Court of Queen's Bench of Alberta

Citation: Rieger v Plains Midstream Canada ULC, 2020 ABQB 312

Date: 20200508
Docket: 1201 07932
Registry: Calgary

Between:

Suzanne Rieger and Darin Rieger

Plaintiffs

- and -

Plains Midstream Canada ULC

Defendant

Reasons for Decision on Application for Certification
of the
Honourable Mr. Justice G.H. Poelman

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I. Introduction

[1] The plaintiffs apply for certification of their action as a class proceeding, pursuant to section 5(1) of the *Class Proceedings Act*, S.A. 2003, c. C-16.5. Their application is opposed by Plains Midstream Canada ULC, the defendant.

[2] Plains was the owner and operator of an oil pipeline, part of which was located near Sundre, Alberta close to the Red Deer River. The plaintiffs allege that the pipeline ruptured near Sundre, releasing light sour crude oil into the river and ultimately into Gleniffer Lake, where the plaintiffs owned property. The action seeks remedies founded in strict liability, negligence, nuisance, trespass and breach of statute.

[3] The certification application was filed on March 26, 2013. The plaintiffs amended their application shortly before the hearing.

II. Factual Overview

[4] Gleniffer Lake is a man-made lake along the Red Deer River, created in 1983 by the construction of a dam. Adjoining the lake are several day-use areas, cottages, a campground, two resort developments (Carefree Resort and Glennifer Lake Resort) and a recreational area with a beach, fishing, boating and campgrounds.

[5] The plaintiffs were joint owners of lots 809 and 827 located on Carefree Resort at Glennifer Lake. The resorts are bareland condominium communities with privately-owned recreational vehicle lots, other privately-owned lots, shared common areas, green spaces, a clubhouse, restaurant, and other buildings, facilities and amenities. The plaintiffs' lots did not directly abut the lake shore, as was the case with the resort lots owned by some members of the proposed class.

[6] Plains owns a pipeline system that includes the pipeline near Sundre, Alberta. On June 7, 2012, it detected a pressure drop in one of its pipelines, soon identified as light sour crude oil, being released from a pipeline into the Red Deer River near Sundre. The oil migrated down the river to Glennifer Lake resulting in closure of the river and the lake for recreational use.

[7] After the leak was detected, Plains undertook steps to respond to the spill, minimize the impact, and communicate with individuals and businesses affected by the incident. Among other things, this involved town hall meetings and individual contacts. Ultimately, in exchange for releases, Plains made financial settlements with 517 landowners, residents and business owners.

[8] This action was commenced by statement of claim on June 22, 2012.

III. Pleadings

[9] As indicated above, the statement of claim commencing this action was filed June 22, 2012. An amended statement of claim was filed March 31, 2016. The plaintiffs conditionally apply to further amend their pleadings and their application for certification, if it is considered necessary, to address any arguments raised at the certification hearing. They maintain, however, that further amendments are not necessary.

[10] In the amended statement of claim, the plaintiffs set out the factual background of Plains' ownership of the pipeline and that on the evening of June 7, 2012 it became aware of a rupture near Sundre. At the initial release point, approximately 3000 barrels or 475,000 litres of oil

escaped the pipeline. Before the spill, water flow in the rivers was significant because of recent rainfall, causing the oil to quickly flow along the Red Deer River and into Glennifer Lake.

[11] At the time of the incident, the plaintiffs jointly owned two lots located on the Carefree Resort on Glennifer Lake, which they were in the process of selling. They allege the value they hoped to achieve was diminished because of the spill.

[12] The plaintiffs brought the action "on behalf of all those in Canada who suffered physical, financial, or other damages as a result of the June 7, 2012 oil spill." The statement of claim pleads that as a result of the spill, oil contaminated water in and along the Red Deer River, contaminated the water of Glennifer Lake (used as drinking water by area and downstream residents), contaminated ground water, exposed residents to harmful and unsafe chemicals, odours and other irritants, hampered recreational use of properties, precluded residents and other inhabitants from drawing upon water supplies, forced the closure of camping and recreational facilities and forced the closure of Glennifer Lake to all recreational uses for the 2012 season.

[13] Because the plaintiffs and other class members were advised to stay clear of the lake and rivers and the area was closed, they were unable to use their properties for their intended use and sought damages for loss of use. In addition, it was alleged that the value of their properties was diminished because of "fear and apprehension" associated with the unknown long-term effects and the possibility of future spills, the inability for residents to enjoy peaceful use of their property and the inability of residents to partake in recreational activities on the lake and rivers in the area.

[14] The amended statement of claim pleads six specific causes of action:

a) **Strict liability**: The plaintiffs rely on the doctrine in *Rylands v Fletcher*. Based on Plains' ownership and operation of the pipeline for transportation of an inherently non-natural hazardous substance, Plains knew or ought to have known of the risk to the plaintiffs and other class members, and that in the event of a leak, damage to them would be inevitable; and in fact, oil escaped from the pipeline and caused damage to the class members.

b) **Negligence**: Plains owed to all class members a duty to exercise care commensurate with the dangerous nature of its operating activities and to ensure that transmission of oil did not expose them to foreseeable injury. They were required to implement and maintain procedures to ensure proper design, construction, maintenance and operation of the pipeline and follow all safety requirements to ensure the pipeline was free of leaks. Plains willfully and knowingly violated and breached such standards in a manner that was wanton, reckless and grossly negligent, thereby breaching its duties of care and causing damages.

c) **Vicarious liability**: Plains is vicariously liable for the acts and omissions of its directors, officers, employees and agents.

d) **Nuisance**: Plains is liable to the plaintiffs and class members because its actions directly interfered with their use, enjoyment and capital realization on their property and the interference was wholly unreasonable and without justification.

e) **Trespass**: Plains is liable to class members for trespass because it released or did not prevent the release of oil into the environment, thereby contaminating "soil, river and lake water, ground water and property downstream . . . owned by the Riegers and other Class Members."

f) ***Environmental Protection and Enhancement Act***: Contrary to the provisions of the *Act*, Plains released into the environment a substance in an amount that caused adverse effects to the class members and their property.

[15] A statement of defence has not yet been filed.

