Economic Subclass Member cannot be determined on a subclass-wide basis. It also asserts that there is no means to determine if each Economic Subclass Member suffered a financial loss because some recalled lots were not contaminated, and so users may have therefore used uncontaminated lots and suffered no harm before the recall and refund program commenced. It says other Economic Subclass Members received full refunds and so suffered no financial loss.

[6] The statutory test for certification is set out in s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. A court hearing a certification application must make a certification order if the pleadings disclose a cause of action, there is an identifiable class of two or more persons, there are common issues of fact or law, a class proceeding is the preferable procedure to resolve the common issues, and there is a representative plaintiff who will fairly represent the interests of the class, who has proposed a workable plan of advancing the proceeding and notifying the class members, and who does not have an interest in conflict with the class.

[7] Kimberly-Clark challenges all of the s. 4 certification elements. The key issues are:

a) whether the pleadings disclose a cause of action under the consumer protection legislation or for unjust enrichment;

b) whether the evidence provides some basis in fact for the common issues; and

c) whether, if those hurdles are overcome, a class proceeding is the preferable procedure given Kimberly-Clark's recall program and refund program.

Section 4(1)(a) – Cause of Action

[8] At the hearing of the certification application, the plaintiff's claim was formally set out in the amended notice of civil claim filed August 29, 2022. In her reply submissions, which were delivered before the hearing began, she provided and relied on a proposed further amended notice of civil claim which included a revised class definition. During the hearing itself, she proposed a further revised class definition and revised proposed common issues.

[9] Kimberly-Clark submitted that the revisions demonstrate that Ms. Bowman does not have a well thought through theory of the case but did not object to the Court considering the proposed revised pleadings, the proposed revised class definition and the proposed revised common issues.

[10] I will address the causes of action and class definition as they were proposed to be refined.

Legal Principles

[11] Section 4(1)(a) of the *Class Proceedings Act* requires that the pleadings disclose a cause of action. Assuming all facts pleaded to be true, the pleadings disclose a cause of action unless it is plain and obvious that the claim cannot succeed: *Pioneer Corp v. Godfrey*, 2019 SCC 42 at para. 27 [*Godfrey* SCC], citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation,* 2013 SCC 57 at para. 63, *Alberta*

v. Elder Advocates of Alberta Society, 2011 SCC 24 at para. 20 and *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25.

[12] In *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 17 [*Finkel* BCCA], the Court of Appeal explained that in applying this test, the pleadings should be read generously, permitting novel but arguable claims and accommodating inadequacies in form to the extent reasonable by allowing for amendments. See also *Sandhu v. HSBC Finance Mortgages Inc.*, 2016 BCCA 301 at para. 44.

[13] Novel claims should be allowed to proceed to trial where they will permit an incremental development in the law: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19at para. 19, citing *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 21. However, even if the facts pleaded are proven, a novel claim will not survive this analysis if it is doomed to fail because a court would not recognize the claim: *Atlantic Lottery* at para. 19, citing *Imperial Tobacco* at para. 21. Properly assessing novel claims at the pleadings stage is crucial because if the court strikes a claim that is novel but not bound to fail, the court runs the risk of pursuing efficiency at the expense of the development of the common law: *Grove v. Yukon (Ministry of the Environment),* 2022 YKCA 8 at paras. 15–16.

[14] The generous approach does not include the court sidestepping difficult legal issues that call into question whether there is a reasonable prospect that the case should proceed. If the case is bound to fail because of the frailty of the legal foundation, that should be addressed at the certification stage: *Atlantic Lottery* at paras. 18–19; *Finkel* BCCA at para. 18, citing *Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.*, 2014 BCCA 36 at para. 64.

[15] A claim will be bound to fail if the pleading does not set out the elements of the cause of action and the material facts in support of them: *Imperial Tobacco* at para. 22. If the pleading is sound, then the question for a chambers judge is whether a superior court has held that even where the facts pleaded are assumed to be proven, the claim does not exist at law, as in *Elder Advocates of Alberta* at

paras. 62–63; *Sangha v. Reliance Investment Group Ltd*., 2010 BCCA 340 at para. 22; and *Carley Estate v. Allied Signal Inc.*, 35 B.C.L.R. (3d) 54 at paras. 8–9.

[16] It is not unusual for class proceeding plaintiffs to propose amendments to defective but curable pleadings when they come under scrutiny at a certification application. The amendments must be proposed with specificity. If the proposed amendments correct deficiencies in manner consistent with principles I have set the court should consider allowing them unless there is prejudice or unfairness to the defendant, taking into account how many opportunities the plaintiff has had to get it right: *Sandhu* at paras. 44-46.

Negligence

[17] Ms. Bowman initially proposed a class of all users and purchasers of the flushable wipes with a subclass of persons who purchased or used flushable wipes primarily for personal, family, or household purposes. That class and subclass included persons whose losses were economic only. In written submissions, Kimberly-Clark submitted that pure economic loss cannot be recovered through a claim in negligence except in rare circumstances that are inapplicable to this case. As a result, Ms. Bowman re-defined the classes to include a Personal Injury Subclass and limited her claims in negligence to that Subclass.

[18] Kimberly-Clark does not dispute that the notice of civil claim contains a proper plea of negligence including all of the constituent elements of negligence for the Personal Injury Subclass.

[19] I conclude that the notice of civil claim meets the s. 4(1)(a) test for a claim in negligence for the Personal Injury Subclass.

Consumer Protection Legislation

[20] Ms. Bowman pleads that Personal Use Purchaser Subclass Members who purchased recalled lots in British Columbia are consumers within the meaning of the *BPCPA.* Ms. Bowman alleges that the flushable wipes are products, Kimberly-Clark is a supplier, and the sale of the wipes were consumer transactions pursuant to the

BPCPA. She alleges that Kimberly-Clark's marketing, sales of defective wipes, representations, advertising, quality control, and failure to advise of contamination of the wipes were deceptive and unconscionable business acts and practices in contravention of ss. 4, 5, 8, and 9 of the *BPCPA*.

[21] Ms. Bowman seeks damages pursuant to s. 171 of the *BPCPA* or relief in the form of a declaration and restoration order under. s. 172 of the *BPCPA.*

[22] Ms. Bowman also makes similar claims under consumer protection legislation of other provinces on behalf of Class Members whose claims are covered by consumer legislation in other provinces as follows:

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

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

c) Manitoba: *Consumer Protection Act*, C.C.S.M. c. C200 [*Manitoba BPA*];

d) Ontario: *Consumer Protection Act*, 2002 S.O., c. 30, Sch. A.;

e) Quebec: *Consumer Protection Act*, C.Q.L.R. c. P-40.1;

f) Nova Scotia: *Consumer Protection Act*, R.S.N.S. 1989, c. 92;

g) Prince Edward Island: *Consumer Protection Act,* R.S.P.E.I. 1988, c. C-19;

h) Newfoundland & Labrador: *Consumer Protection and Business Practices Act*, S.N.L. 2009, c. C-31.1;

i) Yukon: *Consumers Protection Act*, R.S.Y. 2002, c. 40;

j) Northwest Territories: *Consumer Protection Act*, R.S.N.W.T. 1988, c. C-17;

k) Nunavut: *Consumer Protection Act*, R.S.N.W.T. 1988 (Nu), c. C-17.

[23] Ms. Bowman also claims that by making false or misleading misrepresentations to the public that the recalled lots were safe to use when they were not, Kimberly-Clark breached s. 52 of the federal *Competition Act*, giving rise to damages under s. 36 of that act.

BPCPA Claims

[24] Kimberly-Clark asserts that Ms. Bowman has not adequately pleaded causation, which is a necessary element of a cause of action for damages pursuant to s. 171 of the *BPCPA*. Kimberly-Clark submits that Ms. Bowman's causation pleading is deficient because she has not pleaded detrimental reliance on a representation made by Kimberly-Clark.

[25] Kimberly-Clark asserts that the failure to plead detrimental reliance is fatal to a claim of a deceptive practice or act under the *BPCPA* because without the nexus that detrimental reliance supplies, a statement is not a "representation" "used or relied upon by a supplier in connection with a consumer transaction" as required by the provisions of the legislation, relying on *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122 at para. 60. In *Loychuk* at para. 60, Justice Frankel explained that deceptive statements cannot be pleaded "in the abstract".

[26] *Loychuk* was not a class action or about the sale of a product. It was about ziplining, and specifically, whether a waiver signed by the plaintiff was a complete defence to her claim in negligence. The plaintiff asserted that the *BPCPA* rendered the waiver invalid because of deceptive statements made by the defendant. The summary trial judge dismissed the action, questioning whether the *BPCPA* could apply to such a transaction, but that if it did, the representation was not a deceptive act or practice. The Court of Appeal upheld that determination. The adequacy of pleadings was not the issue in *Loychuk.*

[27] As is often observed by the Court of Appeal, a case is only authority for what it actually decides, see for example *Tom v. Tang,* 2023 BCCA 221 at para. 30. In *Loychuk*, the Court of Appeal did not decide that detrimental reliance is a necessary

element of a cause of action or a material fact that must be pleaded to support a cause of action pursuant to ss. 4, 5, or 8 of the *BPCPA*.

[28] Since *Loychuk,* the issue of whether causation and reliance are necessary to ground a claim for damages under s. 171 of the *BPCPA* has been considered several times. In *Seidel v. Telus Communications Inc.*, 2016 BCSC 114 at paras. 88–104, Justice Masuhara undertook a thorough review of the law on this point. He commenced by noting at para. 89 that under ss. 4 and 5 of the *BPCPA*, a deceptive act or practice includes conduct that is "capable of deceiving or misleading; actual deception is not required" [emphasis by Masuhara J.], citing *Knight v. Imperial Tobacco Canada Limited*, 2005 BCSC 172 at para. 29, rev'd in part, 2006 BCCA 235. Justice Masuhara also noted that the question of deception can be litigated without reference to the circumstances of the class members because the focus is on what the defendant did and the effect it was capable of having, not what effect it actually had, a proposition that was stated in *Knight* and repeated in *Stanway v. Wyeth Canada Inc.*, 2012 BCCA 260 at para. 77.

[29] In *Finkel v. Coast Capital Savings Credit Union,* 2016 BCSC 561 [*Finkel* BCSC], Justice Masuhara addressed this issue again and held that a deficient pleading of reliance was not fatal to the claim under the *BPCPA* because it was not necessary for the plaintiff to plead reliance as an element of the claim for causation purposes. Justice Masuhara held that a pleading linking the breach of the *BPCPA* to the class members' alleged losses was sufficient to plead causation, even though it was not a detrimental reliance pleading.

[30] The Court of Appeal upheld Justice Masuhara's conclusion in *Finkel* BCSC, holding that reliance is not always required to establish a breach of the *BPCPA* and damages under s. 171, if the causation element can be proven by means other than reliance: *Finkel* BCCA at paras. 83–87. In *Finkel*, there was a contractual relationship pleaded between the plaintiffs and the defendant. An alleged breach of contract provided the factual causal link between the defendant's action and the plaintiff's loss. The Court of Appeal considered such a claim to be novel, but held

that s. 171 is capable of the broad interpretation necessary for such a claim to be available at law: *Finkel* BCCA at paras. 78–79, 83, and 87.

[31] In this case, there is no contractual relationship alleged. Rather, Ms. Bowman advances three theories of how causation can be proven, absent pleading and proving detrimental reliance.

[32] The first theory of causation is that Kimberly-Clark represented that the recalled lots were safe to use when they were not, did not adequately implement quality-control measures to detect and prevent bacterial infection, and failed to initiate a timely recall. Had Kimberly-Clark done the opposite on these fronts, the Personal Use Purchaser Subclass Members would not have suffered damage or loss. Ms. Bowman asserts that this theory of causation passed the s. 4(1)(a) requirement in *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093, aff'd 2022 BCCA 151 (except on punitive damages).

[33] In *MacKinnon*, the representative plaintiffs sought to certify a claim pertaining to an oral contraceptive that they alleged was defectively manufactured during the class period, as a result of which they became pregnant. The plaintiffs pleaded breach of s. 5 of the *BPCPA* and remedies under ss. 171 and 172. Justice Horsman, then of this court, observed that the law on whether causation for s. 171 of the *BPCPA* can only be established through detrimental reliance "is, at the very least, unsettled", citing, among other cases, *Finkel* BCCA at para. 83. At para. 62, Horsman J. concluded that the pleadings of misrepresentation, causation, and loss, including the cost of purchasing defective medication, were sufficient to ground a cause of action under ss. 171 and 172 of the *BPCPA*.

[34] In this case, the amended notice of civil clam sufficiently pleads misrepresentation, causation, and loss, both in terms of material facts and legal principles. I am satisfied that this theory of causation is not doomed to fail.

[35] The second theory of causation is that the recalled lots should never have been offered for sale because Kimberly-Clark was in breach of the *Food and Drugs*

Act, R.S.C. 1985, c. F-27 by doing so. I will refer to this as the "*Food and Drugs Act*" theory of causation.

[36] In *Krishnan v. Jamieson Laboratories Inc.*, 2021 BCSC 1396, aff'd at *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72, the plaintiff sought to certify a claim pertaining to glucosamine sulfate supplements which were alleged to have been falsely marketed and labelled as though the product contained glucosamine sulfate when it did not. Ms. Krishnan pleaded that by labelling the product as containing glucosamine sulphate when it did not, the defendant violated the *Natural Health Products Regulation*, SOR/2003-196, which prohibits the sale of a natural health product that does not accurately display the proper name. Given that the sale of the product was prohibited as labelled, it ought never have been sold. The prohibition on the sale of the product supplied the causation nexus between the purchase and the loss. Justice Branch held that this "simplified theory of causation" was not doomed to fail and it was at least arguable that the representation caused a loss. He concluded that the theory was such that the claim for damages under s. 171 of the *BPCPA* met the test under s. 4(1)(a): *Krishnan* at para. 76.

