# QUEEN'S BENCH FOR SASKATCHEWAN

Citation: **2021 SKQB 198**

Date: **2021 07 14**
Docket: QBG 1728 of 2018
Judicial Centre: Regina

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BETWEEN:

KELLY KISH

PLAINTIFF

- and -

FACEBOOK CANADA LTD. and FACEBOOK, INC.

DEFENDANTS

Brought under *The Class Actions Act*

**Counsel:**

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| Anthony (E.F.) Merchant, Q.C., Anthony Tibbs and Iqbal Brar | for the plaintiff |
| Mark Gelowitz and Robert Carson | for the defendants |

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JUDGMENT
JULY 14, 2021

KEENE J.

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## INTRODUCTION

[1] This claim seems to be about Ms. Kish's concern that Dr. Aleksandr Kogan and a British business he was affiliated with known as Cambridge Analytica [CA] somehow got personal information about Canadian Facebook account holders and other Canadians who did not have Facebook accounts that somehow Facebook had personal information about. It appears what brought this to Ms. Kish's attention was the news reporting that Dr. Kogan and his colleagues at CA had been retained by Senator Ted Cruz's 2015 presidential campaign and Donald Trump's 2016 presidential campaign to woo supporters and raise money using personal data

retrieved from Facebook accounts. I say "seems to be" because a reading of the amended claim indicates a generalized informational component that refers to how Facebook operates and obtains revenue (paras. 1-7, 9-22 and 43-45) but is focused on Dr. Kogan and CA and the American experience (save for a brief reference to Canada in para. 49 (g) and (h)). Accordingly, this case bears a remarkable similarity to Justice Belobaba's recently decided decision of *Simpson v Facebook*, 2021 ONSC 968 [*Simpson*]. Justice Belobaba provides a well-constructed introduction to his case (paras. 1-17) that I need not reproduce here with the exception of:

> [13] The key point is this. On any fair reading of the plaintiff's pleading, it was the sharing of Canadian users' personal data with Cambridge Analytica that constituted the breach or invasion of privacy.

[2] Justice Belobaba's comments are apropos here even though the plaintiff advances a second class – those who were not Facebook people – but I find that also falls into the same theme. The court in *Simpson* went on to not allow the certification based on a paucity of evidence on this core issue, although noting the plaintiff's claim had a number of other impediments (para. 41).

## THE PLEADINGS

[3] The plaintiff's amended claim describes the class as:

> 8. The Plaintiff brings this claim in her own right and as the proposed representative plaintiff for the "Class" defined as all persons in Canada who:
>
> (a) have or have had at any time since 2004 a Facebook account (the "User Class");
>
> (b) have never registered for a Facebook account and whose identity, personal information, or biometric data has at any time since 2004 been stored or maintained by Facebook (the "Shadow Profile Class").

[4] The "Causes of Action" are set out in paras. 56-100 that cover breach of contract, breach of privacy legislation, negligence, breach of fiduciary duty, intrusion upon seclusion, consumer protection legislation, breach of confidence, unjust enrichment and disgorgement.

## THE CLASS ACTIONS ACT

[5] *The Class Actions Act*, SS 2001, c C-12.01 [*Act*] states:

> **Class certification**
>
> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
>
> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class;
>
> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
>
> (d) a class action would be the preferable procedure for the resolution of the common issues; and
>
> (e) there is a person willing to be appointed as a representative plaintiff who:
>
> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

**ANALYSIS**

[6] Justice Belobaba quickly got down to brass tacks in *Simpson* citing an evidentiary problem and while noting "that certification remains a low hurdle, it is nonetheless a hurdle" (para. 50) and reminding the plaintiff that the onus was on her to "adduce some basis in fact – some evidence – for her core allegation: that Canadian users' personal data was indeed shared with Cambridge Analytica" (para. 24). The court went on to find there was "no evidence in the record that any Canadian user's personal data was shared with Cambridge Analytica" (para. 28). This resulted in the dismissal of the application.

[7] I like Justice Belobaba's approach and have decided to tackle the "no evidence" argument right at the get go. My reading of *Simpson* is that the evidence was simply barren, and no steps had been taken by the defendant to exclude evidence from the record. Here, the defendants want the evidence struck because it appears the affiants seem to be trying to show some Canadian relevancy in connection in their evidence. This necessitates more of a go at what has been offered up by the plaintiff.