IV. Proposed Certification Order

[16] The application for certification, filed on March 26, 2013, seeks certification of the following class:

> All persons, corporations, and their estates, owning property located within an imperfect quadrangle comprised of the areas north of highway 27, east of highway 22, west of highway 2, and south of highway 54, who claim to have suffered physical, financial, economic, or other damages as a result of the June 7th, 2012 oil spill which occurred near Sundre, Alberta on the Rangeland South pipeline operated by Plains Midstream Canada ULC.

The class would include the 517 claimants who made settlements with Plains some years ago.

[17] The application also seeks an order appointing Suzanne Rieger as the representative plaintiff. It seeks certification of a number of common issues, stated in their most current form in the plaintiffs' brief for this application and, if necessary, an amended certification application further refining the issues.

V. Evidence

[18] The evidence for the certification hearing comprises affidavits and cross-examinations thereon from Ms. Rieger and from Greg Filipchuk, the former Director-Stakeholder Relations, Emergency Management and Security, for Plains. In addition to these affidavits from the parties, expert evidence in the form of affidavits, addressing damages, was submitted by the plaintiffs and Plains.

[19] The Riegers purchased lot 809 in October 2006 for $75,000. They listed it for sale privately in 2010 for $119,000, but received no offers. In the spring and summer of 2011, they listed it with a realtor at the same price and again received no offers prior to June 7, 2012 (the spill). Damage was caused by a hail storm in 2014, as result of which the Riegers received insurance proceeds and reduced their price to $74,800. The lot sold on May 18, 2017 for $73,500.

[20] Lot 827 was purchased in 2008 for $99,000. It was privately listed in 2011 for $229,000, but no offers were received. It was listed with a realtor in 2011 at a reduced price of $169,000, as a result of which one offer of $140,000 was received. Again, hail damage was caused in 2014 from which insurance proceeds were received. The property was sold on July 20, 2016 for $140,000 because the Riegers were anticipating moving out of the country.

[21] Mr. Filipchuk, in his affidavits and cross-examination, testified to the business of Plains, the ownership and operation of the pipeline, discovery of the spill, and the steps taken to clean up and remediate the area and deal with members of the community.

[22] Mr. Filipchuk testified that Plains' discussions with potential claimants for settlement purposes did not include "loss of enjoyment" compensation. He confirmed the forms of release signed included releasing Plains from a broad range of claims, including loss of enjoyment:

> Any and all actions, manner of actions, causes of action, suits, claims, contracts, debts, dues, expenses, costs, demands, losses and damages of any and every kind whatsoever at law or inequity, under any statute, which I ever had, now have, or can, shall or may have against the Parties Release, for and by reason of any matter, caused or thing whatsoever, known or unknown, relating to or arising out of a pipeline spill . . . .

[23] Mr. Filipchuk's evidence makes it clear that when Plains was negotiating settlements with claimants, it was aware of the proposed class action commenced by the Riegers. It is a reasonable inference from the evidence (and, for the purpose of this application, conceded by counsel) that Plains did not advise persons with whom they were negotiating that an action had been commenced and did not include such information in the general notices and newsletters it was issuing to the community.

[24] Each of the releases contained a provision acknowledging that the claimant had been given the opportunity to receive independent legal advice.

[25] Courtney Knude, an appraiser, submitted an expert report in the form of an affidavit on behalf of the plaintiffs, on which she was cross-examined. Her opinion is that "there are a variety of methods that could be employed to estimate if an oil spill influenced the market value of affected properties," and sets out those methods. She acknowledges that some of those methods would be more or less feasible than others, due to the small volume of market data. Further, her opinion notes that any negative influence might be temporary "as time tends to heal, especially as the incident fades from headlines and from memory." She acknowledges that the degree of impact would vary from parcel to parcel.

[26] Robert Telford, also an appraiser, provided an expert report in the form of an affidavit on behalf of Plains. He applied, on a preliminary basis, two evaluation methodologies identified by Ms. Knude. Based on his review of the data, he found "no conclusive value trend that can be identified after June 7, 2012 that would indicate the market was impacted directly as a result of the oil spill."

[27] The Alberta Energy Regulator conducted an investigation into the oil spill, the results of which are contained in its March 4, 2014 *Investigation Report*. The *Investigation Report* forms the basis for many of the plaintiffs' allegations against Plains. It found "that the pipeline failure was caused by a combination of high river flow and deficiencies in Plains' pre-incident administration and management of the pipeline." It concluded that Plains had failed to make annual inspections as required by regulatory rules, failed to complete inspections according to its own management program, failed to apply appropriate mitigation measures and failed to respond to a government high streamflow advisory issued before the incident.

[28] As stated in the defendant's brief for this hearing, "Plains accepts all fault for the Spill."

VI. Certification: General Principles

[29] Any member of a class of persons may commence a proceeding on behalf of the members of that class, but must then apply for an order certifying the proceeding as a class proceeding and appointing a person as representative plaintiff (*Class Proceedings Act*, section 2). The legislation sets out criteria on which the court must be satisfied for a certification order to be made (section 5(1)); and directs that where each of the criteria are met, certification must be granted; and if not all of the criteria are met, certification must not be granted (section 5(3) and (4)). The certification requirements in section 5(1) are that: the pleadings disclose a cause of action; there is an identifiable class of two or more persons; the claims raise a common issue; a class proceeding would be the preferable procedure; and there is a suitable representative plaintiff (having regard to certain qualifications).

[30] The emphasis in the *Class Proceedings Act* is on procedural considerations. Section 6(2) provides that "an order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding." The seminal case of *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, repeats that caution, stating that "the certification stage is decidedly not meant to be a test of the merits of the action" at para 16. Nevertheless, *Hollick* also held that "the class representative must show some basis in fact for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" at para 25.

[31] As held in *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477, there is "limited utility in attempting to define 'some basis in fact' in the abstract"; rather, each case must be decided on its own facts, at para 104. There must be sufficient facts to show that the conditions for certification have been met to a degree that would allow the matter to proceed on a class basis without foundering at the merit stage by reason of the requirements of section 5(1): at para 104. In summarizing the thrust of *Pro-Sys*' holdings, Hall J. stated that "the certification requirements need not be proven on a balance of probabilities, nor is the certification judge to enter into a weighing of conflicting evidence": *Walter v Western Hockey League*, 2017 ABQB 382, 62 Alta LR (6th) 85, aff'd 2018 ABCA 188 at para 13, referring to *Pro-Sys*, paras 99-105.