[37] In the proposed further amended notice of civil claim, Ms. Bowman pleads that as a result of Kimberly-Clark's breaches of the *BPCPA*, the Personal Use Purchaser Subclass Members have suffered loss and damage, including the cost of purchasing a worthless product. She also pleads that the manufacture, preparation, preservation, packaging, and storage of the recalled lots was done under unsanitary conditions contrary to s. 18 of the *Food and Drugs Act*, and that due to those breaches, the sale of the recalled lots was prohibited by the *Food and Drugs Act.*

[38] Justice Branch's reasoning in *Krishnan*, which was not disturbed on appeal, applies to Ms. Bowman's *Food and Drugs* Act theory of causation. I conclude that this theory of causation, and the pleading as a whole, discloses a claim that is not bound to fail and so satisfies s. 4(1)(a) of the *Class Proceedings Act.*

[39] The third theory of causation is that the misrepresentations caused Ms. Bowman and the Personal Use Purchaser Subclass Members to suffer a loss at

the point of sale. I will refer to this as the “point of sale” theory. This theory is that Personal Use Purchaser Subclass Members had incomplete information about the flushable wipes that precluded them from making a choice as to whether to buy them, a competing product, or no product. This lack of information affecting the purchase choice caused a loss at the point of purchase. Ms. Bowman has pleaded, or seeks to amend in order to plead, that due to Kimberly-Clark’s marketing the recalled lots as safe for use when they were not and failing to inform consumers of bacterial contamination in the recalled lot, the Personal Use Purchaser Subclass Members suffered loss and damage including the cost of purchasing a worthless product.

[40] If the amendments are made, the point of sale theory is adequately pleaded in terms of material facts and legal principles. Although it is novel, I conclude that this theory of causation could provide the nexus for the loss and ought to be considered at trial with the benefit of evidence.

[41] I conclude that the claims for damages under s. 171 of the *BPCPA* meet the s. 4(1)(a) requirement.

[42] With regard to a restoration order under s. 172(3)(a) of the *BPCPA*, Kimberly-Clark submits that Ms. Bowman has not adequately pleaded that she has an interest in the property being claimed. Ms. Bowman asserts that her current pleadings meet the requirement of claiming an interest at paras. 8 and 33 of the amended notice of civil claim. In addition, she seeks to amend her notice of civil claim to plead that the Personal Use Purchaser Subclass Members were the source of the funds paid for the recalled lots and have an interest in the portion of the sale proceeds received directly or indirectly by Kimberly-Clark.

[43] I do not accept that paras. 8 and 33 of the amended notice of civil claim adequately plead an interest in the funds over which a restoration order is sought. I do accept that the proposed amendments rectify this omission.

[44] With regard to whether detrimental reliance is required for relief under s. 172, in *Seidel* the claim was for a declaration that the act or practice was deceptive pursuant to s. 172(1) and an order for restoration of funds paid pursuant to s. 172(3)(a). I agree with Justice Masuhara's reasoning that pleading and proof of detrimental reliance is not a requirement for such relief.

[45] In summary, the weight of the jurisprudence is that detrimental reliance is not always required for the causation element of a breach of sections 4, 5, or 8 of the *BPCPA*, and to seek declaratory and restorative remedies under s. 172, so long as there is an alternative theory of causation adequately pleaded.

[46] I conclude that Ms. Bowman's claims, if amended as proposed, are not bound to fail and thus pass the s. 4(1)(a) threshold.

Other Provincial Consumer Protection Legislation

[47] Kimberly-Clark points out that under the Ontario, Newfoundland and Labrador, and Prince Edward Island consumer protection legislation, contractual privity is required in order to advance a claim for an unfair practice. Ms. Bowman concedes that those requirements exists and that there was no contractual privity between Kimberly-Clark and any Class Members pertaining to the recalled lots. Ms. Bowman is no longer seeking certification based on the Ontario, Newfoundland and Labrador, and Prince Edward Island legislation. The amendments in her proposed further amended notice of civil claim will also eliminate claims pursuant to the consumer legislation of Quebec, Nova Scotia and the territories.

[48] Kimberly-Clark takes issue with the claims under the Alberta consumer protection legislation on the basis that the legislation requires notice be given within a year of the alleged unfair practice. Ms. Bowman replies that the required notice is to be given within a year of a supplier having been found to have engaged in an unfair practice, and given that there is not, as of yet, any such finding, the notice requirement is not yet outstanding. I agree with that. I also observe that it is not a matter of pleading. In addition, s. 7.2(3) permits the court to allow the claim despite the notice having not been given if the interests of justice warrant it, a discretion

exercised in *McKercher v. The Renovation Store Ltd*, 2015 ABQB 748 at para. 51. I am of the view that the failure to plead that notice has been given does not result in this claim being doomed to fail.

[49] With regard to the consumer protection legislation of Alberta, Saskatchewan, and Manitoba, Ms. Bowman asserts they are substantively similar to the BC legislation and so, for the same reasons as pertain to the *BPCPA*, she has met the s. 4(1)(a) test. Kimberly-Clark advances the same arguments regarding detrimental reliance and causation with regard to the legislation of these provinces.

[50] For the same reasons I have articulated in relation to the BC claims, I am not persuaded that the claims under the consumer protection legislation of Alberta, Saskatchewan, and Manitoba are bound to fail.

Competition Act

[51] Pursuant to s. 36 of the *Competition Act*, a person who has suffered loss or damage as a result of conduct which is contrary to a Part IV provision, including false or misleading representations made contrary to s. 52, may sue for an amount equal to the loss or damaged proved.

[52] Kimberly-Clark argues that the pleading does not disclose a cause of action pursuant to the *Competition Act* because Ms. Bowman has failed to plead requirements of s. 52, specifically that Kimberly-Clark made the false or misleading representation knowingly or recklessly.

[53] Ms. Bowman's plea is that Kimberly-Clark marketed the recalled lots "…as being safe and suitable for personal use when the Defendants knew or were reckless or willfully blind to the fact that the Recalled Lots were unsafe and unsuitable…" and that the marketing was false or misleading. I conclude that in this excerpted pleading, Ms. Bowman has adequately pleaded that Kimberly-Clark made the false or misleading representations knowingly or recklessly.

[54] In *Wakelam*, the Court of Appeal held that because s. 36 of the *Competition Act* required causation between the false or misleading representations and the alleged loss, detrimental reliance must be pleaded. Kimberly-Clark's position is that Ms. Bowman's failure to plead detrimental reliance means that the *Competition Act* claims are bound to fail.

[55] Detrimental reliance for the purposes of the *Competition Act* has also been the source of judicial consideration since *Wakelam*. One of the reasons for ongoing debate is that in *Wakelam*, the Court of Appeal reached the conclusion that detrimental reliance must be pleaded despite that shortly before *Wakelam* was decided, the Supreme Court of Canada permitted certification of a s. 36 claim for damages based on a breach of s. 52 in *Pro-Sys*, where detrimental reliance was not pleaded and could not be pleaded given the factual basis for the claim. However, in *Pro-Sys*, the Court did not expressly address that issue.

[56] In *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, the Court of Appeal revisited the issue and upheld the determination of the chambers judge that it is not plain and obvious that detrimental reliance is required for a claim of loss or damage resulting from a breach of s. 52 of the *Competition Act*. In doing so, at para. 233, the Court of Appeal observed that one of the cases relied on by the Court in *Wakelam*, *Singer v. Schering Plough Canada Inc.*, 2010 ONSC 42, had been overtaken by subsequent decisions such as *Rebuck v. Ford Motor Company,* 2018 ONSC 7405. The Court also considered the result in *Wakelam* to be inconsistent with *Pro-Sys*: *Valeant* at paras. 235–236.

[57] In *Valeant* at paras. 34–35, the Court of Appeal held that an adequate causation pleading for damages under s. 36 of the *Competition Act* can be satisfied by pleading that the defendant's misrepresentations caused the plaintiff to spend more than advertised or to acquire a product with less value than advertised.

[58] Ms. Bowman asserts the same three theories of causation discussed above in relation to the *BPCPA* claims satisfy the causation requirement for damages under s. 36, for the purposes of a pleading that is not bound to fail. I agree and

conclude that her claim discloses an adequate causation pleading for the *Competition Act* claim.

[59] Kimberly-Clark also submits that Ms. Bowman is attempting to seek a restitution or disgorgement remedy under the *Competition Act* and that claim is bound to fail. I agree with Ms. Bowman's submission that her pleading relating to the *Competition Act* is for damages pursuant to s. 36. Her pleading for disgorgement and restitution in relation to unjust enrichment does not undermine or negate her s. 36 pleading.

Unjust Enrichment

[60] An action in unjust enrichment restores money or property to a plaintiff who can establish: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding detriment; and (3) the absence of a juristic reason for the enrichment: *Pro-Sys* at para. 85.

[61] The factual underpinning for Ms. Bowman's pleadings on unjust enrichment include that the Class Members paid for recalled lots. This assertion is inconsistent with the current proposed class definition because the Class Members include Personal Injury Subclass Members who are defined as persons who used the recalled lots. The Personal Injury Subclass definition includes persons who used but did not purchase recalled lots. By contrast, the Economic Subclass Members all purchased the recalled lots.

[62] I do not understand how Class Members who did not purchase recalled lots could claim they suffered a detriment that corresponds to an enrichment received by Kimberly-Clark. Ms. Bowman did not address why her unjust enrichment pleading is brought for the Class Members as opposed to the Economic Subclass Members. Kimberly-Clark did not address it either.

[63] In *Krishnan* at para. 52, Justice Branch identified what he considered to be an obvious oversight in the pleadings on unjust enrichment because the pleading only alleged enrichment of some defendants and not others. He held that it was

permissible for the plaintiff to amend the claim to address that, and he certified the case with leave to the plaintiff to amend the claim to conform to his reasons: at para. 243. On appeal, the Court of Appeal held that it was not an error for Justice Branch to have characterized the problem with the pleading as an obvious oversight and to certify subject to rectification of this drafting error: *WN Pharmaceuticals Ltd.* at para. 82.

[64] I consider the problem on Ms. Bowman's pleadings in this case to be anomalous given the refinement of the class definition and proposed amendments of the notice of civil claim on more than one occasion, including during the certification hearing. I cannot conclude that it is an obvious oversight or error. The anomalous nature of the issue includes that the parties did not make submissions on this issue. Given the amendments to the class definition and pleadings that occurred after Kimberly-Clark delivered its materials on certification and again during the hearing, it is not fair to fault counsel for Kimberly-Clark for failing to make submissions on this point.

[65] Given that I did not receive submissions on the problem I have identified, I will go on to address the arguments on whether the pleadings disclose a cause of action assuming the claim is brought on behalf of the Economic Subclass Members. I will return to the problem I have identified.

[66] Kimberly-Clark argues that unjust enrichment is only available where there is a direct correspondence between the enrichment and the deprivation, or "different sides of the same coin", citing *Moore v. Sweet*, 2018 SCC 52 at para. 41. Kimberly-Clark argues that it is plain and obvious that this claim cannot succeed because Kimberly-Clark did not have direct relationship with any of the Class Members. Accordingly, this argument applies if the claim were pleaded for the Economic Subclass Members.

[67] While a claim for unjust enrichment will not lie against a party who received "incidental collateral benefits" from the plaintiff's payment (*Peel (Regional Municipality) v. Canada*, [1992] 3 S.C.R. 762 at 797, the case law does not require

the payment to flow directly from the plaintiff to the defendant. In *Kerr v. Baranow*, 2011 SCC 10 at paras. 38 and 51, the Court explained that while the plaintiff must show that his or her contribution was received and retained by the defendant and the link between the plaintiff's contribution, corresponding deprivation, and the acquisition of the property must be substantial and sufficiently direct, it need not be absolutely direct. Indirect contributions will suffice where there is a connection between the plaintiff's contribution and deprivation and the acquisition, preservation, maintenance, or improvement of the property: *Kerr* at para. 51.

[68] Ms. Bowman has pleaded that Kimberly-Clark was enriched by the portion of her payment for wipes that a retail seller passed on to Kimberly-Clark. It is well established that at the pleadings stage, the failure to plead that the plaintiff's deprivation flowed directly from the plaintiff to the defendant because there was an intermediary such as a retailer does not mean the claim is bound to fail: *Pro-Sys* at para. 87.

[69] Kimberly-Clark also argues that the transactions by which the Economic Subclass Members purchased the recalled lots were sales contracts which provide a juristic reason for the payments. Ms. Bowman has pleaded that any purchase contracts are void or voidable due to Kimberly-Clark's breaches of the *Competition Act* and the *Food and Drugs Act*.

[70] I conclude that the issue of contracts is joined on the pleadings. That is all that is required at this stage. The determination of whether the plaintiff can prove the absence of the established categories of juristic reason, one of which is a contract, is an issue of the merits, not of the pleadings, and is not appropriately considered at certification: *Pro-Sys* at para. 88.

[71] Accordingly, but for the Class Member / Economic Subclass Member issue, I conclude the claim in unjust enrichment is not bound to fail. In the circumstances that this problem is one on which I did not receive submissions but cannot conclude it is an oversight, it is appropriate to allow the parties to make further submissions on whether and how this problem needs to be addressed or should be addressed.

Sections 4(1)(b)-(e) – Evidence and Evidentiary Threshold for Certification

[72] A proposed representative plaintiff must show some basis in fact to support the certification elements set out in sections 4(1)(b), (c), (d) and (e): *Finkel* BCCA at para. 19.

[73] A basis in fact is synonymous for evidence that supports the certification elements: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540. The requirement that there be evidence does not mean that where the evidence conflicts, the court should attempt to resolve it or in some way prefer the plaintiff's evidence. In *Finkel* BCCA at paras. 19–20, the Court of Appeal explained that the "'some basis in fact' standard does not require the court to weigh and resolve conflicting facts and evidence" and that the court is ill-equipped to resolve conflicting evidence at the certification stage.

[74] The "some basis in fact" threshold is low. It is not a burden to prove anything on the balance of probabilities: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, leave to appeal to SCC ref'd, 40479 (4 May 2023) [*Nissan Canada*] at paras. 134-136. When expert evidence conflicts as to matters that may affect whether a proposed common issue can be resolved on a class-wide basis, the plaintiff's evidence need not prove its case nor be preferred over the conflicting evidence: *Rebuck* at para. 26, citing *Pearson v. Inco Ltd*. (2005), 78 O.R. (3d) 641 (C.A.) at para. 76. The threshold is deliberately low because the evidence has not been through the trial laboratory. The low threshold anticipates that the evidence will be more developed at trial and the findings of fact may well be different.

[75] At this juncture, I will summarize the evidence for the purpose of providing the evidentiary context for all of the certification elements that require an evidentiary foundation. I will address the evidence in more detail on some issues as they arise.

[76] Where the evidence is simply background or is non-controversial, I will state it as fact. Where evidence is contested or is not conceded and it is on a point other than non-controversial background information, I will identify the debate. In most cases, it will not be necessary or appropriate to resolve any debates as the "some

basis in fact" standard does not require this, and the appellate authority cautions against resolving disputed evidence: *Finkel* BCCA at paras. 19–20 citing *Pro-Sys* at paras. 102–105. To the extent that I state or find facts, I only do so for the limited purpose of determining whether there is "some basis in fact" for certification.