[8] The plaintiff has led evidence consisting of:

1. Expert evidence – Dr. Norm Archer

2. Two affidavits from the plaintiff – Ms. Kish

[9] The defendants, Facebook, Inc. and Facebook Canada Ltd., have filed an application seeking to strike out Dr. Archer's affidavit. They argue that Dr. Archer does not have relevant qualifications, did not verify the accuracy or reliability of the information received from plaintiff's counsel, and did not review the defendants' responding evidence.

[10] Facebook also argues that the first Kish affidavit is inadmissible since the articles therein were provided by counsel and not verified by Ms. Kish, and the internet materials are unreliable. They argue that the second Kish affidavit is inadmissible because it is not proper reply evidence since it does not respond to matters raised in the defendants' affidavits, contains improper legal argument, and again Ms. Kish made no efforts to verify the attached documents.

**ISSUES**

1. What is the standard for admissibility of expert evidence?
2. What is the standard for admissibility of internet hearsay evidence?
3. Are the affidavits of Dr. Norm Archer and Ms. Kish admissible?

***What is the standard for admissibility of expert evidence?***

[11] The standard of proof for certification was set out by McLachlin C.J. in *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 SCR 158 [*Hollick*]: "... 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" (para. 25). The evidentiary burden is not an onerous one, it requires only a "minimum evidentiary basis": *Hollick* at paras 21, 24-25. The purpose of the certification stage is to determine whether the action can properly proceed as a class action; it is not a determination of the merits of the matter (*Hollick* at para 16).

[12] In *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477, the Supreme Court of Canada clarified that:

> [102] … The "some basis in fact" standard does not require that the court resolve conflicting facts and evidence at the certification stage. Rather, it reflects the fact that at the certification stage "the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight" (*Cloud* [*Cloud v Canada (Attorney General)* (2004), 73 OR (3d) 401 (CA)], at para. 50; *Irving Paper Ltd. v. Atofina Chemicals Inc.* (2009), 99 O.R. (3d) 358 (Ont. S.C.J.), at para. 119, citing *Hague v. Liberty Mutual Insurance Co.* (2004), 13 C.P.C. (6th) 1 (Ont. S.C.J.)). The certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action; "rather, [it] focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding" (*Infineon* [*Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2009 BCCA 503, 98 BCLR (4th) 272], at para. 65).
>
> [103] Nevertheless, it has been well over a decade since *Hollick* was decided, and it is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" (*CPA* [*Class Proceedings Act*, RSBC 1996, c 50], s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> [104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

[13] Although the evidentiary burden for certification hearings is low, that burden must still be discharged by admissible evidence. The evidence tendered on a certification hearing must still meet the usual criteria for admissibility: *Wiegers v Apple, Inc.*, 2020 SKQB 24 at para 82 [*Wiegers*]; *Tluchak Estate v Bayer Inc.*, 2018 SKQB 311, at paras 56-58 [*Tluchak*]; *Stout v Bayer Inc.*, 2017 SKQB 329 at para 46 [*Stout*] citing *Williams v Canon Canada Inc.*, 2011 ONSC 6571 at paras 65-67 [*Williams*]; *Dembrowski v Bayer Inc.*, 2015 SKQB 286 at para 26, 482 Sask R 211

[*Dembrowski*]; *R v Brooks*, 2009 SKQB 509 at paras 39-40, [2010] 6 WWR 81 [*Brooks*]; *Sweetland v Glaxosmithkline Inc.*, 2014 NSSC 216 at para 16, 347 NSR (2d) 328 [*Sweetland*]; *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 at para 42, 27 CPC (7th) 32 [*Martin*]; *Ernewein v General Motors of Canada Ltd.*, 2005 BCCA 540 at para 31, 260 DLR (4th) 488.