VII. Cause of Action

A. Introduction

[32] Section 5(1)(a) requires the court to be satisfied that the pleadings disclose a cause of action. The legislation is clear that this element is determined from the pleadings only.

[33] The test is the same as the test to strike pleadings for failure to disclose a cause of action. Thus, "the question ... is whether the disputed claims disclose a cause of action, assuming the facts pleaded to be true. If it is plain and obvious that a claim cannot succeed, then it should be struck out": *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24, [2011] 2 S.C.R. 261 at para 20, citing *Hollick* and *Hunt v Carey Canada Inc*, [1990] 2 S.C.R. 959, 74 D.L.R (4th) 321 at 980.

[34] As Martin J. (now of the Supreme Court of Canada) held, citing authority, in *Andriuk v Merrill Lynch Canada Inc*, 2013 ABQB 422, 578 A.R. 40, aff'd 2014 ABCA 177, pleadings "must be construed generously and liberally with allowances for drafting deficiencies that do not disclose radical defects" at para 68. Further, again citing authority: "a cause of action will be

disclosed if the facts pleaded *could possibly* be considered to entitle the plaintiff to a legal remedy; conversely, if it is plain and obvious that the facts are incompatible with an entitlement to remedy, or insufficient for that purpose so that the plaintiff has no chance of success, then a cause of action will not be disclosed": *Andriuk* at para 68 (emphasis in original).

[35] The novelty of a cause of action will not militate against the plaintiff establishing a cause of action for the purpose of a certification hearing. Rather, pleadings "which reveal an arguable, difficult or important point of law" must be allowed to proceed because this is the way that the common law continues to evolve to meet modern legal challenges: *Andriuk* at para 69, relying upon *Hunt v T&N plc*, [1990] 2 S.C.R. 959 at para 55; *Harrison v XL Foods Inc*, 2014 ABQB 431, 592 A.R. 266 at paras 58-63; *R v Imperial Tobacco Ltd*, 2011 SCC 42, [2011] 3 S.C.R. 45 at paras 21-25.

[36] In oral submissions, Plains' counsel conceded that a representative plaintiff need not personally have each cause of action pleaded on behalf of the proposed class. It is sufficient that he or she has one valid cause of action. This is consistent with the notion that the essence of a class action is between the class and a defendant. Examples of cases recognizing that a plaintiff need only have one valid cause of action are *Alves v Red Seal Vacations Inc*, 2011 SKCA 117, 342 D.L.R. (4th) 409 at paras 36-45; and *Fehr v Sunlife Assurance Company of Canada*, 2015 ONSC 6931, 56 CCLI (5th) 15 at paras 335-339.

[37] I turn next to a review of the causes of action asserted by the plaintiffs to determine whether they meet the requirements of section 5(1)(a). I will not address the categories of strict liability and vicarious liability, as they are not part of the proposed common issues and were not placed in issue during the hearing of this application.

B. Negligence

1. General

[38] The most common formulation of the elements of a cause of action for negligence, applied in many cases, is that "[t]he party alleging negligence must prove on a balance of probabilities that a duty was owed by the defendant and, having breached the appropriate standard of care, the defendant's substandard action caused the plaintiff's injury": *McArdle Estate v Cox*, 2003 ABCA 106, 13 Alta. L.R. (4th) 19 at para 23.

[39] The first element, whether a duty of care is owed, is the main question here.

[40] The defendant characterizes its challenge as based on there being "no precedent for imposing a duty of care in favour of owners of lands claiming pure economic loss due to environmental damage to public or other third-party lands" (brief, para 44). They argue that the Riegers' claim relates entirely to loss of use of Glennifer Lake and the Red Deer River and diminution in value of their properties. They have not pleaded any physical damage to property they owned as a result of the spill.

[41] As Brown (now Brown J. of the Supreme Court of Canada) emphasizes, it is wrong to characterize whether a claimant can succeed based on the kind of loss suffered, such as whether it arises from physical harm to person or property. Rather, the question is whether a duty was owed to the plaintiff – if so, pure economic loss, like other losses, is recoverable. "The purely economic or physical quality of the loss *does*, however, influence the question of whether a duty of care was owed": Brown, *Pure Economic Loss in Canadian Negligence Law* (Toronto: LexisNexis, 2011), paras 1.1-1.4 generally, and quoting n. 5 (emphasis in original).

[42] Thus, the question is whether "it is plain and obvious" that a claim for pure economic loss cannot succeed.

2. Pure Economic Loss

[43] The test for a duty of care in Canada is the one initially set out in *Anns v Merton Borough*, [1977] 2 All E.R. 492, [1978] A.C. 728 (H.L.) at 751, adopted in Canada by *City of Kamloops v Nielsen*, [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641. The *Anns* two-part test, as adopted in *Kamloops*, involved asking (1) whether there was a sufficiently close relationship between the parties so that a defendant might reasonably contemplate that carelessness might cause damage to the other person, and (2) whether there were any considerations which ought to negate or limit the scope of the duty, the class of persons to whom it is owed or the damages to which a breach might give rise.

[44] The authoritative Canadian test has since been modified to what is often referred to as the "*Anns/Cooper test."* In *Cooper v Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537, the plaintiffs were investors who had lost investments due to misconduct of a mortgage broker. They sued the provincial regulator in negligence. The Supreme Court of Canada presented its revised duty of care test as still within the *Anns* structure of two stages. The two stages involve the following considerations, which are discussed at paras 30-38:

1) Was the harm reasonably foreseeable? Even if foreseeable, is the relationship between the parties sufficiently proximate that it would be just to impose a duty of care? This question is about determining whether it would be justly fair, having regard to the relationship, to impose a duty of care.

2) If the harm was reasonably foreseeable and there was a proximate relationship, are there reasons outside of the relationship of the parties for not imposing tort liability in this case? This stage considers residual policy considerations such as the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally.

[45] The type of "pure economic loss" at issue in this action is described in the authorities as "relational economic loss." In other words, physical harm caused to a third party has adversely affected the plaintiffs because of their relationship to that third-party: Brown, paras 1.75-1.79. In the context of this case, the Riegers suffered harm, such as loss of use, because of their relationship to other persons whose property was physically harmed. (Mostly, I will continue to use the general term "pure economic loss," in keeping with arguments of counsel and the nomenclature used in the authorities relevant to this case.)