[77] Kimberly-Clark designed, developed, manufactured and marketed the flushable wipes that are at issue in this litigation. All flushable wipes sold in Canada, the United States, and the Caribbean are manufactured at Kimberly-Clark's facility at Beech Island in South Carolina.

[78] The flushable wipes are packaged in various sizes ranging from 14 wipes in a small pouch, to 168 wipes in a refill bag. When sold, the packages themselves may be bundled together into "value packs" or "club packs".

[79] Kimberly-Clark does not sell flushable wipes to end users. Kimberly-Clark sells them to retailers. Retailers set the prices for the wipes, which may be higher or lower than the manufacturer-suggested retail price.

[80] Kimberly-Clark led evidence that in August 2020, it investigated the cause of a three-month upward trend in consumer complaints about odours in flushable wipes. In September 2020, Kimberly-Clark stopped production on Line 2 of the Beech Island production facility. It found P. gergoviae in some wipes produced on that line and found that a sanitization cabinet used on Line 2 had occasionally malfunctioned after it was rebuilt in early 2020. Kimberly-Clark personnel believe that contamination of wipes produced on that line was intermittent and infrequent. It asserts that as a result of its sampling, it found about 7% of wipes in a lot were contaminated.

[81] Kimberly-Clark put a hold on all products produced on that line between February 7, 2020 to September 14, 2020 that were still in Kimberly-Clark's possession. It also issued a recall for flushable wipes during that time period. The start date was based on the date the sanitization cabinet that malfunctioned had been rebuilt. Kimberly-Clark determined that 2,064,860 packages of flushable wipes

manufactured on Line 2 during that time frame had been distributed to Canada. Of those, Kimberly-Clark estimated 301,107 were still in the possession of Kimberly-Clark, and therefore the recall included 1,763,753 packages of flushable wipes distributed to Canada.

[82] Kimberly-Clark asserts that the only way to determine which of the recalled lots were actually contaminated with P. gergoviae is to test the wipes in a given package.

[83] Ms. Bowman led medical evidence from Dr. Abdu Sharkawy, a physician and professor of medicine and infectious diseases at the University Health Network, which is part of the University of Toronto. Kimberly-Clark led medical evidence from Dr. Mark Roberts, a physician who works for a scientific research and consulting company and who has experience in epidemiological investigations of health complaints.

[84] Dr. Sharkawy deposed that P. gergoviae is a bacteria that resides in the gastrointestinal tract and has the potential to cause serious infections, including life threatening infections in persons with compromised immune systems. He deposed that environments that are poorly sanitized are more likely to promote greater numbers of this type of organism, and if the hygienic standards are compromised in a manufacturing facility, the organism may be more frequently identified in the manufactured product.

[85] Dr. Sharkawy opined that products that contain P. gergoviae are not safe for use by humans. He deposed that even a small amount could cause serious infection in a given host and so it is difficult to determine what might constitute a negligible versus significant quantity of P. gergoviae in flushable wipes. Dr. Sharkawy opined that P. gergoviae can cause urinary tract infections, respiratory tract infections, intrabdominal infections including infections of the lining of the abdomen, infections of the gall bladder, and bloodstream infections in newborns.

[86] Dr. Roberts did not directly take issue with the potential for serious infection caused by P. gergoviae, but he opined, quoting Health Canada, that P. gergoviae rarely causes serious infections in healthy individuals and that individuals with weakened immune systems and other underlying conditions are at increased risk of infection. Dr. Roberts opined that he would not expect medical conditions or symptoms to be caused by the wipes when used externally. He did not explain what he meant by external use, given that the flushable wipes are intended to be used on parts of the body that have openings. Dr. Roberts opined, based on literature with case reports of persons with P. gergoviae infection, that the cases present "unique collections of symptoms". He did not offer any opinion or evidence on what those symptoms are. He did opine that the conditions and symptoms associated with P. gergoviae may have other causes, including exposure to other bacteria.

[87] Dr. Sharkawy opined that infection with P. gergoviae can be confirmed by a culture taken from the infection site. Alternatively, the diagnosis can be made based on no alternative explanation for the patient's clinical presentation and a history of exposure. Dr. Sharkawy explained that not all soft tissue infections enter the bloodstream so diagnosis is made by clinical assessment of a temporal connection between use of a skin irritant such as P. gergoviae-contaminated wipes with the onset of skin irritations and soft tissue infectious presentations.

[88] Dr. Roberts opined that a definitive connection between harm suffered by a person who used a recalled lot and the recalled lot itself would be established through bacterial sample tests. First by testing the recalled lot used by the class member for P. gergoviae, then isolating P. gergoviae in a clinical sample taken from a class member, and then performing appropriate tests to link the two samples together.

[89] Ms. Bowman testified that she began purchasing Kimberly-Clark's flushable wipes in 2020. She has a receipt for a large package of flushable wipes she bought at Costco on July 17, 2020. She deposed that she used the wipes several times a day because of underlying health conditions including ulcerative colitis. She deposed

that she developed inflamed hair follicles and sores in her pubic region. She deposed that her pre-existing back and general body pain worsened. She also developed inflamed skin follicles in other areas where she uses the wipes including her mouth, nose, arms, breasts, and buttocks. She deposed that the inflammation is painful.

[90] Kimberly-Clark's deponents, Kent Schopp and Renée Witthuhn, described the recall program, refund program and personal injury claims settlements.

[91] On October 7, 2020, Kimberly-Clark issued a recall of all wipes that were manufactured on Line 2 between February 7, 2020 and September 14, 2020. The recall included packages in which Line 2 wipes were packaged with Line 1 wipes. Kimberly-Clark developed a lot checker through which consumers could check whether the flushable wipes that had purchased or used were from a recalled lot.

[92] Ms. Bowman's counsel checked the lot number off a package of wipes that Ms. Bowman bought and confirmed that she purchased a package of wipes from the recalled lots.

[93] Kimberly-Clark instituted a refund program pertaining to recalled lots. There were 11,651 refunds issued to Canadian consumers totalling $214,290.49.

[94] It is not clear whether it was through the refund program or otherwise, but some personal injury claims came to Kimberly-Clark's attention. Mr. Schopp deposed that as of June 23, 2022, when he made his affidavit, Kimberly-Clark had received 149 claims from Canadian consumers alleging personal injury related to the use of recalled lots, and that all but eight claims had been resolved. The resolution included compensation in exchange for a final release of all claims.

[95] The parties also led evidence from marketing experts.

[96] Dr. Yesim Orhun provided an opinion report that Kimberly-Clark relies on. Dr. Orhun has a Ph.D. in Business Administration from the University of California at Berkley. She is an associate professor of marketing and information at the Stephen

M. Ross School of Business at the University of Michigan and is an Associate Professor of Information at the School of Information, University of Michigan. Her research and teaching focuses on firm product, price, and promotion strategies as well as consumer behaviour and attitudes.

[97] Dr. Orhun provided opinions on the types of consumers that would constitute the Economic Subclass, whether the price paid for recalled lots can be determined on a subclass-wide basis, and whether there is methodology that can be utilized to determine whether each Subclass Member suffered economic harm. Dr. Orhun did not distinguish between the subclasses in addressing these issues. However, at the time she prepared her report the class definition was different – including different subclasses – than the present proposed class definition. I will describe her opinions as they apply to the current class definition. In general, her opinions pertain to the Economic Subclass but some of them are relevant, in certain respects, to the Personal Use Purchaser Subclass.

[98] In summary, Dr. Orhun opined that:

a) There is variation among consumers of paper products including preference as to where to shop, preferences for product attributes, stockpiling behaviour, and consumer price sensitivity.

b) There is significant variability in prices paid by the Economic Subclass Members for recalled lots during the class period, including variation by retailer despite manufacturer's suggested retail prices (referred to as variation across channels), variation over time, and variation among consumers purchasing from the same retailer at the same time due to things such as coupons.

c) Consumer purchase patterns vary especially in regard to whether they buy in bulk, whether they have the logistical means to search out the best price and world events such as the Covid-19 pandemic which was associated with spikes in paper products purchasing in March 2020.

d) While there is data that includes the manufacturer's suggested retail price, and average prices for the weeks of the class period within the K-C Neilsen Data, there is no specific data as to what each class member paid for recalled lots.

e) The question of whether each Economic Subclass Member suffered economic harm can not be determined on a subclass-wide basis because some received a full refund and because some used the products they purchased to their satisfaction before the recall. There is no subclass-wide methodology which could be used. The only method is individualized inquiry.

[99] Ms. Bowman filed an affidavit and report of Dr. Przemyslaw Jeziorski, an Associate Professor of Marketing at the University of California, Berkeley. Dr. Jeziorski has a Ph.D. in Economic Analysis and Policy from Stanford University and was a Price Theory Scholar at the University of Chicago Booth School of Business. He has been retained as an expert in marketing, pricing, and consumer economic issues such as refunds and chargebacks.

[100] Dr. Jeziorski responded to the opinions of Dr. Orhun as follows:

a) Dr. Jeziorski agreed that consumers may pay different prices for paper products for the reasons stated by Dr. Orhun, but he opined that there is data available on pricing strategy which will permit econometric analysis to account for the reasons for variation that Dr. Orhun has identified. Dr. Jeziorski is of the view that Dr. Orhun overstated some of the sources of variation in prices paid by consumers, including variation across channels and variation across consumers at retailers at one point in time.

b) Dr. Jeziorski opined that the price paid by each Economic Subclass member can be obtained using available data. Dr. Jeziorski asserted that he has confirmed the availability of granular data for Canadian consumers that has been used in peer-reviewed scientific studies that he has

identified. He opined that such data could be used to determine a minimum price paid by all Economic Subclass Members, which would be statistically reliable. He also opined that individual-level transactions records are likely to exist for all retailers that sell Kimberly-Clark's wipes and that retailers keep transaction ledgers that specify the UPC of the product, the transaction price and quantity, and the transaction date.

c) Dr. Jeziorski disagreed with Dr. Orhun's opinion that there is no method to determine the price that each Economic Subclass Member paid on a subclass-wide basis. He identified and described four methodologies for doing so: the wholesale price methodology, the minimum price methodology, the average price methodology, and the regression methodology. He opined that the necessary documents and data to do use these methodologies would be available from the retailers and the manufacturers.

d) Dr. Jeziorski opined that Compensating Variation is a widely-accepted methodology for assessing the amount of economic harm suffered in a consumer transaction. He described the method and the modelling that would be done to utilize it. The model he described would use the prices paid by Economic Subclass Members as determined with one of the methodologies identified above. The model would be able to compute the amount of money to transfer to an Economic Subclass Member to make that person indifferent between a factual world where they bought a product that may be contaminated with P. gergoviae, and a counterfactual world where there is no possibility of contamination.

e) Dr. Jeziorski opined that Economic Subclass Members who purchased contaminated recalled lots and those who purchased uncontaminated recalled lots suffered economic damages because they had incomplete information about the products that precluded them from making a choice as to whether to buy those wipes, a competing product, or no product. Dr

Jeziorski opined that estimating welfare loss due to inaccurate or incomplete information to establish economic loss is widely accepted in economic literature and that accuracy of information at the point of purchase is a crucial determinant of consumer welfare.

f) Dr. Jeziorski opined that Economic Subclass Members were potentially economically harmed even if they received a full refund. He opined that Economic Subclass Members who purchased contaminated recalled lots were economically harmed if they "realized harm from using the product" that was larger than the refund amount. He opined that Economic Subclass Members who purchased uncontaminated recalled lots were harmed because consumers who had the information they should have had would not have bought the wipes even if the price was zero.

Section 4(1)(b) – Identifiable Class

[101] Section 4(1)(b) of the *Class Proceedings Act* requires the plaintiff to establish that there is an identifiable class of two or more persons.

[102] In *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para. 82, the Court of Appeal summarized the general principles to be applied when determining whether there is an identifiable class as:

> - 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.]

[103] Ms. Bowman initially proposed a class of all users and purchasers of the wipes manufactured between February 7, 2020 and September 14, 2020, with a subclass of persons who purchased or used the wipes primarily for personal, family, or household purposes. As a result of Kimberly-Clark's submissions on pure economic loss and the overbreadth of a class that pertained to wipes that were not contaminated with P. gergoviae, Ms. Bowman proposed a re-defined class to include a Personal Injury Subclass and an Economic Subclass, which consists of two subclasses called the Purchaser Subclass and the Personal Use Purchaser Subclass. All of the wipes purchased or used in the re-defined class are in the recalled lots. The Economic Subclass is broken down because while all purchasers have claims under the *Competition Act*, only persons who purchased for personal, household, or family purposes have claims under the *BPCPA* and other provincial consumer protection statutes. Members of the Personal Injury Subclass may also be members of the Economic Subclass if they also purchased recalled lots, and members of the Personal Use Purchaser Subclass if they purchased recalled lots for the primary purpose of personal, household, or family use. Ms. Bowman refers to the members of all subclasses as the Class Members and the Class.

[104] The current proposed class definition is:

> All persons in Canada who belong to one or more of the following overlapping subclasses:
>
> a) persons who used the Recalled Lots and who claim to have suffered personal injury as a result of using the Recalled Lots (the "Personal Injury Subclass" and the "Personal Injury Subclass Members");
>
> b) persons who purchased the Recalled Lots (the "Purchaser Subclass and the "Purchaser Subclass Members"); and
>
> c) persons who purchased the Recalled Lots primary for personal, family, or household purposes (the "Personal Use Purchaser Subclass" and the "Personal Use Purchaser Subclass Members"),
>
> the Purchaser Subclass and the Personal User Purchaser Subclass are collectively the "Economic Subclass" and the "Economic Subclass Members", the Economic Subclass and the Personal Injury Subclass are collectively the "Class" and the "Class Members", but excluding any persons who purchased Recalled Lots for the purpose of resale.

[105] With regard to the evidentiary requirement of showing some basis in fact that the class exists, the record contains evidence that 1,763,753 recalled lots were distributed to retailers to be sold to Canadian consumers. I accept the logic of Kimberly-Clark's submission that the number of persons who purchased recalled lots will be much smaller because some people may have bought more than one recalled lot, especially since some retailers bundle the packages for sale. In addition, the evidence is that not all recalled lots distributed to retailers were sold to consumers before the recall. Nevertheless, there is clearly evidence on which I can conclude that there are many persons who will meet the definition of the Purchaser Subclass and the Personal Use Purchaser Subclass. The evidence also shows that Kimberly-Clark received 149 personal injury claims that were made pertaining to recalled lots, which is some basis in fact that there are persons who meet the definition of the Personal Injury Subclass.