[14] In Warren K. Winkler, Paul M. Perell, Jasminka Kalajdzic & Alison Warner, *The Law of Class Actions in Canada* (Toronto: Canada Law Book, 2014), the authors, at pages 32-33, summarize the evidentiary principles as such:

> The lesser standard of proof of some basis in fact does not diminish the standards for the admissibility of evidence; the evidence on a motion for certification must meet the usual standards for admissibility. The evidence must of course be relevant in order to be admissible. To be relevant on a certification motion, the tendered evidence must be material to the certification criteria and must not solely relate to the merits of the action itself. Other established exclusionary rules of evidence, such as the hearsay rule, apply to evidence proffered on a certification motion.
>
> Evidence is inadmissible if it is (1) hearsay that is not admissible through an exception; (2) affidavit evidence that fails to disclose the deponent's source of information and belief if the evidence deals with contentious matters; (3) opinion that is not properly qualified; or (4) improper legal argument.
>
> Relevant evidence must be assessed on the appropriate standard. The views of legal practitioners on whether the requirements of certification have been met are not admissible as evidence to be considered in arriving at a decision about certification. Evidence from class members regarding their opposition to a class proceeding is of no assistance in determining whether a class proceeding should be certified.
>
> Opinion evidence for a certification motion can only be tendered through the evidence of a properly qualified expert. The court may strike out inadmissible opinion evidence. Although the court is not called upon to ultimately decide the merits of the expert evidence on a certification motion, a properly qualified expert is nevertheless a precondition to admitting expert opinion evidence on such a motion.

> Where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial, and it follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible. [Citations removed]

[15] Further, as was nicely summarized by Justice Horkins in *Martin*:

> [38] … Obviously there is a distinction between determining the admissibility of evidence and deciding what weight to attach to evidence that is admissible. As the gatekeeper, it is the role of the certification judge to determine admissibility. It is not the role of the certification judge to assess and weigh evidence and resolve conflicts in the evidence. When considering all of the admissible evidence that is before the court, the certification judge is assessing if there is some basis in fact for the s. 5(1) (b)-(e) criteria.

[16] Thus, the onus is on plaintiffs to satisfy the court that the evidence is relevant to the issue of certification. Some courts have gone as far as to require that the plaintiffs explain how the information is relevant and how it is of assistance in determining whether the certification criteria have been met: *Sweetland* at para 17. I will turn to the admissibility of Internet and expert evidence specifically.

***Internet Evidence***

[17] *Thorpe v Honda Canada Inc.,* 2010 SKQB 39, 352 Sask R 78 [*Thorpe*], is the current authority for this Court's approach to internet-based hearsay evidence. In *Thorpe,* Honda brought an application to strike affidavit evidence pursuant to former Rules 77 (now Rule 3-89) and 319 (now Rule 13-30) of *The Queen's Bench Rules*. The affidavit evidence set forth information taken from the internet including postings from online discussion forums. The affiants had sworn that they had personal knowledge of the facts sworn to in the affidavit but provided no basis for the belief or anything to suggest that the information was true, accurate, reliable and unaltered. Honda argued that such internet information is inadmissible due to reliability

concerns. Justice Popescul (as he then was), following *ITV Technologies Inc. v WIC Television Ltd.*, 2003 FC 1056, 29 CPR (4th) 182, outlined the requirements for the admissibility of internet-based hearsay evidence:

> [22] The approach taken by the Federal Court Trial Division has logical appeal. Even though the appellate court declined to endorse the analysis and conclusion, I agree with the essence of the ruling: internet information may be admissible in court proceedings depending upon a variety of circumstances relating to reliability which include, but are not limited to:
>
> - whether the information comes from an official website from a well known organization;
> - whether the information is capable of being verified;
> - whether the source is disclosed so that the objectivity of the person or organization posting the material can be assessed.
>
> [23] Where the threshold of "admissibility" is met, it is still up to the triers of fact to weigh and assess the information to determine what significance, if any, such information would have on the issues to be decided.
>
> [24] **If the internet-based evidence tendered does not contain sufficient badges of reliability, it ought be rejected as worthless and, hence, inadmissible**.