[46] The modern Canadian law on recovery for relational economical loss was laid down in *Bow Valley Husky (Bermuda) Ltd v Saint John Shipbuilding Ltd*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385. The defendant shipbuilders were allegedly responsible for damage caused during construction to a drilling rig owned by a company related to the plaintiff companies. The plaintiff companies remained contractually responsible for use of the rig even while it was out of service for repairs. The court found that the contractual relationships between the plaintiff companies and the company owning the rig were insufficient as a ground for recovery.

[47] In brief, *Bow Valley* stands for several propositions:

a) Relational economic loss is recoverable only in special circumstances where the appropriate conditions are met.

b) The "special circumstances" fall into certain categories, defined as of the date of *Bow Valley* as (1) cases where the claimant has a possessory or proprietary interest in the damaged property, (2) general average cases (a maritime law concept), and (3) cases where the relationship between the claimant and property owner constitutes a joint venture.

c) The categories are not closed, and "[w]here a case does not fall within a recognized category the court may go on to consider whether the situation is one where the right to recover contractual relational economic loss should nevertheless be considered" at para 50.

d) "The general rule against recovery for policy-based reasons might be relaxed where the deterrent effect of potential liability to the property owner is low, or, despite a degree of indeterminate liability, where the claimant's opportunity to allocate the risk by contract is slight, either because of the type of transaction or an inequality of bargaining power" at para 50.

(Quoting and paraphrasing from paras 48 – 50 of the decision.)

[48] While the categories were not closed in *Bow Valley*, the court cautioned that "courts should not assiduously seek new categories; what is required is a clear rule predicting when recovery is available" at para 50. As suggested by Brown, establishing new categories for pure economic loss likely means having regard to the few points of guidance in *Bow Valley* itself and, more broadly, the *Anns/Cooper* duty of care test: paras 2.114-2.115.

[49] I have been referred to several cases where courts have refused to close the door on a claim for pure economic loss at a preliminary stage. For example, in *Anderson v Manitoba (Attorney General)*, 2014 MBQB 255, 312 Man. R. (2d) 259, certification was sought for members of First Nations as a result of flooding on a reserve. The chambers judge refused certification on grounds not relevant to this case. However, if certification had been ordered, the class would have been defined as including First Nation members who did not reside on the reserve and sustained no property loss, but came onto the reserve to work and had their work interfered with by the flooding. While this may be a claim of pure economic loss, the court considered it arguable that non-resident First Nation members would have a closer connection than non-members who simply did business with people on the reserve – and thus, the class definition was considered appropriate. On appeal, 2017 MBCA 14, certification was allowed, with no further comment on the class definition – thus, in effect, certifying a claim by First Nation members who merely sustained an interference with their ability to work on the reserve.

[50] Another example is *Evans v General Motors of Canada Company*, 2019 SKQB 98, [2019] 10 W.W.R. 725, a decision by Barrington-Foote J.A. sitting *ex officio* in Queen's Bench, where proposed class members alleged that breaches in duties regarding design, development, testing and monitoring of a new vehicle caused them damage as they overpaid for the vehicle and had devalued vehicles. It was observed that these were claims for economic loss, but Barrington-Foote J.A. found that there continued to be a debate in some authorities on whether courts would

extend recovery in negligence to non-dangerous defects. Accordingly, it was held that the claim met the test for certification.

[51] As the defendant argues, there certainly are cases suggesting that a pure economic loss case such as this one cannot succeed. Most comparable is *Cuff v Canadian National Railway*, 2007 ABQB 761, 51 C.P.C (6th) 383, where the plaintiffs sought certification of proceedings because of a train derailment which led to oil entering a recreational lake, causing loss of enjoyment of the lake and damage to watercraft on the lake. The defendant argued that some aspects of the claims were barred because they sought recovery for pure economic loss.

[52] Belzil J. noted that the modified two-part test of *Anns* would have to be satisfied for a new type of pure economic loss claim to be recognized, and the plaintiffs had acknowledged "that no court in Canada has ever accepted a pure economic loss claim based on a loss of recreational use of a lake" at paras 24-27. He held that the plaintiffs would not be able to satisfy the *Anns* requirements. "The situation is further complicated," he observed, "by the fact that the Defendant, through its counsel, has indicated that it is fully prepared to repair physical damage to any watercraft which were damaged by oil, and as earlier noted, most watercraft on the lake have already been cleaned" at para 29.

[53] *Brooks v Canadian Pacific Railway*, 2007 SKQB 247, 283 D.L.R. (4th) 540, also arose out of a train derailment – in this case, involving railcars containing anhydrous ammonia. While no substances escaped the railcars, 175 area businesses and residents were evacuated as a precaution. The court found there could be no recovery, particularly because "[t]he category of persons who may suffer economic losses is incalculable" at para 85. The court offered as examples that, in addition to businesses in the vicinity, that losses may have been suffered by the suppliers and consumers of the businesses, and people who had to reroute their normal travel, as well as family members or friends of evacuated persons who assisted evacuees. (While not commented on in the decision, I find it noteworthy that there was no physical injury to the person or property of anyone, other than the defendant's own property; unlike in most cases, where there is physical injury to the person or property of someone other than the defendant.)

[54] *Cuff* and *Brooks* are cases where the court was prepared to conduct the *Anns/Cooper* analysis in full. The other examples I gave, such as *Anderson* and *Evans*, reflect a more cautious approach of leaving the full analysis to a later stage. That was the approach adopted by Rooke A.C.J. in *Harrison* on a motion to strike parts of a statement of claim in a class action. He held that "[i]n a motion to strike application, the court should not engage in the second stage of the *Anns* analysis. Once a plaintiff establishes that a novel *prima facie* duty of care is possible, the court's inquiry generally ends" at para 103, citing authority. The only exceptions could be where the court was confident the parties had agreed upon all of the facts necessary to conduct the second stage of the analysis, or where the court was satisfied that it had everything before it that would be necessary for that purpose: at para 104. Rooke A.C.J.'s approach, is of course, fully consistent with other authority on the need for caution before concluding that a plaintiff has no chance of success, on an application to strike pleadings: *Tottrup v Alberta (Minister of Environment)*, 2000 ABCA 121, 255 A.R. 204 at para 8.