[106] Kimberly-Clark asserts that the class remains overbroad in two respects.

[107] The first pertains to the start date of the recall program on February 7, 2020. Kimberly-Clark asserts that its recall program was overly broad out of caution, including the start date. It argues that the Economic Subclass will include people who purchased recalled lots that were not contaminated and thus do not have a claim.

[108] In addition, Kimberly-Clark led evidence and submitted that the contamination was intermittent on one of two production lines. All of the lots produced on that line were recalled. Accordingly, some of the recalled lots were not contaminated with P. gergoviae and so some of the Economic Subclass Members do not have claims.

[109] I am not persuaded by these submissions. It is permissible to have a class definition that includes people who may not ultimately establish a claim. At the certification stage, it is inappropriate to require that the class be restricted to all persons who suffered damage so long as the class is not irrationally overly broad: *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at paras. 41–42, aff'd 2013 BCCA 21; *MacKinnon* at para. 82.

[110] While Kimberly-Clark has led evidence that its recall program was overly broad, that evidence is led at certification where the only threshold Ms. Bowman has to meet is the low "some basis in fact" for her class definition. Kimberly-Clark's evidence that the recall program is overbroad has not been tested at trial. One of the matters that may have to be resolved will be to reconcile its evidence on this application that it was an overly broad recall program with its statement in the program that the recalled lots "do not meet our high quality standards". This statement is some evidence that all of the recalled lots could cause the loss or damage alleged to have been suffered by the Economic Subclass. I am not in a position to determine whether Kimberly-Clark's evidence on this application should be preferred to the natural inference that flows from its statement in the recall program.

[111] Related to this is a concern that Kimberly-Clark's submission imports a merits-based inquiry into this issue which is currently the subject of a high level of information asymmetry in favour of Kimberly-Clark. The issue of whether the contamination was intermittent, how intermittent, and whether the recall program was overly broad are issues to be determined at trial on the evidence.

[112] Similarly, Kimberly-Clark submits that Ms. Bowman has not proved that even she purchased wipes that were contaminated with P. gergoviae. For the purposes of this proceeding, the fact that she and many others bought wipes that Kimberly-Clark recalled and told persons to discontinue use because they failed to meet Kimberly-Clark's high quality standards is sufficient evidence for the class definition. This shows that there is a means by which she and others can identify themselves as Class Members through the class definition that refers to persons who used and purchased recalled lots. This circumstance entirely distinguishes this case from *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58. In that case, the Court held that because some of the products included the allegedly price-fixed ingredient high fructose corn syrup, while some identical-looking products did not, and the product labelling did not specify the type of sweetener used in that

particular item, the class members could not self-identify as having purchased a price-fixed product: *Sun-Rype* at para. 66.

[113] In *Sun-Rype* at para. 73, the Court went on to say such problems do not always preclude certification because if there is some basis in fact to conclude that at least two persons could prove they have suffered individual harm, the certification threshold has been met. By that, the Court did not mean that some basis in fact had to be satisfied by proof that two people meet the class definition. The Court meant that there was some basis in fact to conclude that when called upon to do so, class members will be able to self-identify and "could" prove membership in the class. Typically, they will not be called upon to do so until the individual issues trial.

[114] This understanding of the certification requirements regarding class definition explains why in *Jiang* the Court of Appeal emphasized the word "later" when stating that the class definition has to allow class members to self-identify and "later prove membership" in the class: at para. 82.

[115] I conclude that the proposed refined class definition is supported by some evidence and that it is objective, and the definition is not overly broad.

Section 4(1)(c) – Common Issues

[116] Ms. Bowman has proposed common issues that are divided into categories: common issues that apply to all Class Members and all claims; common issues that pertain to issues relating to negligence for the Personal Injury Subclass; common issues that related to the *BPCPA* claims and claims under other provincial consumer legislation relating to the claims of the Personal Use Purchaser Subclass; common issues that pertain to claims under the *Competition Act* relating to the claims of Economic Subclass; and common issues that pertain to subrogated claims under the British Columbia *Health Care Recovery Act* and similar acts of other provinces that relate to the claims of the Personal Injury Subclass.

[117] Ms. Bowman asserts that the record discloses some basis in fact for all of the common issues sought to be certified.

[118] Kimberly-Clark asserts that none of the common issues pass the commonality test because there is no basis in fact to support the proposition that the Class Members were harmed by the recalled lots. Specifically, it asserts that there is no basis in fact that Ms. Bowman or any other Class Members suffered a personal injury or an economic loss due to their purchase or use of recalled lots because there is no way to know if the recalled lots were actually contaminated with P. gergoviae without testing them, which has not been done.

Legal Principles

[119] Section 4(1)(c) of the *Class Proceedings Act* requires the plaintiff to establish that the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members. Section 1 of the *Class Proceedings Act* 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".

[120] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39, the Court held that the underlying question when analyzing commonality is "whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis".

[121] A common issue need not be determinative of liability in order to advance the litigation for or against the class: *Kirk v. Executive Flight Centre Fuel Services Ltd.*, 2019 BCCA 111 at para. 65, citing *Cloud v. Canada (Attorney General)* 2004), 247 D.L.R. (4th) 667 (O.N.C.A.) at para. 53.

[122] In *Pro-Sys* at para. 108, the Court discussed commonality, incorporating and refining the principles set out in *Dutton*, including that commonality must be approached purposively. The Court explained that while an issue will be common only where its resolution is necessary to each class member's claim, it is not essential that the class members be identically situated *vis-à-vis* the opposing party. The Court also explained that it is not a requirement that the common issues

predominate over individual issues, but the class members' claims must share a substantial common ingredient.

[123] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 45–46, the Court further clarified some of its earlier statements about commonality with regard to common success, explaining that questions can be considered common even if the answers to those questions vary between class members. Even a significant difference among class members does not necessarily defeat a finding of commonality. If material differences emerge, they can be addressed as required.

[124] In *Service v. University of Victoria*, 2019 BCCA 474 at para. 59, the Court of Appeal interpreted *Vivendi* as imposing a low threshold on this requirement, i.e. that the "plaintiff need only show that there is a triable factual or legal issue that, once determined, will advance the litigation".

[125] The question of whether a common issue will advance the litigation is appropriately determined by reference to the litigation as a whole, not simply the perspective of the plaintiff: *Godfrey* SCC at para. 109.

[126] As discussed above, to satisfy s. 4(1)(c) of the *Class Proceedings Act*, the proposed representative plaintiff must show "some basis in fact" that the claims raise common issues: *Hollick* at para. 25; *Pro-Sys* at paras. 101–102. The evidentiary burden on commonality is low. It is understood by recognizing that some basis in fact can be contrasted to no basis in fact: *Nissan Canada* at paras. 134–136, citing *Hollick* at paras. 24–25, and *Ewert v. Nippon Yusen Kabushiki* Kaisha, 2019 BCCA 187 leave to appeal ref'd [2019] S.C.C.A. No. 311, at paras. 100–104.

[127] On this application, Kimberly-Clark invokes an approach to evidence on common issues that I will refer to as the two-step evidentiary test. According to Kimberly-Clark, the two-step evidentiary test posits that the requirement to show some basis in fact has two steps when applied to the common issues element of certification. The two steps are: (1) some basis in fact that the common issue exists; and (2) some basis in fact that the issue is common to the class members. Kimberly-

Clark relied on the two-step evidentiary test in its written submissions but did not emphasize it in oral submissions.

[128] In *O'Connor v. Spinks*, 2023 BCSC 1371, Chief Justice Hinkson addressed a debate in the jurisprudence pertaining to whether the common issues evidentiary test contains these two steps or only one step, as articulated at para. 110 of *Pro-Sys*:

> [110]… in order to establish commonality, evidence that the acts allegedly actually occurred is not required. Rather, the factual evidence required at this stage goes only to establish whether these common issues are common to all the class members.
>
> [Emphasis mine].

[129] Chief Justice Hinkson reviewed jurisprudence from British Columbia, Ontario and the Federal Court about the two-step evidentiary test. With regard to the first step, which is the focus of the controversy, some cases draw a distinction between the prohibition of a merits-focussed inquiry which might lead to setting the burden of proof too high, and the need for some evidence, on a low threshold of proof, going to whether the issue "exists" as the first step.

[130] The most recent British Columbia appellate statement on the issue is in *Nissan Canada*. Writing for the Court in *Nissan Canada,* Justice Griffin referred to a two-step evidentiary test where the first step was stated in slightly different terms than that set out above. The different terminology might be because it was a different test, or it might have been because the first step was restated in relation to the particular common issue at being addressed, which was whether there was a defect in the Nissan vehicles which were the subject of the proposed class action. Justice Griffin rejected the proposition that evidentiary support for a common issue in a claim of product liability requires proof of negligence where the common question proposed is that there was a defect in the product: para. 132. Instead, Griffin J.A. held that the question is whether, given the language of the common issue proposed, there is some evidence that supports the argument that it is a common issue across members of the class: para. 133.

[131] Justice Griffin's conclusion that there is no evidence required, ie: no onus or proof regarding negligence is consistent with *Pro-Sys* at para. 110, set out above.

[132] In *Nissan Canada*, Justice Griffin also discussed the evidentiary burden on certification as a general proposition. Justice Griffin explained that while there should not be a robust inquiry into the merits of the claim, the court must undertake more than a superficial scrutiny of the sufficiency of evidence to establish whether the claim is suited for certification. The evidence does not have to be conclusive or even meet the civil standard of a balance of probabilities. The level of evidence that will satisfy the court in a given case is highly case-specific: *Nissan Canada* at para. 134. In a product liability claim, it is essential to avoid a merits-focussed inquiry because of the high level of information asymmetry in favour of the defendant at the certification stage: at para. 138. I take this as a reminder that the court's gate keeping role must not be sidestepped by too lax an approach to what the plaintiff must establish at certification, but at the same time there is no one-size-fits-all test as to the evidentiary requirements.

[133] In *O'Connor*, Chief Justice Hinkson concluded that in *Nissan,* Justice Griffin did not reject the two-step evidentiary test, she rejected that the plaintiff has a burden to lead evidence that the defendants were negligent by showing that the defect in the engine was dangerous (at para. 255 and 259 of *O'Connor)*.

[134] Chief Justice Hinkson returned to the characterization of the first step as going to the "existence" of the issue. He stressed, at paras. 261-262, that it is the second step where the plaintiff has an evidentiary burden: some evidence of class-wide commonality. Ultimately, he concluded that it does not matter much if it is called one step or two because it is difficult to conceive of how one can say there is evidence that an issue is common unless there is evidence that the issue exists (at para. 263).

[135] I agree with Chief Justice Hinkson's observation at para. 263. In most cases, evidence of commonality will often also be evidence of the existence of the matter the issue seeks to address.

[136] I would add to that observation that an issue "exists" if it is a live issue of fact or law in the proceeding. Such existence can and often does arise from the pleadings, jurisprudence or legislation. While in *Hollick* at para. 25, cited in *Pro-Sys*, Justice Gascon made it clear that the evidentiary burden with regard to common issues is some evidence "apart from the pleadings", i.e.: pleading an issue does not make it common, I am of the view that a pleading, legislation or legal principles can support the "existence" of an issue, and together with some evidence of commonality, will meet the certification test.

[137] There is a lack of cogency if the courts impose a rigid evidentiary requirement to demonstrate the "existence" of an issue for all proposed common issues because the *Class Proceeding Act* defines common issues as issues of fact and issues of law arising from common facts. The "existence" of legal issues will not always be amenable to evidentiary demonstration, although the requirement that they are based on common facts is amenable to evidence and is the one step evidentiary test described in *Pro-Sys*. For example, aggregate damages have spawned much of the law on the evidentiary burden regarding common issues. Aggregate damages are potentially live issues in class proceedings because section 29 of the *Class Proceedings Act* provides that the court may make an order for an aggregate monetary award if there is claim for monetary relief, an antecedent determination of liability and the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. The last part of the requirements just stated is the second step of the two-step test and the single step of the one-step test.

[138] Fitting this common issue into the two-step evidentiary test with a requirement of some basis in fact for the "existence" of the common issue is awkward as the existence of the issue arises from s.29 of the *Class Proceedings Act* which is not aptly described as evidence or a basis in fact. Nor are the requirements of a claim to monetary relief and an antecedent determination of liability matters of evidence.

[139] In summary, I conclude that the two-step evidentiary test as it has been articulated is not appropriate for every common issue that might be sought to be certified in a given case. It may overstate the burden and run the risk of a merits-focussed inquiry. It may misstate the burden. While there must be common issues to certify a class proceeding, their existence is determined by whether they are live issues of fact or law which is not always an evidentiary matter. There must be some evidence of the commonality of a proposed common issue. That evidence will often also go to its existence, but if it does not, the existence can be supported by the pleadings or the law.

Proposed Common Issues

[140] Ms. Bowman revised the proposed common issues to align with the revised class definition and her concession that negligence claims are appropriately limited to the Personal Injury Subclass.

[141] As a preliminary matter, I will address Kimberly-Clark's assertion that all of the common issues must fail because Ms. Bowman has not proven that she purchased recalled lots contaminated with P. gergoviae that caused her personal injury and economic loss. Kimberly-Clark asserts that when combined with the evidence it has led that only a percentage of the recalled lots were actually contaminated, there is no basis in fact to conclude that there actually is an issue of contaminated flushable wipes being purchased and/or used by class members.

[142] Kimberly-Clark's written submissions frame the common issue analysis within the two-step evidentiary test and identify this shortcoming in relation to the first step. Kimberly-Clark asserts that Ms. Bowman has not met the first step of showing some basis in fact that common harm or loss was caused to the Class Members by Kimberly-Clark. During oral submissions, Kimberly-Clark did not expressly refer to the two-step evidentiary test, but she did so in substance by submitting that Ms. Bowman advances common issues that are notionally common, and that she has not adduced evidence that the common issues actually exist.

[143] I reject this broad submission as being inappropriately merits-based in the same manner as cautioned against in *Nissan Canada* and contrary to the Supreme Court of Canada's holding in *Pro-Sys* at para. 110 that the plaintiff is not required to adduce evidence that the acts alleged actually occurred.