[55] With respect, I prefer the approach taken by Rooke A.C.J. in *Harrison* when addressing the requirement that the pleadings disclose a cause of action (from section 5(1)(a) of the *Class Proceedings Act*). As noted earlier, the test for present purposes is the same as when applying to strike pleadings. An application to strike pleadings or a determination of whether an action

should be certified is not the place to engage in the robust factual and legal policy questions required to determine a duty of care under the *Anns/Cooper* test.

[56] It is enough for me to address the first stage of the *Anns/Cooper* test: that is, was the harm claimed by the plaintiffs reasonably foreseeable? If so, is the relationship between the plaintiff and the defendant sufficiently proximate that it would be just to impose a duty of care?

[57] I conclude that these questions must be answered in favour of recognizing that establishing a *prima facie* duty of care is possible. The Riegers and others similarly situated within the proposed class owned recreational properties that had value because of their proximity to the lake and its facilities, including the marina. Plains owned and operated an oil pipeline in the immediate vicinity, and effectively recognized itself as part of the affected community – both before and after the incident. The bare foreseeability of harm test is clearly met, and not seriously disputed by the defendant. The proposed class is limited by criteria of physical proximity to the lake and the spill, which goes some way to address policy concerns about "indeterminate liability."

[58] I conclude that the cause of action is not hopeless, even though the Riegers and those similarly situated will have the challenge of overcoming the presumption of the usual rule set out in *Bow Valley*. As noted above, the authorities on applications to strike pleadings and on certification applications repeatedly emphasize that "the approach must be generous and err on the side of permitting a novel but arguable claim to proceed": *Imperial Tobacco* at para 21. Otherwise, even incremental developments in the common law, which have been its lifeblood, could never occur.

[59] Another argument in favour of allowing the Riegers' claim for economic loss to proceed is that there are other members of the proposed class who, I infer from the pleadings and evidence, sustained direct physical harm to their property from the spill. They would not face the challenges of overcoming a presumption against claims for pure economic loss.

[60] The review of the authorities summarized earlier in these reasons show that different courts, in different contexts, have come to different conclusions on the degree of stability of the current law on recovery for pure economic loss. In Manitoba (where leave is required to appeal certification orders), Monnin J.A. granted leave, observing that "[w]hat moves me to this conclusion is the fact that the issue of recovery for pure economic loss remains an unsettled area of law": *Pisclevich v Manitoba,* 2018 MBCA 127, 41 C.P.C. (8th) 232 at para 29. (Presumably because the action was settled, the case did not proceed to appeal before a full panel.)

[61] I do not suggest that the plaintiffs have established a valid cause of action for their loss, only that on the authorities their arguments are not so hopeless as to justify dismissal at the certification stage.

C. Nuisance

[62] A good cause of action in private nuisance requires establishing interference with an owner's use or enjoyment of land that is both substantial and unreasonable: *Antrim Truck Centre Ltd v Ontario (Transportation),* 2013 SCC 13, [2013] 1 S.C.R. 594 at para 19. Substantial means non-trivial, and unreasonable requires consideration of all the circumstances. Unlike trespass, nuisance may be an indirect intrusion onto a plaintiff's land: *Smith v Inco Ltd,* 2010 ONSC 3790, 52 C.E.L.R. (3d) 74 at para 38, rev'd on other grounds 2011 ONCA 628, 107 O.R. (3d) 321.

[63] Nuisance focuses on the harm suffered, rather than the prohibited conduct; it is of no consequence whether the interference results from intentional, negligent or non-faulty conduct: *Saint Lawrence Cement Inc v Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392 at para 77.

[64] Plains does not dispute that there may be members of the proposed class who meet the test for nuisance, if their property was directly affected by the oil spill. Their argument is that, if the Riegers do not have a cause of action in negligence (because their claim is for pure economic loss), then Ms. Rieger cannot be a representative plaintiff unless she has another valid cause of action – and she fails to meet the test for negligence.

[65] As I discussed earlier, a representative plaintiff need not have all of the causes of action that may exist for other class members. One valid cause of action will suffice for the purpose of section 5(1)(a).

D. Trespass

[66] A good cause of action in trespass requires a direct and physical intrusion onto land that is in the possession of the plaintiff: *Smith* at para 37. The defendant's act need not be intentional as long as it is voluntary. Trespass is actionable without proof of damage: *Smith* at para 37; *Windsor v Canadian Pacific Railway Limited*, 2006 ABQB 348, 402 A.R. 162 at para 63, aff'd 2007 ABCA 294, 417 A.R. 20.

[67] As with the cause of action in nuisance, Plains' main position with respect to trespass is that the Riegers do not qualify, but I find it is possible that other members of the purported class will.

E. Statutory Action

[68] Section 109(2) of the *Environmental Protection and Enhancement Act*, RSA 2000 c. E-12, provides that "no person shall release or permit the release into the environment of a substance in an amount, concentration or level or at a rate of release that causes or may cause a significant adverse effect." Section 219 provides that where a person is convicted of an offence, "any person who suffers loss or damage as a result of the conduct . . . may . . . sue for and recover from the convicted person an amount equal to the loss or damage proved to have been suffered." "Loss or damage" is defined as including "personal injury, loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income": section 194(b).

[69] Plains pleaded guilty to and accepted responsibility for the enforcement actions undertaken by the Alberta Energy Regulator, thus triggering potential liability under section 219. The parties differ, however, on whether a civil action under statute would face the same issues on recovery of pure economic loss as would be raised in the common law of negligence.

[70] As with the previous causes of action, Plains acknowledges that the real issue is whether the Riegers would qualify for this cause of action.

F. Conclusions

[71] I am satisfied that the pleadings disclose a cause of action within the meaning of section 5(1)(a) as interpreted by the authorities. It is not plain and obvious that the Riegers must fail in their claim for damages resulting from the negligence of Plains. Likewise, it is not plain and obvious that other members of the proposed class do not have arguable claims in nuisance, trespass and under the *Environmental Protection Enhancement Act*. Accordingly, this criterion for a certification order has been satisfied.