[144] Kimberly-Clark's evidence is that some portion of the recalled lots were contaminated with P. gergoviae. Ms. Bowman purchased and used a recalled lot. The Class is defined in relation to persons who purchased or used recalled lots. The common issues proposed by Ms. Bowman include whether "some" of the recalled lots were contaminated, and if so, how many and which lots. There is some basis in fact to demonstrate that those are live issues: the evidence is that some of the lots were contaminated but not all.

[145] Kimberly-Clark's evidence is that only 7% of the recalled lots were contaminated, an assertion that has not been tested in the trial laboratory. This may be right or it may be wrong, by little or by a lot. In any event, at certification, the question is not what percentage of the recalled lots were actually contaminated, but rather whether there is some evidence that it was a common problem. The evidence is that Kimberly-Clark stated in the recall program that the recalled lots, not a fraction of the recalled lots, did not meet Kimberly-Clark's quality standards, and advised all purchasers of the recalled lots to stop using them. This evidence provides some basis in fact to conclude that there is a common issue of recalled lots being contaminated with P. gergoviae. The issue of whether the recalled lots were contaminated with P. gergoviae to some extent, and if so, whether Kimberly-Clark was negligent in that regard (for the Personal Injury Subclass) and made misrepresentations in the marketing of the recalled lots (for the Economic Subclass) are issues that can be addressed on a body of common evidence. Determining these issues will advance the litigation, even if the answer is that not all recalled lots were contaminated.

[146] Kimberly-Clark also raises concerns with the categories of common issues and some of the proposed issues within the categories. I will address the proposed

categories and the issues within them for the purpose of addressing Kimberly-Clark's arguments and to determine whether the proposed common issues are supported by some basis in fact and that their resolution will advance the litigation.

Factual Issues Pertaining to All Class Members

[147] Ms. Bowman's proposed common issues one through five are factual issues that relate to the causes of action for all Class Members:

1. Were some lots of Recalled Lots manufactured by the Defendants or some of them contaminated by *pluralibacter gergoviae* during the period February 7, 2020, to September 14, 2020 (the "Class Period")?
2. If the answer to the preceding question is yes:
    a) What was the nature of the contamination?
    b) How did the contamination occur?
    c) Which lots were affected by the contamination?
3. Did the Defendants or some of them market or present the Recalled Lots as safe to use to the public during the Class Period?
4. When did the Defendants or some of them initiate the Recall, and what were the steps taken by the Defendants to publicise the Recall?
5. How many Recalled Lots were sold in Canada during the Class Period and what was the value of those sales to the Defendants?

[148] An earlier version of proposed common issues 1 and 2 were whether the flushable wipes were contaminated. Kimberly-Clark argued that those issues, asking about contamination generally, are disconnected from the pleadings which are about contamination with P. gergoviae. Ms. Bowman amended the proposed common issues to refer to "recalled lots" instead of "wipes" and to specify contamination with P. gergoviae.

[149] Similarly, proposed common issue 5 as previously drafted pertained to the value of flushable wipes sold in Canada during the class period. Ms. Bowman has amended it to address how many recalled lots were sold in Canada in the class period and what their value was.

[150] The evidence as a whole, including Kimberly-Clark's evidence, demonstrates that manufacturing, recall and the numbers sold is the subject of a common body of

evidence that also supports that issues 1, 4 and 5 are live issues. With regard to contamination as part of issues 1 and 2, I have explained above why I regard this matter to be support by some basis in fact as a common issue.

[151] With regard to issue 3, Ms. Bowman relies on examples of Kimberly-Clark's marketing that she asserts were representations that flushable wipes were safe for personal use. Kimberly-Clark points out that this evidence, which includes screen captures of Kimberly-Clark's website, was captured in September 2021, almost a year after the end of the class period.

[152] I agree with Kimberly-Clark that such ads are not *per se* evidence of the marketing during the class period. However, they are evidence that Kimberly-Clark has marketed its flushable wipes as safe for personal care use after the class period. It is not reasonable to expect Ms. Bowman to have captured the Kimberly-Clark website during the class period, because the end of the class period is the beginning of the recall program, the time at which Kimberly-Clark advised the public that some recalled lots were contaminated with P. gergoviae. In other words, during the class period, Ms. Bowman did not have the information that would have prompted her to compare the safety of the recalled lots to Kimberly-Clark's advertising.

[153] On this application, Kimberly-Clark had the opportunity, and arguably the obligation, to address this matter given the evidence led by Ms. Bowman. Pursuant to s. 5(5) of the *Class Proceedings Act*, Kimberly-Clark's certification affiant is required to depose that there are no material facts pertaining to certification that have not been disclosed. Given the evidence filed by Ms. Bowman on the marketing, and given its advantage of knowledge on the topic of its marketing during the class period, if Kimberly-Clark did not market the flushable wipes as safe for personal care use before or during the class period, then it ought to have led evidence on that.

[154] The evidence demonstrates common advertising during the time at which it was done. Given that there is no evidence of stratified advertising that would affect the commonality of this issue at any time, including during the Class Period, the post Class Period advertising is some evidence that Kimberly-Clark employed standard

advertising during the Class Period. This issue is a live one raised by the pleading of negligence. The evidence shows some basis in fact that Kimberly-Clark marketed the flushable wipes before and during the class period and that marketing was common so far as the Class Members were concerned.

[155] I am satisfied the resolution of these issues will advance the litigation.

Breach of the Business Practices and Consumer Protection Act and Consumer Protection Legislation of Alberta, Saskatchewan and Manitoba

[156] Ms. Bowman proposes the following common issues for the Personal Use Purchaser Consumer Subclass Members:

> 6. If the answer to Question 1 is yes, during the Class Period did the Defendants, or any of them, commit a "deceptive act or practice" as defined in the *BPCPA* section 4, in the manner in which they sold Recalled Lots, having regard to the factors set out in subsections 4(3) but irrespective of whether the factors set out in subsection (3)(a), 3(b) or 3(c) are present in any individual case?
>
> 7. During the Class Period, did the Defendants, or any of them, commit an "unconscionable act or practice" as defined in the *BPCPA* section 8, in the manner in which they sold Recalled Lots, having regard to the factors set out in subsections 8(3) but irrespective of whether the factors set out in subsection (3)(a)-(f) are present in any individual case?
>
> 7.1. During the Class Period, did the Defendants, or any of them, commit an "unfair practice" within the meaning of section 6 of the *Alberta CPA*?
>
> 7.2. During the Class Period, did the Defendants, or any of them, commit an "unfair practice" within the meaning of sections 6 and 7(a) of the *Saskatchewan CPABPA*?
>
> 7.3. During the Class Period, did the Defendants, or any of them, commit an "unfair business practice" within the meaning of sections 2(1) or 2(3)(a) of the *Manitoba BPA*?
>
> 8. If the answer to Questions 6 or 7 is yes, and the actions of the Defendants, or any of them, during the Class Period were a "deceptive act or practice" or an "unconscionable act or practice" as defined in the *BPCPA*, are the Plaintiff and Personal Use Purchaser Subclass Members entitled to:
>
> a) A declaratory order under s. 172(1)(a) to the effect that the Defendant(s) have engaged in an act or practice that contravenes the provisions of the *BPCPA*?

b) Damages under s. 171 of the *BPCPA*?

c) In the alternative to damages under s. 171, an order under s. 172(3)(a) of the *BPCPA* compelling the Defendant(s) to restore the monies improperly paid as a result of the unconscionable act or practice?

8.1. If the answer to Question 7.1 is yes, and the actions of the Defendants, or any of them, during the Class Period were an "unfair practice" as defined in the *Alberta CPA*, are the Plaintiff and Personal Use Purchaser Subclass Members entitled to:

a) Damages under section 13(2) or 142(2) of the *Alberta CPA*?

b) In the alternative, restitution for the purchase price paid for the Recalled Lots?

8.2. If the answer to Question 7.2 is yes, and the actions of the Defendants, or any of them, during the Class Period were an "unfair practice" as defined in the *Saskatchewan CPABPA*, are the Plaintiff and Personal Use Purchaser Subclass Members entitled to:

a) Damages pursuant to section 93(1) of the *Saskatchewan CPABPA*?

b) In the alternative, restitution for the purchase price paid for the Recalled Lots?

8.3. If the answer to Question 7.3 is yes, and the actions of the Defendants, or any of them, during the Class Period were an "unfair business practice" as defined in the *Manitoba BPA*, are the Plaintiff and Personal Use Purchaser Subclass Members entitled to:

a) Damages pursuant to section 23(2) of the *Manitoba BPA*?

b) In the alternative, repayment of the purchase price paid for the Recalled Lots?

9. If the answer to Questions 6 or 7 is yes, and the Defendants, or any of them, breached the *BPCPA*, are the Plaintiff and Personal Use Purchaser Subclass Members entitled to damages or a restoration order?

[157] With regard to proposed common issues 6, 7 and 7.1-7.3, Ms. Bowman makes the same arguments I addressed above in relation to proposed common issue 3.

[158] In *Stanway* at paras. 80–81, the Court of Appeal held that the language of s. 4 of the *BPCPA* defining a "deceptive act or practice" includes a representation "that fails to state a material fact", meaning that an omission can be a deceptive act or practice.

[159] For the same reasons I set above in relation to common issue 3, I conclude that there is some basis in fact to support common issues about advertising to support that proposed common issue 6.

[160] With regard to proposed common issue 7, because s. 8(3)(b) is engaged if a supplier takes advantage of a consumer's ignorance, I conclude that it is arguable that an omission of this kind may give rise to ignorance. Section 8 incorporates the common law elements of unconscionability but has also expanded beyond the common law concept, and can include more "systemic" conduct, as recently discussed in *Live Nation Entertainment, Inc. v. Gomel*, 2023 BCCA 274 at para. 71, citing *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139 at para. 42; *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at paras. 61–65; and *Loychuk* at paras. 29–31 and 54. Depending on the circumstances, omissions may lead to a finding of an unconscionable act or practice.

[161] The evidence on this application provides some basis in fact that it is a common issue that Kimberly-Clark marketed the flushable wipes as safe for personal care use and did not disclose that some recalled lots were contaminated with P. gergoviae until the recall program, and such an omission may have given rise to a level of ignorance on the part of the purchasers of the recalled lots, which may lead to a finding of unconscionable conduct under s. 8 of the *BPCPA*. The same reasoning logically applies to unfair practices under s. 6 of the Alberta *CPA*, sections 6 and 7(a) of the Saskatchewan CBABPA, and unfair business practices under sections 2(1)(3) or 2(3)(a) of the Manitoba *BPA*. Accordingly, there is some basis in fact in support of proposed common issues 7 and 7.1-7.3.

[162] Kimberly-Clark argues that proposed common issues 8, 8.1-8.3, and 9 are not common because they have causation embedded in them because, as discussed above, causation is an element of entitlement to damages under s. 171 of the *BPCPA* and to a restoration order under s. 172(3). Kimberly-Clark asserts the same is true of the other provincial consumer protection statutes.

[163] Ms. Bowman asserts that her three theories of causation, as discussed above, are all supported by some basis in fact.

[164] Ms. Bowman's first theory of causation is that given the nature of the alleged breaches of the *BPCPA*, had Kimberly-Clark not misrepresented the safety of recalled lots for personal use care, Ms. Bowman and the Personal Use Purchaser Subclass Members would not have suffered loss or damage by purchasing a worthless product. There is some evidence that Kimberly-Clark did not provide the information that some flushable wipes were contaminated with P. gergoviae to consumers or to retailers until the recall program, and then instructed them to discontinue use and dispose of the products. Keeping in mind that an omission can be a deceptive act or practice, there is some basis in fact to conclude that the issue of whether, as a result of Kimberly-Clark's conduct, Personal Use Purchaser Subclass Members purchased a worthless product, is a common issue. This type of theory was held to be viable and to give rise to a common issue by Justice Masuhara in *Finkel* BCSC at paras. 52–56.

[165] With regard to the *Food and Drugs Act* theory of causation, there is some basis in fact to support a common issue that embeds causation on the basis that the sale of the recalled lots that were contaminated with P. gergoviae was prohibited. The evidence is that Kimberly-Clark knows that some of the recalled lots were contaminated but does not know which. Under this theory, Kimberly-Clark should not have sold any of the recalled lots without making that determination. This method of establishing causation is common to all of the Personal Use Purchaser Subclass Members.

[166] The third theory of causation is the point of sale theory proposed by Dr. Jeziorski.

[167] In *Godfrey* SCC, the Supreme Court of Canada refined some of the principles it stated in *Pro-Sys* pertaining to common issues that address loss to class members on a class-wide basis, including addressing the evidentiary threshold of some basis in fact when there is competing expert evidence. At para. 102, Justice Brown, for the

majority, stated that it is not necessary that there be a methodology by which harm can be proved for each class member. What is necessary is a methodology by which loss can be proved to the class as a whole. In that price fixing case, the proposed methodology would show that the price fixing reached the requisite purchaser level: at paras. 102 and 107. Despite the possibility that not every class member suffered a loss, the "some basis in fact" standard was met by demonstrating a methodology by which harm to the class could be proved or shown to be incapable of proof, thereby advancing the litigation.

[168] I am of the view that Dr. Jeziorski's has provided a methodology, which if successful, can show that the point of sale theory establishes loss to the Personal Use Purchaser Subclass because the theory relies on the proposition that the Subclass Members had incomplete information about the product they were purchasing. I am satisfied that there is some basis in fact to support the finding that any incomplete information about the contamination of recalled lots was common to the Personal Use Purchaser Subclass.

[169] Some of the proposed common issues pertain to whether the plaintiffs are entitled to damages or a restoration order under the various provisions of provincial consumer protection legislation. Those proposed common issues do not include a determination of the quantum of damages or restoration order for each Personal Use Purchaser Subclass Member. The determination of quantum of damages or restoration for each Personal Use Purchaser Subclass Member raises the issue of the refund program and whether Personal Use Purchaser Subclass Members who received refunds have "residual damages". That determination is not foreclosed by certifying a common issue as to whether there is entitlement to damages because, as explained in *Godfrey v. Sony Corporation*, 2017 BCCA 302 [*Godfrey* BCCA] at para. 158, certification of a common issue does not create an ultimate right to recovery, it is merely a procedural step that does not change the substantive rights of the parties.