VIII. Identifiable Class of Two or More Persons

[72] The second requirement for certification is that "there is an identifiable class of two or more persons" (section 5(1)(b)).

[73] The class definition must be based on objective criteria enabling identification of potential class members without reference to the merits of the claim; have a rational connection between the definition, causes of action and common issues; and not be so broad as to include persons who have no claim against the defendant, but not so narrow as to arbitrarily exclude persons with claims similar to those asserted on behalf of the proposed class: *Windsor* (C.A.) at paras 18 and 19; *Buelow v Morrissey*, 2013 ABQB 277, 562 A.R. 79 at para 27.

[74] As with all requirements for certification, other than disclosing a cause of action, the plaintiff must adduce evidence to meet this requirement. This element cannot be satisfied by pleadings or argument. While it is a "relatively low evidentiary standard," plaintiffs "have an obligation at the certification stage to introduce evidence to establish some basis in fact that at least two class members can be identified:" *Sun-Rype Products Ltd v Archer Daniels Midland Company*, 2013 SCC 58, [2013] 3 S.C.R. 545 at para 61.

[75] As confirmed in the appeal decision in *Windsor*, relying on *Western Canadian Shopping Centres Inc v Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, the importance of class definition is that it identifies the individuals entitled to notice, entitled to relief (if awarded) and bound by the judgment: *Windsor* (C.A.) at para 18. "The plaintiff must establish that the class could not be defined more narrowly without arbitrarily excluding persons with claims similar to those asserted on behalf of the proposed classed": at para 19.

[76] As noted above, the proposed definition is a geographical delineation, with reference to persons, corporations and estates that as of the incident date resided or owned property within an area defined by certain numbered public highways. The "imperfect quadrangle" encompasses the area where the rupture in the pipeline occurred and the water bodies affected by the spill.

[77] The defendant argues that the area "seems to be entirely arbitrary," and "no attempt is made to provide a basis in fact to conclude that any loss has in fact been sustained": brief, paras 63 and 64. The plaintiffs argue that the definition must enable each individual member of the class, as laypersons, to determine whether they fall within the class. Further, without prejudging the merits of the claim, they say, there is no way to rationally advance a methodology for determining an exact radius by distance (for example).

[78] An example of class membership being defined by geographical reference to roadways around an area of ground water contamination is in *Windsor*, where the Court of Appeal addressed the issue in an instructive fashion for the present case: at paras 25-26. The objection was that the definition was arbitrary. The court stated the following at para 26:

> The key again is that the class definition must allow for the identification of the class members, without being merit based. . . . The Appellant has not asked that the class definition be expanded to include all owners within the plume, but rather has taken the position that any definition of the class is arbitrary and essentially impossible, and that certification should be denied in total. The representative plaintiffs are entitled to define the class in such a way that the litigation is manageable.

[79] It is not an answer to a proposed class definition that some members may not have a successful claim or that the answer given to a question might vary from one member of the class to another: *Del'Aniello v Vivendi Canada Inc,* 2014 SCC 1, [2014] 1 S.C.R. 3 at paras 44-45.

[80] Plains has failed to articulate an alternative definition, other than one that meets its criteria for likely success: claimants whose land was affected by entry of oil and who have suffered a demonstrable loss. Such a definition fails to meet the requirements of the authorities for objective criteria that are not merit based. Further, it is too narrow having regard to the claims for pure economic loss, which I have held met the test for a cause of action for certification purposes.

[81] I agree with the plaintiffs' submission that their proposed class definition appropriately includes those who could possibly have a claim while remaining a comprehensible definition to those who will read it.

IX. Common Issues

[82] As for the third requirement of certification, the plaintiffs must establish that "the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members" (section 5(1)(c)).

[83] As the section and the authorities state, it is clear that the common question need not predominate over issues relating to individual class members (although that is a factor to be considered in the "preferable procedure" inquiry). "Class proceedings," wrote Rooke A.C.J., "are not intended to solve all the efficiency problems encountered in complex litigation. . . . What they can do is assist the parties and the Courts by shortening the process, even if only for hours or days over the course of a lawsuit": *Windsor* (Q.B.) at para 131. Similarly, in *T.L. v Alberta (Director of Child Welfare)*, 2006 ABQB 104, 395 A.R. 327, Slatter J. (now J.A.) found that even though in the case before him the individual issues would substantially predominate over the common issues, and thus the overall benefits would be slight, "there is still some practical utility in deciding the common issues once" at para 133.

[84] The common issues proposed in this case are as follows:

Negligence

1) Did the Defendant, as the operator of a pipeline carrying hazardous substances, owe a duty of care to the Plaintiffs and Class Members?

2) If the answer to question (1) is *yes*, did the Defendants breach the duty of care either by:

    a) disregarding or failing to adopt or implement appropriate safety protocols, standards, practices, and policies;

    b) failing to conduct their operations in a manner commensurate with the dangerous nature of its operating activities, and to ensure that the transmission of the Oil would not expose the Plaintiffs or the Class to foreseeable harm or injury?

c) failing to properly design, construct, maintain, inspect, or operate the pipeline? or

d) disregarding or failing to comply with warnings, notices, and advisories received from regulatory authorities?

Nuisance

3) Did the conduct of the Defendant lead to a 'substantial interference' with the use and enjoyment of the Plaintiffs' and the Class' property?

4) If the answer to question (3) is *yes*, *was* that interference unreasonable in all the circumstances?

Trespass

5) If the answer to question (2) is *yes* [in that negligence has been established], did this amount to direct interference with the Plaintiff' and Class' property, in the nature of the tort of trespass?

6) If the answer to question (6) is *yes*, are the Defendants liable to the Plaintiffs and the Class for *per se* damages for trespass and if so, may the Court determine a common baseline amount for the same?

Environmental Protection and Enhancement Act

7) Were the Defendants "convicted" of a breach of the *EPEA* (as described in *EPEA* s. 219)?

Damages

8) Are the Defendants liable to the Plaintiffs and the Class for damages?

9) Are the Defendants liable to the Plaintiffs and the Class for punitive damages? If so, can the amount of those punitive damages be determined on a class-wise basis?

Settlements

10) Did the Defendant have an obligation to disclose the existence of this proposed class proceeding to members of the Class prior to entering into settlements with said members of the Class relating to the factual circumstances plead in this action?