[170] Accordingly, the refund program and its implications for the calculation of damages should not prevent certification of issues as to whether the Personal Use Purchaser Subclass is entitled to an order for damages or a restoration order under the respective provincial consumer protection statues. Kimberly-Clark is not precluded from arguing that the refunds paid to some Personal Use Purchaser Subclass Members must be considered before any damages determined under this common issue are distributed to Personal Use Purchaser Subclass members.

[171] I am satisfied that Ms. Bowman's theories of causation are adequately pleaded, that the entitlement to damages or a restoration order arise from the provincial statutes, and both are supported by some basis in fact sufficient to certify proposed common issues 8, 8.1-8.3 and 9.

Negligence

[172] Ms. Bowman proposes the following common issues for the Personal Injury Subclass Members:

> 10. Did the Defendants, or any of them, owe a duty of care to Personal Injury Subclass Members in the manufacturing, distribution or sale of the Recalled Lots?
>
> 11. If the answer to questions 1 and 10 are yes, then did the Defendants, or any of them, breach the standard of care owed to Personal Injury Subclass Members as a result of the contamination of the Recalled Lots?

[173] Ms. Bowman has retracted the following causation common issue:

> 12. If the answer to question 11 is yes, did the breach cause damage to the Class Members?

[174] Kimberly-Clark's objections to the statement of common issues pertaining to negligence were based on the claims of pure economic loss being included in the negligence claims and causation being a common issue. As Ms. Bowman now only seeks to certify negligence common issues for the Personal Injury Subclass and, by retracting proposed common issue 12, does not seek to certify a common issue on causation for negligence, Kimberly-Clark's objections have been addressed.

[175] These common issues are examples of where the support for the existence of the issue such as whether a duty of care was owed arises as much from the pleadings as from evidence. However, if it is necessary to state so, the evidence that Kimberly-Clark manufactured the recalled lots is some basis in fact to support the existence of an issue of a duty of care. The evidence that that Kimberly-Clark was the manufacturer of the recalled lots is some evidence that the proposed common issue of whether a duty of care was owed is common.

[176] I do not accept that there has to be any evidence at this juncture that Kimberly-Clark breached the standard of care. The existence of that issue is supported by the pleadings and the law of negligence. In any event, the recall and Kimberly-Clark's statement that recalled lots did not meet Kimberly-Clark's quality standards is some evidence. The same evidence demonstrates that it is a common issue.

[177] I conclude that proposed common issues 10 and 11 are appropriate common issues that are supported by some basis in fact.

Breach of the Competition Act

[178] Ms. Bowman proposes the following common issues for the Economic Subclass Members:

> 13. If the answer to Question 1 is yes, and in view of the answers to Questions 2-4, did the Defendants, or any of them, engage in conduct that is contrary to s. 52 of the *Competition Act*?
>
> 14. If the answer to Question 13 is yes, what damages, if any, are payable by the Defendants to the Economic Subclass Members pursuant to s. 36 of the *Competition Act*?
>
> 15. If the answer to Question 13 is yes, should the Defendants, or any of them, pay the full costs, or any, of the investigation into this matter and of proceedings pursuant to s. 36 of the *Competition Act*?

[179] Proposed common issue 13 is about the conduct of Kimberly-Clark during the class period. The evidence provides some basis in fact that this conduct was common insofar as the claims of the Economic Subclass Members are concerned. Whether the conduct was contrary to s. 52 is a live issue arising from the pleadings

and the *Competition Act*. For the same reasons I have given above about Kimberly-Clark's marketing, there is some evidence to support that it stated that the recalled lots were safe to use. The medical evidence and the recall evidence is some evidence that they were not safe to use.

[180] Kimberly-Clark takes issue with proposed common issue 14 because it asserts that causation is embedded in it and since Ms. Bowman has not pleaded detrimental reliance and cannot prove it on a subclass-wide basis, this issue cannot be certified as a common issue.

[181] For the same reasons I have given on the s. 4(1)(a) analysis, I conclude that the *Competition Act* s. 36 damages claim does not require a finding of detrimental reliance to prove causation and so the proposed common issue does not, as a matter of course, embed detrimental reliance as the causation element. However, I agree it does embed causation, by virtue of the statutory language. In order for issue 14 to be capable of common determination, there must be a plausible method to determine causation on a class-wide basis.

[182] Ms. Bowman relies on the same three theories of causation I have discussed above. For the same reasons, I conclude that Ms. Bowman's three theories of causation are supported by some basis in fact.

[183] I note however that Ms. Bowman has not proposed a methodology which could both estimate the harm and account for refunds on a class-wide basis.

[184] For the same reasons I have articulated with respect to the provincial consumer protection statutes and with regard to the evidence of Drs. Orhun and Jeziorski, I am of the view that common issue 14 is common to the extent of addressing entitlement to damages under s. 36 of the *Competition Act*. For the same reasons I articulated with regard to the provincial consumer protection statutes, certification of this type of common issue does not preclude Kimberly-Clark from arguing for an accounting of refunds before distribution of damages to the Economic Subclass Members.

[185] With regard to proposed common issue 15, there is no objection to the commonality of the issue of whether the *Competition Act* investigation costs ought to be paid by Kimberly-Clark. I conclude that proposed common issue 15 is a common issue.

Unjust Enrichment

[186] Ms. Bowman proposes the following common issues for all Class Members:

> 16. If the answer to Question 1 is yes, and in view of the answers to Questions 2-4 and 13, were the Defendants unjustly enriched by the receipt of sales revenue on the Recalled Lots from the Plaintiff and Class Members in violation of the *Competition Act* or the *Food and Drugs Act*?
>
> 17. Did the Plaintiff and Class Members suffer a corresponding deprivation?
>
> 18. Is there a juristic reason for the Defendants' enrichment?
>
> 19. If the Defendants or some of them were unjustly enriched, are the Plaintiff and Class Members entitled to an accounting, restitution and/or disgorgement of the amounts charged to them by the Defendants during the Class Period for the Recalled Lots in violation of the *Competition Act* or the *Food and Drugs Act*, and if so in what amount?

[187] These proposed common issues also engage the concern I have already expressed about unjust enrichment being pleaded and common issues being stated on behalf of all Class Members, not just Economic Subclass Members. For the reasons given above, these issues are not common to Class Members because some Class Members did not purchase recalled lots and so do not have a cause of action in unjust enrichment.

[188] Consistent with my approach above, I will consider the arguments made as though these common issues are proposed for the Economic Subclass, but I will not certify them until I have heard submissions on this Class Member / Economic Subclass Member problem.

[189] There is no dispute that proposed common issues 16 and 17 are common issues.

[190] With regard to common issue 18, relying on *Godfrey* BCCA at paras. 27–30 and 185–186, Ms. Bowman argues that it is appropriate to certify whether breaches of the *Competition Act* negate a consumer contract as a juristic reason for unjust enrichment. Ms. Bowman makes the same argument with regard to unfair practices, citing *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, leave to appeal to Ont. S.C.J. (Div. Ct.) ref'd, 2022 ONSC 1586.

[191] Kimberly-Clark asserts that because each transaction by which Class Members purchased recalled lots was a contract, individual inquires must be made as to the terms of those contracts and those individual inquiries cannot be circumvented by Ms. Bowman's pleas of unconscionability and illegality.

[192] *Godfrey* BCCA is not directly on point because it stands for a more general proposition that a breach of the *Competition Act* could be the unlawful means element of the tort of civil conspiracy by unlawful means, or that a claim under s. 36 of the *Competition Act* did not preclude a claim for restitution based on unjust enrichment. *Godfrey* BCCA does not stand for the precise proposition that an allegation and some evidence of a class-wide breach of s. 36 of the *Competition Act* can serve as some basis in fact for a common issue that juristic reason has been negated by a breach of the *Competition Act.* However, the principles cited in that case support the proposition. In particular, the proposition that evidence of breaches of the *Competition Act*, which by definition are some basis in fact for common conduct by a defendant, can be evidence of unlawfulness for another cause of action: *Godfrey* BCCA at paras. 164–186.

[193] In *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at para. 27, the Saskatchewan Court of Appeal held that a contract is not a juristic reason for enrichment unless it permits the receipt of funds for the alleged deprivation and the contractual provision is valid and enforceable. In short, the contract must provide for the benefit.

[194] In this case, there is no express evidence on the existence of the terms of any contracts that governed the sales of the recalled lots from various retailers to the

Economic Subclass Members. However, the transactions that are said to give rise to the contracts are retail sales transactions. The evidence is that there were no contracts between the Economic Subclass Members and Kimberly-Clark over the sale of the recalled lots, and so any contract were between the Economic Subclass Members and retailers. The evidence of the representative plaintiff and the nature of the claim are such that there is some basis in fact to conclude that the Economic Subclass Members were purchasers who picked up packages of recalled lots off the shelf and walked to a clerk or a self check-out station to pay for the product, or bought them online.

[195] If there were contracts between the Economic Subclass Members and the retailers, it is reasonable to infer that the terms were not negotiated between them for each purchase. It is therefore reasonable to infer that any terms of any purchase and sale contracts are common. Ms. Bowman's claims that Kimberly-Clark engaged in unlawful conduct by breaching s. 36 of the *Competition Act* provides a common factual foundation to assess the validity of any such contracts.

[196] In addition, in *Krishnan* at para. 154*,* Justice Branch held that the plaintiff's theory that the product was sold in breach of regulations which would void retail contracts for sale, analogous to the breach of the *Food and Drugs Act* theory in this case, was a basis for similarly worded common issues.

[197] With the caveat that proposed common issue 19 does not preclude Kimberly-Clark from seeking to account for refunds paid to Class Members prior to payment of damages, I conclude that there is some basis in fact for the common issues stated by Ms. Bowman on unjust enrichment and that they will advance the litigation. However, I will not certify them unless and until I have heard submissions and resolved the Class Member / Economic Subclass Member problem noted above.

Health Care Costs Recovery Act Subrogated Claims

[198] Ms. Bowman proposes the following common issues for Personal Injury Subclass Members:

20. Are Personal Injury Subclass Members "beneficiaries" who are entitled to recover from the Defendants for Health Care Services provided by Provincial Health Insurers, as defined under provincial health and territorial health care cost recovery legislation?

21. In particular, does: a) an infection; b) irritation, abrasion, and scarring to the skin; c) a psychological injury, or any of them, constitute "personal injury" in order to warrant such recovery?

[199] Ms. Bowman originally proposed additional common issues under this heading, to which Kimberly-Clark took objection. As a result of those objections. Ms. Bowman has eliminated proposed common issues as to whether the British Columbia Ministry of Health and other provinces incurred health care costs on behalf of the Class Members and whether they would incur costs in the future. Instead, the proposed common issues are focussed on the Personal Injury Subclass Members status as beneficiaries under provincial health care costs recovery legislation and whether certain conditions constitute personal injuries to warrant recovery of health care costs.

[200] The evidence of Ms. Bowman provides some basis in fact, and when combined with the legislation, proposed common issue 20 is properly supported. Proposed common issue 21 is supported by some basis in fact found in the medical evidence, the evidence of Ms. Bowman, and the legislation.

[201] These common issues will advance the litigation. I conclude they are appropriate for certification.

Aggregate Monetary Relief

[202] Ms. Bowman proposes the following common issues:

22. If common issues 8, 9, 12 and/or 14 are answered in the affirmative, can the amount of loss or damages suffered by the Class Members, or any of them, be determined on an aggregate basis and, if so, in what amount?

23. If issue 19 is answered in the affirmative, can the amount of restitutionary relief or disgorgement to which the Class Members, or any of them, are entitled be determined on an aggregate basis, and if so, in what amount?

[203] As a preliminary point regarding proposed common issue 22, proposed common issues 8 and 9 are stated on behalf of the Personal Use Purchaser Subclass. Common issue 12 has been abandoned. Common issue 14 is proposed on behalf of the Economic Subclass. This preliminary point does not give rise the same type of problem as the Unjust Enrichment Class Member / Economic Subclass Member problem because that problem has its origins in the pleadings, and this problem is only in the stated proposed common issues. The Court is at liberty to certify common issues worded differently from those proposed by the representative plaintiff.

[204] With regard to proposed common issue 23, common issue 19 has been proposed on behalf of the Class, but it relates to the unjust enrichment claim that is subject to the Class Member / Economic Subclass Member problem. Consistent with my approach above, I will consider common issue 23 for the Economic Subclass but subject to the resolution of the Class Member / Economic Subclass Member problem.

[205] Accordingly, I will address these proposed common issues as though they read as follows:

> 22. If:
>
> (a) common issues 8, 8.1-8.3 and/or 9 are answered in the affirmative, can the amount of loss or damages suffered by the Personal Use Purchaser Class Members, or any of them, be determined on an aggregate basis and, if so, in what amount?
>
> (b) common issue 14 is answered in the affirmative, can the amount of loss or damages suffered by the Economic Sub Class Members, or any of them, be determined on an aggregate basis and, if so, in what amount?
>
> 23. If issue 19 is answered in the affirmative, can the amount of restitutionary relief or disgorgement to which the Economic Subclass Members, or any of them, are entitled be determined on an aggregate basis, and if so, in what amount?

[206] The discussion of aggregate damages must always take into account that they require an antecedent finding of liability at the common issues trial before they can be utilized: *Pro-Sys* at paras. 131–132; *Godfrey* SCC at para. 116. For that

reason, in some cases they might be appropriately certified at the initial certification hearing if there are other issues certified that are capable of determining liability on a class-wide basis. In other cases, the determination of whether aggregate damages ought to be certified is better deferred until after the other liability-related common issues have been decided. In addition, even in cases where the question of whether aggregate damages can be determined is certified at the outset, if the outcome of the common issues trial is that some unidentifiable portion of the class did not suffer a loss, individual issues will be required because the answer to the common issue of whether damages can be assessed using aggregate damages will be no: *Godfrey* SCC at paras. 120–121.

[207] Justice Brown explained that aggregate damages were appropriate to be certified in that case because the plaintiff's proposed methodology could prove the entire class suffered loss, or might fail to prove that any portion of the class suffered a loss, or might prove that an identifiable portion of the class suffered a loss: *Godfrey* SCC at para. 120. However, if, at the end of the common issues trial, the plaintiff's expert methodology proved that only a portion of the class suffered a loss but the portion that did not suffer a loss was not identifiable, it would be inappropriate to proceed to aggregate damages as a common issue. The nature of the issue certified was whether damages could be assessed through aggregate means, and if so, in what amount: *Godfrey* SCC at para. 121.

[208] Kimberly-Clark makes the same arguments about causation and detrimental reliance arguments that it made about the proposed common issues pertaining to liability under the provincial consumer protection statutes, the *Competition Act*, and unjust enrichment to support its position that loss cannot be proved on the appropriate subclass-wide basis. I have not accepted those arguments.

[209] In addition, Kimberly-Clark argues that Ms. Bowman has not shown a basis in fact that monetary relief can be determined without proof by each of the various Subclass Members. Kimberly-Clark submits that Dr. Orhun's evidence demonstrates variability in consumer behaviour and prices such that loss cannot be assessed on a

subclass-wide basis and that Dr. Jeziorski's evidence does not adequately address the variability that precludes subclass-wide determination.

[210] When assessing whether the plaintiff has shown some evidence in fact to establish that a proposed common issue to establish loss is common based on a proposed expert methodology, the methodology must be sufficiently credible or plausible and grounded in the facts of the case: *Godfrey* SCC at para. 106, citing *Pro-Sys* at paras. 114–118. The low threshold was explained by the Supreme Court of Canada in *AIC Limited v. Fischer*, 2013 SCC 69, where Justice Cromwell emphasized the caution in *Pro-Sys* that courts should not seek to resolve conflicting expert evidence at certification and that the "some basis in fact" standard will not be met where there is no methodology, but it is not necessary that the evidence in support of the methodology be compelling: at paras. 40–41 and 43.

[211] In *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at paras. 86–92, the Court of Appeal held that the same standards apply to evidence of methodology in non-price fixing cases. In addition, while expert evidence may be required based on the complexity of the type of claim, it is not required in every case, especially not in cases that do not involve multi-level complex chains of distribution: *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at paras. 31–38.

[212] I am not in a position to resolve the points of debate between Dr. Orhun and Dr. Jeziorski at this stage and I will not do so.

[213] With one exception, I consider Dr. Jeziorski's opinions to reach the level of some basis in fact. He states the reasons he disagrees with Dr. Orhun on some matters and provides substantiation for his disagreement with reference to literature, alternate sources of data, or competing understandings of consumer behaviour and price theory. He suggests methodologies for resolving the issues of debate that can be used to address Ms. Bowman's proposed common issues on a subclass-wide basis which, he asserts, are grounded in marketing and price theory and for which he has provided supporting research and identified potential data sources.

[214] For example, with regard to price variations, Dr. Jeziorski disputes the degree to which there will be channel variation because economic research demonstrates that mass merchandise chains charge “nearly uniform” prices across stores, despite variations in consumer statistics. He cites a 2019 publication from *the Quarterly Journal of Economics* for this proposition. On cross-examination, he agreed that the uniform pricing studies he referred to were about the same retailers at the same point in time, not across different retailers.

[215] On cross-examination, Dr. Jeziorski agreed that his proposed methodologies are means of estimating prices that each class member paid and estimating economic harm. That does not undermine his evidence as a whole or lead to a conclusion that it does not meet the “some basis in fact” threshold.

[216] However, for the purposes of common issues that address whether class members or subclass members have suffered a loss, it is not necessary that the methodology be able to demonstrate the exact loss to each class member or subclass member; a methodology that estimates the loss to the class is sufficient: *Godfrey* SCC at paras. 102 and 106–107.

[217] In addition, I observe that the caselaw in which the “some basis in fact” threshold has been refined includes price fixing and anti-competitive behaviour cases where proposed methodologies to estimate harm on a class-wide basis include regression analysis. This methodology, one of those proposed by Dr. Jeziorski, results in an estimate of harm on a subclass-wide basis, as opposed to a subclass member-by-subclass member calculation.

[218] The point on which I am not persuaded that there is some basis in fact is that those who received full refunds have suffered a loss. This opinion is set out at para. 17 of Dr. Jeziorski’s report. On that issue, unlike on other matters, Dr. Jeziorski does not provide any economic support in price or marketing theory.

[219] With regard to his posited difference between “realized harm from use” and the refund amount (para. 17.i of Dr. Jeziorski’s opinion) for persons who used

contaminated wipes, I understand him to be opining that Personal Injury Subclass Members may have suffered personal injury or economic harm due to personal injury that is greater than the amount they were refunded. However, because neither personal injury causation nor damages for personal injury are sought to be resolved on a subclass-wide basis, Dr. Jeziorski's opinion on this point is irrelevant.

[220] With regard to Economic Subclass Members who bought uncontaminated wipes, Dr. Jeziorski opined that the economic damage at the point of purchase is greater than the refund, even if the refund was a full refund (i.e., equal to or greater than the purchase price) because those consumers would not have purchased the product even if the price was zero and so a full refund would not result in complete restitution. He asserts that the residual harm can be determined using the Compensating Variation methodology.

[221] Counsel for Ms. Bowman has not provided me with any submissions that an Economic Subclass Member who purchased recalled wipes and received a full refund has a residual loss that is legally compensable.

[222] While I am satisfied that the Compensating Variation methodology meets the low threshold for some basis in fact as a methodology to estimate harm from the purchase of the recalled lots, I am not satisfied that it can be applied to Economic Subclass Members who received a full refund to determine residual harm in a manner that is consistent with the legal principles of compensation. In addition, in this part of his opinion (para. 17.ii), Dr. Jeziorski does not refer to any economic literature or studies to support his thesis.

[223] The terminology used in *Pro-Sys* and *Godfrey* SCC is that "loss" or "liability" must be capable of being determined on a class-wide basis before aggregate damages can be entertained. In this case, the question arises as to whether loss or liability means the damages suffered by the Economic Subclass before considering refunds paid through the recall and refund program. The parties did not address this issue directly; the focus of their submissions on the recall and refunds pertained to preferability.

[224] In other cases where there have been refunds or amounts that are the subject of pleaded claims for set off (in this case, Kimberly-Clark has not pleaded equitable set off or legal set off), there seems to be at least implicit acceptance that liability and loss can be determined without reference to the refund or set off claim, and any accounting for refunds or set off claims will be dealt with as individual issues. For example, in *MacKinnon v. National Money Mart Company*, 2007 BCSC 348, aff'd 2009 BCCA 103, the claim pertained to allegedly illegal interest charges on payday loans. Some of the class members still had principle loan amounts outstanding. The defendant claimed those amounts should be set off against any damages for illegal interest charged. The plaintiff did not seek to certify an aggregate damages issue, but did seek to certify the issue of whether the defendants were "liable" for unjust enrichment. The plaintiff argued that if they were liable, then damages could be assessed using aggregate means and data. Justice Brown certified the unjust enrichment liability issue and addressed the set off pertaining to the principle loan amounts as individual issues that were relevant to the preferability analysis.

[225] This is consistent with the manner in which set off is dealt with generally, i.e. the calculation of the set-off takes place at the quantification of damages stage: *Wilson v. Fotsch*, 2010 BCCA 226 at para. 65.

[226] Accordingly, despite that I do not accept Dr. Jeziorski's opinion on residual losses after full refunds, I am satisfied that liability for Ms. Bowman's claims on behalf of the Personal Use Purchaser Subclass and the Economic Subclass can be determined antecedent to aggregate damages. The issue of whether aggregate damages can be determined on a subclass-wide basis for the claims brought on behalf of those subclasses is appropriately certified now even though the answers to common issues 8, 9, 14 and 19 may mean that the answers to common issues 22 or 23 are "no".

[227] If the answers to common issues 22 and 23 are "yes", then the issues of refunds or any set off claims can be addressed as individual issues.

[228] With regard to common issue 14, certification of aggregate damages is dependent on the resolution of the Class Member / Economic Subclass Member problem.

Interest

[229] Ms. Bowman proposes the following issue on interest for the Class Members:

> 24. What is the liability, if any, of the Defendants, or any of them, for court-ordered interest?

[230] This issue is too broadly stated. Damages issues have not been certified for the Personal Injury Subclass.

[231] With regard to the Economic Subclass and the Personal Use Purchaser Subclass, if the answers to the common issues are that aggregate damages can be dealt with on the relevant subclass-wide basis for some or all of the claims and eitihe or both of those subclasses, then it follows that interest can be addressed on the relevant subclass-wide basis.

[232] Accordingly, I certify the following interest issue:

> 24. What is the liability, if any, of the Defendants, or any of them, for court-ordered interest on any damages that are assessed aggregately pursuant to common issues 22 or 23?

Distribution

[233] Ms. Bowman proposes the following common issues:

> 25. What is the appropriate distribution of any aggregate damages award to the class, and should the Defendants pay for the cost of that distribution?

[234] Ms. Bowman has not addressed the refund issue in her submissions on this common issue. She has not proposed to address the refunds in distributing damages to the Economic Subclass or the Personal Use Purchaser Subclass.

[235] I am of the view that while distribution is a live issue in the case as a whole, Ms. Bowman has not addressed the refund issue in a manner that supports distribution being dealt with as a common issue.

Section 4(1)(d) – Preferable Procedure

[236] The preferability element is found in section 4(1)(d) of the *Class Proceedings Act* which requires the court to consider whether a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

[237] Ms. Bowman asserts that a class action is the preferable procedure to advance the access to justice and judicial economy goals of class proceedings. She asserts that Kimberly-Clark's refund, recall, and compensation programs will not satisfy either of those goals because the recall program was not adequate to give Class Members the information to make any sort of claim and so the access to justice goal will be frustrated if Class Members are precluded from pursuing their claims in a class action. Ms. Bowman emphasizes this point as particularly important for the Economic Subclass Members whose individual claims are likely low-value and not economically viable to pursue individually.

[238] Kimberly-Clark asserts that a class action is clearly not the preferable procedure because Kimberly-Clark has identified a viable and effective alternate procedure: its recall, refund, and compensation programs. Kimberly-Clark asserts that its recall, refund, and compensation programs meet all three statutory purposes of the *Class Proceedings Act*: access to justice, judicial economy, and behaviour modification. It submits that where a manufacturer of a product who has a mishap and who promptly takes the steps it took to address the mishap, a certified class action will defeat these objectives instead of furthering them.

[239] For the reasons that follow, I agree with Kimberly-Clark's submissions with regard to the recall and refund program that applied to the claims of the Economic Subclass Members who are not also Personal Injury Subclass Members. But for the Personal Injury Subclass Members, I am not persuaded that the recall program provided them adequate notice of their right to make a claim, and I am not

persuaded that there is evidence that the compensation program addressed their claims in a manner that could be said to be the preferable procedure.

Legal Principles

[240] There are two questions that are central to the preferability analysis. The first is whether a class proceeding would be a fair, efficient, and manageable method of advancing the claims. The second is whether the class proceeding is preferable for the resolution of the claims compared with other realistically available means for their resolution, which may include court processes or non-judicial alternatives: *Rumley v. British Columbia*, 2001 SCC 69 at para. 35, citing *Hollick* at para. 28. See also *Finkel* BCCA at paras. 24–26.

[241] In *Finkel* BCCA at para. 25*,* the Court of Appeal confirmed that when comparing a class proceeding to other realistically available means for resolving the claims, a practical cost-benefit approach applies, citing *AIC Limited* at paras. 21, 23 and *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 230, aff'd 2015 BCCA 252, leave to appeal to SCC ref'd, 36584 (17 March 2016).

[242] Generally speaking, the preferability analysis must be applied through the triple lenses of the objectives of class proceedings: access to justice, judicial efficiency, and behaviour modification: *Hollick* at para. 27. Related to this, when considering whether a class proceeding will be fair, efficient, and manageable, the common issues must be considered in the context of the action as a whole, and their relative importance taken into account: *Hollick* at para. 30.

[243] Section 4(2) of the *Class Proceedings Act* sets out non-exhaustive criteria pertinent to this analysis:

> (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.

[244] As it is necessary for a certification judge to consider each of the s. 4(2) factors (*Lewis v. WestJet Airlines Ltd.*, 2022 BCCA 145 at para. 51), I will address the competing arguments with reference to and within the framework of these factors.

Whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members.

[245] Common issues 1–5, 10, and 11 pertain to claims of the Personal Injury Subclass members. They demonstrate that substantive and substantial common issues can be resolved on a subclass-wide basis. The Personal Injury Subclass Members' claims raise individual issues of diagnosis with a P. gergoviae-related condition, causation, and quantification of damages. These type of individual issues can be complex, especially if the Personal Injury Subclass Members have underlying health issues as Ms. Bowman does.

[246] The individual issues also include whether the Personal Injury Subclass Members who received compensation from Kimberly-Clark released their claims and some releases contained an acknowledgement that this proceeding as a proposed class action had been brought. The evidence does not show how many of the 141 involved releases or how many releases specifically acknowledge this proceeding. Accordingly, it is difficult to assess how numerous those cases are and whether they will be time consuming at individual issues trial.

[247] The existence of potentially complex individual issues does not usually stand in the way of certifying a claim where the substantial ingredients of the liability issues

are central and can be resolved in a common way thereby eliminating the need to litigate them for each class member.

[248] The common issues in this case are central. While Kimberly-Clark has approached this certification hearing on the basis that it had a time-limited intermittent problem with contamination on one of its two production lines, it has not admitted any of the elements of negligence including that it owed a duty of care, what the standard of care was, and whether it was breached. The evidence on this hearing is conflicting on how dangerous P. gergoviae is to humans and how frequently contamination occurs. Those are matters that go to what the standard of care was and whether it was breached. They will require significant document disclosure, oral discoveries, and expert opinion evidence.

[249] I consider this case to be like the many product liability and/or personal injury class proceedings where the common issues have been a reason to determine that a class proceeding is the preferable procedure despite many potentially substantive and time-consuming individual issues. See for example: *Rumley*; *Miller*; *Nissan Canada*; *Campbell v. Flexwatt Corp.*, 44 B.C.L.R. (3d) 343, (C.A.); and *Chace v. Crane Canada*, 44 B.C.L.R. (3d) 264 (C.A.).

[250] Despite the potential complexity in some of the individual issues, I conclude that the common issues are likely predominant, and so certification will further the fair and efficient management of the proceeding.

[251] With regard to the Economic Subclass Members, common issues 1–5, 13–15, 16–19, and 22–23 will address liability for the claims of the Personal Use Purchaser Subclass and the Economic Subclass (subject to resolution of the unjust enrichment Class Member / Economic Subclass Member problem). The individual issues will be refunds and distribution of damages. I consider the common issues to be the heart of the claims and to predominate for the Personal Use Purchaser Subclass and the Economic Subclass.

Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions.

[252] There is no evidence that any Class Members have expressed an interest in controlling the prosecution of separate actions.

Whether the class proceeding would involve claims that are or have been the subject of any other proceedings.