11) If the answer to question (10) is *yes*, did the Defendant fail to comply with that obligation?

12) If the answer to question (11) is *yes*, are the releases executed by the class enforceable vis-à-vis the Defendant?

[85] The defendant submits that there is no common issue to be tried in negligence, because it has admitted "fault" for the spill. As Winkler J. observed, however, "an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class": *Bywater v Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, 83 O.T.C. 1 (Ont. Ct J (Gen Div) at para 14. For an admission to be binding on the defendant in respect of all proposed members, there must be a certification order.

[86] In light of the legal issues raised regarding whether claims for recovery of pure economic loss can be successful, this is a case where the first negligence question "may require nuanced and varied answers based on the situations of individual members" and the commonality requirement does not mean an identical answer is necessary for all members: *Vivendi*, at para 46. Thus, it is likely that upon certification being ordered, the parties will have to reattend to address how the first question should be framed to take into account that the duty of care may vary depending upon geographic locations, type of interest in an affected property, and type of harm alleged with respect to a type of property.

[87] Similar considerations apply to the nuisance and trespass questions. It might be appropriate to frame questions on these causes of action to consider the same variation of interests of the potential class members.

[88] In addition, for the trespass action, the fact that damages may be recoverable without proof of harm makes this a particularly suitable topic for a common issue. A court trying the trespass issues could make determinations about liability and could possibly also address the amount or method for determining common baseline damages.

[89] Regarding the statutory cause of action, in addition to the question about conviction (which will be answered quickly), refinements of the question may be necessary to address Plains' arguments about whether rights under the *Act* may vary according to the same types of factors identified for the first negligence question.

[90] The questions on damages may also need refinement, to consider whether a common trial is the proper place to decide general questions of assessment methodology. Punitive damages are more obvious in their common aspect, because such damages are usually founded on the conduct of the defendant, with little relationship to the effect on the plaintiff: *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142, 408 D.L.R. (4th) 661 at para 82, leave to appeal to SCC refused, [2016] S.C.C.A. No. 572. Further, the fact that a common issues trial judge may not be in a position to decide the appropriate level of compensatory damages does not mean it should be precluded from assessing punitive damages: *Good v Toronto Police Services Board*, 2014 ONSC 4583, 121 O.R. (3d) 413 at paras 79-80, aff'd 2016 ONCA 250, 130 O.R. (3d) 241, leave to appeal to SCC refused [2016] S.C.C.A. No. 255.

[91] Plains argues that the competing expert affidavits should lead to the conclusion that there is no common issue related to damages and the plaintiffs have failed to show "a basis in fact to conclude that any loss has in fact been sustained": brief, para 64. I conclude, however, that the plaintiffs have shown some basis in fact for alleged losses, based on their own affidavits and Ms. Knude's opinion on methodologies that might be used to measure the loss. It is not proper to assess the merits of competing theories of damages at certification stage: *Tiboni v Merck Frosst Canada Ltd* (2008), 60 C.P.C. (6th) 65, 295 D.L.R. (4th) 32 (Ont. Sup Ct) at paras 50-53, aff'd *Mignacca v Merck Frosst Canada Ltd* (2009), 95 OR (3d) 269, 71 CPC (6th) 350. Nor, as that case holds, is it necessary for the plaintiffs to challenge a defendant's expert evidence on issues that go only to the merits of the claims. It is enough that the plaintiffs have established some basis in fact that there is a methodology by which damages might be calculated, and it is particularly noteworthy that Plains' expert himself used one of the methods proposed by the plaintiffs' expert.

[92] Finally, it is likely that there will be common issues if Plains seeks to rely on the settlements. Again, nuanced answers may be necessary if it appears that different information was possessed or made available to various proposed class members.

[93] However, in my view, it would be premature to certify questions on settlements. There is evidence about settlements made between Plains and a large number of claimants, but those settlements have not been pleaded in defence of liability, because no statement of defence has been filed. Whether there should be trials of common questions on the enforceability of settlements is best left to the point where issues have been joined in the pleadings.

[94] In the result, I conclude that the questions proposed by the plaintiffs are suitable common issues within the meaning of section 5(1)(c), although the final form of the questions will be settled after further submissions. At this stage I decline to include questions on settlements as part of the common issues.

X. Preferable Procedure

A. General Principles

[95] The fourth statutory requirement is that the class proceeding "be the preferable procedure for the fair and efficient resolution of the common issues" (section 5(1)(b)). In determining whether a class proceeding is the preferable procedure, the court must consider all relevant matters, including at least the five matters set out in section 5(2).

[96] A preliminary matter is the scope of an inquiry into whether "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues." The words of the section might suggest, as was argued in *Hollick*, "that the court must look to the common issues alone, and ask whether the common issues taken in isolation would be better resolved in a class action rather than in individual proceedings" at para 27. The court rejected that contention, finding instead that "there must be a consideration of the common issues in context" at para 30; and that "the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims and not just the possibility of individual actions" at para 31. Thus, the focus is not merely the best procedure for resolving the common issues.

[97] *Hollick* was decided without the benefit of section 5(2), which lists factors to be considered when determining the preferable procedure. Those factors confirm the holding in *Hollick* that the scope of the preferable procedure inquiry extends to a consideration of whether a class action is the preferable procedure for resolving the claims of the proposed class members.

B. Statutory Considerations

a) "Whether questions of fact or law common to prospective of class members predominate over any questions affecting only individual prospective class members": s. 5(2)(a).

[98] Plains argues that "the key factor . . . that weighs against certification in this case is that individual questions of fact and law predominate over any common issues to an extreme degree": brief, para 112. In my view, largely for reasons already given, this minimizes the value to be derived from determination of common questions.

[99] Furthermore, Plains' argument that individual trials would be required for each class member ignores the flexible, streamlined procedures available for determination of individual issues. Section 28 of the *Class Proceedings Act* allows the court to have individual issues determined before judges or by appointment of "one or more persons, including, without limitation, one or more independent experts" to conduct inquiries and report back to the court: section 28(1)(b). The court may give directions for procedures to be followed in conducting hearings and inquiries, and in doing so must choose "the least expensive and most expeditious method of determining the individual issues," including dispensing with procedural steps considered unnecessary: section 28(2) and (3).