[253] There is no evidence of other court proceedings pertaining to the recalled lots except a Quebec proceeding which has been stayed pending the outcome in this case.

Whether other means of resolving the claims are less practical or less efficient and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[254] I will address sub-issues (d) and (e) together as the comparator to this class action is the recall, refund, and compensation programs. Kimberly-Clark's position is that compared to those programs, this proceeding is less practical, less efficient, and will create greater difficulties for resolving the claims.

[255] In *Richardson v. Samsung*, 2018 ONSC 6130, Justice Rady considered a recall and refund program instituted by the manufacturer of cell phones that overheated. Justice Rady held that a prompt refund and recall program serves the goals of access to justice and behaviour modification, even if it is not perfect in matching compensation with loss: at paras. 73 and 78. Justice Rady also observed that class proceedings may not perfectly match compensation with loss: at para. 78. I agree with Justice Rady on both fronts.

[256] In *Coles v. FCA Canada Inc.*, 2022 ONSC 5575, Justice Perell held that a recall and replacement program for defective airbags was superior to a class action. Part of the analysis in that case was that the class action had taken seven years from inception to certification, and a common issues trial was likely two to four years away. Justice Perell characterized the progress of the class action as "dawdling" (at

paras. 158–159) and for that reason, the recall and repair program that was already underway was superior: at paras. 169–170.

[257] I do not consider that class counsel has dawdled in bringing forward this class action. It was commenced within months of the contamination being made public in 2020 and it was ready for certification in the fall of 2022. The original certification hearing was adjourned due to late delivery of the Jeziorski report and the timing of an application brought by Kimberly-Clark to exclude it: see *Bowman v. Kimberly-Clark Corporation*, 2022 BCSC 1864 at para. 38.

[258] Despite that this claim was brought swiftly and certification has been promptly pursued, there is no gainsaying that the timing of the recall and refund program is far superior to the timing of this proposed class action for the Economic Subclass claims (including both subclasses of the Economic Subclass). The recall and refund programs were initiated within weeks of discovery of the problem. In relation to when the recalled lots were purchased, Economic Subclass Members who bought recalled lots are much more likely to have remembered that they bought flushable wipes and to have the means of ascertaining that the flushable wipes they bought were recalled lots.

[259] Ms. Bowman submits that the notice of the recall was inadequate and that the take up rate is evidence of its inadequacy.

[260] I do not accept Ms. Bowman’s argument on this point.

[261] The recall notice was developed together with the United States Food and Drug Administration and Health Canada. The notice was communicated to retailers. The notice advised retailers to dispose of or return to Kimberly-Clark recalled lots that were still in their possession. Kimberly-Clark also contacted retail customers by telephone and told them to remove the products from their shelves immediately and to dispose of them or return them.

[262] Kimberly-Clark created a webpage specific to the recall. The webpage contains the lot checker. The website instructs consumers to dispose of the recalled

lots and provides information on how to seek a refund. Kimberly-Clark also posted recall notices on its Facebook and Twitter pages. Those notices provide the same type of information to consumers that was provided on the recall website.

[263] Health Canada issued an alert on its website. The information stated that consumers should immediately stop using the product, dispose of it, and contact Kimberly-Clark.

[264] Some retailers sent letters to purchasers. For example, Costco sent a letter, on Kimberly-Clark letter head with Kimberly-Clark's contact information, to Costco members who purchased flushable wipes between February 7, 2020 and October 8, 2020. That letter advised consumers that P. gergoviae can cause infections in humans and that certain persons, e.g., those with weakened immune systems, are at particular risk of infection. The information stated that at this time, there "is a low rate of non-serious complaints, such as irritation and minor infection".

[265] The recall program also received media attention on CTV News, the Toronto Star, CNN Health, USA Today, and the New York Post. The CTV News, New York Post, and USA Today coverage included the same language about "non-serious complaints such as irritation and minor infection" as the letter sent to Costco members.

[266] Consumers were able to claim refunds by completing an online form, by calling a member of a customer service team, by emailing the customer service team, by asking to make a claim via social media, or by sending a claim in the mail. Claims were approved where the customer had certain details including the lot number, the retailer from which the recalled lot was purchased, and the package size. However, the deponent for Kimberly-Clark deposed that if the customer did not have the lot code, they could obtain a refund if some (unspecified) information about the purchase was provided. Kimberly-Clark did not require proof of purchase for claims of up to five packages. If a consumer claimed a refund for more than five packages, proof of purchase had to be provided.

[267] At the beginning of the refund program, Kimberly-Clark set the refund amount in relation to eight different package sizes that the claimant may have purchased. By mid-October 2020, Kimberly-Clark simplified the refund program to 3 amounts, a per-package amount, an amount for each Club Pack, or an amount if no information was provided about the type of the product. The refunds were issued in the form of a pre-loaded Visa card.

[268] For the refund program, Kimberly-Clark more than doubled the size of its existing customer service team. The staff costs, for the worldwide recall program and refund program, was USD $1.6 million. The refund program continues. That is, persons who have not yet sought a refund may still do so.

[269] It is not possible to compare 11,651 refunds issued to Canadian consumers totalling $214,290.49 (up to the date the evidence was filed) to the roughly 1.8 million recalled lots distributed by Kimberly-Clark for sale in Canada. However, at $3 per package, if every package distributed to retailers for sale in Canada was sold to consumers and refunded, the total would be over $5 million. Based on this math, Ms. Bowman asserts that the refund program resulted in less than 5% of compensation to Economic Subclass Members. Kimberly-Clark says that the take up rate is about 14% when the refunds to retailers are included.

[270] I cannot resolve that evidentiary issue on this application.

[271] Ms. Bowman has not described what notice program she would employ in this class proceeding that would be more effective than the recall program. Even if the take up rate is as low as Ms. Bowman asserts, there is no evidence that this class proceeding with an outcome two years or more from now and an undefined notice program will reach more people and inspire them to make a claim if the plaintiff is successful.

[272] Ms. Bowman also asserts that the class proceeding is preferable because even if more compensation is not actually paid to Economic Subclass Members, there is an opportunity for Cy-pres distribution of the damages that will have the

effect of enhancing access to justice by indirectly benefiting Economic Subclass Members.

[273] I am not aware of any authority that the benefits of indirect Cy-pres distribution alone justify certifying a class proceeding for claims that the defendant has attempted to redress. Neither access to justice nor judicial efficiency are furthered by certifying a class action for the sole purpose of Cy-pres distribution where individual compensation is possible and has already been undertaken. With regard to behaviour modification, the recall program and the refund program are evidence that Kimberly-Clark takes its responsibilities as a manufacturer seriously and invested significant resources into promptly reaching out to Economic Subclass Members to provide refunds. Indeed, I agree with the submissions of Kimberly-Clark that the responsibility demonstrated by Kimberly-Clark should be recognized and lauded. Certification of the claims of the Economic Subclass Members despite the recall and refund program might deter other manufacturers from doing the same if they cannot avoid the class proceeding in any case.

[274] For the Economic Subclass Members, the evidence is that the refund program provided compensation based on a minimal level of proof of purchase. Those who wished to prove that they bought more recalled lots than a threshold number could provide receipts. While the compensation may not have been perfectly matched to the losses the Economic Subclass Members suffered, it is adequate. This is especially so when it is acknowledged that a class proceeding program would not likely be perfect either, especially given that the plaintiff seeks quantification of damages to proceed by assessment of aggregate damages.

[275] I conclude that access to justice and behaviour modification will not be furthered by certifying the claims of either subclass of the Economic Subclass Members who are not also Personal Injury Subclass Members. There is no evidence that any such persons intend to commence individual claims and so there is no basis to conclude that judicial economy will be furthered by certifying the claims of Economic Subclass Members who are not Personal Injury Subclass Members.

[276] The view I have just expressed pertain to the claims of persons who only belong to the Economic Subclass. I turn to the compensation for personal injury that Kimberly-Clark provided compared to the claims of the Personal Injury Subclass Members, some of whom may also be members of the Economic Subclass.

[277] The recall notice sent to retailers described P. gergoviae as a cause of infection in humans and described persons with certain conditions, such as a weakened immune system, as particularly at risk. The recall notice sent to retailers directed retailers to, as a matter of urgency, immediately examine their inventory, quarantine recalled lots, and destroy the recalled lots or deliver them to Kimberly-Clark's third party disposal service provider.

[278] The FAQs on Kimberly-Clark's recall webpage described P. gergoviae as a naturally occurring bacterium that rarely causes serious infections in health individuals, however individuals with weakened immune systems are at heightened risk of infection. The FAQs advised consumers who experience a heath-related issue to immediately seek medical advice and stop using the product. The FAQs also advised all consumers to stop using the product. The FAQs advised persons who no longer have their product and so cannot check their lot codes to call them with any questions, and advised those who have a health-related concern to contact their health care provider.

[279] There is no evidence that Kimberly-Clark, through the recall program or the refund program, advised consumers that they can also make a claim for a personal injury, or advised how to make a claim for a personal injury caused by using contaminated wipes. Ms. Witthuhn deposed that during the refund program, if a consumer alleged that they had suffered any form of harm related to their use of wipes, Kimberly-Clark did a follow up wellness check unless the consumer indicated that they did not want to be contacted. It is not clear whether the refund program and/or the wellness checks were responsible for the identification of the 149 personal injury claims about which Mr. Schopp deposed.

[280] Unlike the details provided regarding the refund program, Kimberly-Clark has not provided any evidence of the quantum of compensation provided to personal injury claimants, the method by which they obtained the compensation, or how appropriate compensation was determined.

[281] I am not satisfied that there has been any effective notice to the Personal Injury Subclass about compensation. I am not satisfied that the compensation provided has been adequate because there is simply no evidence about it.

[282] The evidence is that some Personal Injury Subclass Members signed releases in conjunction with receiving compensation for their personal injury claims. The enforceability of those releases may be an individual issue to be addressed but as discussed above, I am not of the view that the Personal Injury Subclass individual issues outweigh the access to justice benefits of this class proceeding.

[283] Accordingly, I am of the view that access to justice is furthered by certifying the claims of the Personal Injury Subclass. It follows that judicial economy is also furthered. I am of the view that behaviour modification will also be furthered since Kimberly-Clark was not motivated to put together a structured and comprehensive compensation program for personal injury claims.

[284] In summary, I conclude that a class proceeding is not the preferable procedure for those Economic Subclass Members who are not also Personal Injury Subclass Members. I am of the view that a class proceeding is the preferable procedure for Personal Injury Subclass Members.

[285] Given the evidence about take up on the recall and refund programs, it is entirely possible that Personal Injury Subclass Members may still have claims as Economic Subclass Members that have not been addressed. I consider a class proceeding to be the preferable procedure to address their economic claims as well as their personal injury claims since the common issues on the economic claims are comprehensive compared to the individual claims on the economic claims.

Section 4(1)(e) – Representative Plaintiff

[286] Section 4(1)(e) of the *Class Proceedings Act* requires the court to consider whether 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.

Ms. Bowman

[287] Kimberly-Clark asserts that Ms. Bowman is not a suitable representative plaintiff for the Personal Injury Subclass because the evidence falls short of establishing that she purchased contaminated flushable wipes and that the medical issues she has identified were caused by the use of those wipes.

[288] Ms. Bowman has provided evidence that she purchased and used recalled lots.

[289] Dr. Roberts reviewed Ms. Bowman's medical records and her affidavit and opined that he could not determine that the flushable wipes caused the symptoms she described because she has not been tested for P. gergoviae and she was never diagnosed with a medical condition as a result of using the flushable wipes.

[290] Dr. Roberts raised issues with the timing of the symptoms recorded in the medical records compared to the time when Ms. Bowman was using flushable wipes. He also raised issues with her evidence about inflamed skin follicles elsewhere in her body because her medical records contain description of these problems as "bug bites", potentially a parasite that she got from a bird, and in other ways.

[291] Dr. Roberts' interpretation of Ms. Bowman's records must be received with some circumspection because he did not examine her, there is no evidence that he is qualified to make any diagnosis or causative determination (his evidence is that he

is an epidemiologist who studies community health outbreaks, not that he is involved in diagnosis or causative determinations in any clinical settings), and the medical records are hearsay. In any event, the relevance and probative value of his opinions on causation with regard to Ms. Bowman are limited because the evidence at certification is received and reviewed for the purpose of whether there is "any basis in fact" for the certification elements.

[292] On certification, Ms. Bowman does not have to prove that she was exposed to P. gergoviae because that finding of fact is not necessary to support any of the certification elements. Ms. Bowman has withdrawn her proposed common issue pertaining to causation for the Personal Injury Subclass. Accordingly, there is no requirement for her to show that causation is a common issue and so Dr. Robert's scepticism about the cause of her symptoms is not relevant to certification except that it demonstrates that individual causation may not be straightforward in some cases, a factor that I have taken into account in assessing preferability.

Plan for the Proceeding

[293] The purpose of the litigation plan is to set out a framework for how the case may proceed and demonstrate that the plaintiff understands its complexity. It is not necessary that the plaintiff detail every step that will be required in the proceeding: *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at para. 57, citing *Godfrey* BCCA at para. 253, and *Lam v. University of British Columbia* 2010 BCCA 325 at paras. 85–86.

[294] No particular issues are raised with the plan of proceeding. It will have to be amended, as anticipated in the caselaw (e.g. *Godfrey* BCCA at para. 252), given the more limited certification order I have made and events that unfold during the course of the proceeding.

[295] I conclude that Ms. Bowman and her plan for proceeding satisfy s. 4(1)(e).

Disposition

[296] The claims of the Personal Injury Subclass are certified, including claims they have as members of the Economic Subclass. The claims of the Economic Subclass Members who are not also Personal Injury Subclass Members are not certified.

[297] The parties should make arrangements to appear before me to address the Class Member / Economic Subclass Member problem, taking into account what I have said about that problem in these reasons, and that I am only prepared to certify the claims of Economic Subclass Members who are also Personal Injury Subclass Members.

[298] The class definition and common issues should be amended to align with my disposition of which claims are certifiable, these reasons, and with the resolution of the unjust enrichment Class Member / Economic Subclass Member problem. If the parties cannot agree on the appropriate amendments to the class definition and the common issues, they may arrange for an appearance before me to speak to the issues.

[299] If the parties agree on how the outstanding issues should be addressed, they should seek an appearance to apprise me of their agreement and to finalize the certification order in accordance with s. 8 of the *Class Proceedings Act.*

"Matthews J."