[100] This flexibility is emphasized in *Bouchanskaia v Bayer Inc*, 2003 BCSC 1306, [2003] B.C.J. No. 1969 at paras 150 and 151; and an example of the type of procedures employed for expeditious resolution of individual issues is seen in *Lundy v VIA Rail Canada Inc*, 2016 ONSC 425, [2016] O.J. No. 268, with an attached schedule entitled "Individual Issues Litigation Plan."

b) "Whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions": s. 5(2)(b).

[101] There is nothing in the evidence to suggest that any other members of the proposed class are interested in controlling the prosecution of their own actions. Indeed, it is a fair inference from the evidence that there has been little or no interest in pursuing an action apart from that shown by these plaintiffs. This factor thus has little bearing on the preferable procedure.

[102] While not directly relevant to this factor, Plains suggest that "the lack of utility in certification, in terms of judicial economy, is also evidenced by the fact that after nearly eight years of litigation there is still no direct evidence that anyone beyond the Plaintiffs has any interests pursuing a claim against Plains": brief, para 118. While that argument might seem compelling at first blush, it works against the policy objectives of class action legislation. The authorities indicate that the policy objectives of access to justice and behaviour modification "often depend upon a representative Plaintiff taking the initiative in circumstances where other members of the class would be ignorant of their loss or acquiesce because of disinterest, lack of resources or fear of an adverse costs award": *Keatley Surveying Ltd v Teranet Inc*, 2015 ONCA 248, 384 D.L.R. (4th) 147 at para 72.

c) "Whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 5(2)(c).

[103] There have been no other proceedings that would weigh against a class proceeding in this case. While there have been a large number of settlements (although their binding nature may yet be in dispute), these do not qualify as other proceedings. The evidence indicates that Plains would not negotiate loss of use or enjoyment claims, even though settlements required a release broad enough to bar such claims in the future. In any event, it is undisputed that there are proposed class members who are not part of the settlements.

d) "Whether other means of resolving the claims are less practical or less efficient": s. 5(2)(d).

[104] Plains has put forward no alternative means of resolving the claims sought to be certified in this action. Preferability must be assessed in comparison to some other viable alternative. The only alternative Plains has contemplated are individual trials, which of course will not proceed. It

is a reasonable inference from the record before me that, after this number of years, no other members of the proposed class would initiate alternative proceedings.

[105] Apart from the apparent unlikelihood that individual actions would proceed, individual determination of the claim of each proposed class member would lead to duplication of fact-finding and legal analysis, increased costs and much lower efficiency in the use of the court system. In contrast, as in *Montague v Pelletier*, 2018 ABQB 1047, "[i]n the circumstances here, certification produces an overall economy and practicability. Certification would promote the objectives of judicial economy and access to justice, which underly the purpose of class proceedings" at para 183.

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": s. 5(2)(e).

[106] The consideration of this factor is similar to the preceding ones.

[107] There is no basis for me to conclude that a class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means. As I have indicated, there are common issues capable of being addressed within the structure of a class proceeding. The possibility of individual issues remaining to be determined does not create greater difficulties than if the claims were pursued by means other than a class action. To the contrary, the procedures available under section 28 of the *Class Proceedings Act* offer economy and practicability to the benefit of class members and Plains.

C. Any Matter Considered Relevant

[108] In addition to the required considerations listed in section 5(2)(a) through (e), the court may consider any matter it considers relevant to determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. To assist in determining what considerations are relevant, regard must be had to the purpose of the "preferable procedure" inquiry, well set out by Martin J. as follows:

> The Court is required to take a purposive approach to the interpretation of these factors [as set out in sections 5(2)(a) through (e)], testing them against the objectives of the *CPA*. The essence of the preferable procedure inquiry is whether a class action represents a fair, efficient and manageable procedure that is preferable to any alternative method of resolving the claims: *Hollick* at para 28. Furthermore, the Court must determine whether proceeding as a class action advances the policy objectives of access to justice, judicial economy, and behaviour modification: *Hollick* at para 27. [*Andriuk* at para 149]

[109] The express considerations in the *Class Proceedings Act* and the authorities guiding its purpose and interpretation persuade me that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues presented by the plaintiffs in this case. In fact, there have been no other procedures attempted by claimants or proposed as alternatives by Plains.

[110] Behaviour modification is not a significant factor here. However, it also weighs in favour of certifying these proceedings, notwithstanding Plains' cooperation following the incident. As pointed out in *Windsor*, the goal of class proceedings legislation is usually focused on the original conduct that allegedly caused the harm in the first place, not a defendant's subsequent behaviour trying to mitigate its liability or loss: at para 150 (Q.B.).

XI. Representative Plaintiff

[111] The final requirement for a certification order concerns the proposed personal representative. The court must be satisfied that there is a representative plaintiff who would fairly and adequately represent the interest of the class, has presented a workable litigation plan for advancing the action, and does not have a conflict of interest on the common issues.

[112] Plains takes no issue with Ms. Rieger as the representative plaintiff, other than arguing that she must have at least one of the causes of action pleaded and she fails on this count because her only claim is one of pure economic loss. The plaintiffs acknowledge that, to be representative, they must have at least one cause of action.

[113] Based on my finding that the plaintiffs' action in negligence against Plains meets the requirement of a cause of action for certification purposes, the requirement of a suitable representative plaintiff has been satisfied. (Mr. and Ms. Rieger are both plaintiffs, but only Ms. Rieger is proposed as a representative plaintiff.)

XII. Conclusions and Incidental Matters

[114] I therefore conclude that the criteria for certification have been satisfied, and accordingly I must grant an order certifying this proceeding as a class proceeding. In my view, no amendments of the statement of claim are necessary for this order.

[115] The class will be defined as proposed by the plaintiffs, set out earlier in these reasons. The questions will be as proposed by the plaintiffs, as set out earlier in these reasons, subject to modification and refinement as may be determined by further submissions; excluding questions regarding settlements, on the basis that they are premature.

[116] The parties may arrange to schedule a further appearance to address finalization of the questions, litigation plan, and notification. The parties may also speak to any claims for costs.

Heard on the 19th and 20th day of February, 2020.
Dated at the City of Calgary, Alberta this 8th day of May, 2020.

G.H. Poelman
J.C.Q.B.A.

Appearances:

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for the Defendant