Justice Popescul then concluded that:

> [27] Accordingly, I find that **affidavit evidence, "on information and belief", including information taken from the internet, is potentially admissible in interlocutory applications, such as a class action certification application, and may be admitted "under special circumstances" where the "grounds for such information and belief" are adequately disclosed and the information is reliable.** Here, the subjective basis for the reliability of the information has not been disclosed and, furthermore, there is no objective basis to believe that the various postings have any degree of reliability.
>
> [28] Accordingly, those portions of the impugned affidavits containing the hearsay internet information are struck because they are offside Rule 319. ...
> [Emphasis added]

[18] Similarly, in *Rosetim Investments Inc. v BCE Inc.,* 2011 SKQB 253, 376 Sask R 264 [*Rosetim*], Justice Gabrielson, following Justice Popescul's decision in *Thorpe,* found that in order to be admissible, internet material must be established to be reliable. In that case, the affiant had attached analyst reports that he had downloaded from the internet and attempted to submit them for the truth of their contents. However, there was nothing in the affidavit which suggested that the reports came from an official website or that the information could be verified. Thus, Justice Gabrielson found that they were not admissible pursuant to former Rule 319 (now Rule 13-30) (paras. 25-27).

[19] Ontario Courts have also followed *Thorpe*. In *Williams*, for example, Justice Strathy adopted the approach taken by Justice Popescul in *Thorpe*:

> [100] I respectfully adopt these observations and this approach. The plaintiff says that the information in Mr. Joffe's searches is reliable because it is taken from Google, unquestionably the largest and most recognized internet search engine. The problem, however, is that the Google searches are simply agglomerations of hundreds or thousands or millions of individual postings, the authenticity and reliability of which is entirely unknown. There is no way of testing the underlying truth of the postings and it is clear from the evidence of Mr. Joffe that he made no attempt to do so. The defendants have adduced evidence to show that the reliability of some of the individual postings is open to serious question.
>
> [101] Common sense tells us that simply because there are several million responses on Google to "Elvis is alive" or "I have been abducted by aliens" does not mean that these statements are true, either as individual observations or as collective proof of the facts. Nor do hundreds of thousands or even millions of responses to "E18 Lens Error" mean that hundreds of thousands or millions of people have experienced an E18 Error message. There is in this case no objective basis to determine that the results of the Google searches are reliable, and there is, in fact, evidence to the contrary.
>
> [102] For these reasons, the decision in *Thorpe v. Honda* is of no assistance to the plaintiffs. Nor is Rule 39.01(4). That rule provides that an affidavit for use on a motion may contain statements of the

> deponent's information and belief "if the source of the information and the fact of the belief are specified in the affidavit." **I agree with the conclusion of Popescul J. that in order for information from the internet to be admissible, there would have to be some objective basis for a conclusion that the information is reliable.** Mr. Joffe having made no personal attempt to obtain confirmation of the reliability of the information, and there being no objective basis to conclude that the underlying information is reliable, it is inadmissible.
>
> [Emphasis added]

[20] Additionally, a number of expert evidence cases also follow Justice Popescul's decision in *Thorpe* due to the prevalence of the use of research pulled from the internet. These will be discussed below.

***Expert Evidence***

[21] Two Supreme Court of Canada decisions govern the admissibility of expert evidence: *R v Mohan,* [1994] 2 SCR 9 [*Mohan*] and *White Burgess Langille Inman v Abbott and Haliburton Co.,* 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*]. The general test from *Mohan* is that expert evidence must satisfy the following criteria: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert (defined as a person shown to have acquired special or peculiar knowledge through study or experience in respect of the matters which he or she undertakes to testify).

[22] In *White Burgess,* the Supreme Court expanded that inquiry into two distinct components. Justice Cromwell described the steps of the inquiry as follows:

> [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four *Mohan* factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a

> novel purpose, the reliability of the underlying science for that purpose. Relevance at this threshold stage refers to logical relevance. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement.
>
> [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in *J.-L.J.* [*R v J.-L.J.*, 2000 SCC 51, [2000] 2 SCR 600], Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para. 47. Doherty J.A. summed it up well in *Abbey* [*R v Abbey*, 2009 ONCA 624, 97 OR (3d) 330], stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76.

[23] Later Justice Cromwell commented on the difference between assessing weight and admissibility of expert evidence:

> [45] Following what I take to be the dominant view in the Canadian cases, I would hold that an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted. That approach seems to me to be more in line with the basic structure of our law relating to expert evidence and with the importance our jurisprudence has attached to the gatekeeping role of trial judges. Binnie J. summed up the Canadian approach well in *J.-L.J.*: "The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility" (para. 28).

[24] These expert evidence rules are further codified in *The Queen's Bench Rules*:

**Duty of expert witness**

**5-37(1)** In giving an opinion to the Court, an expert appointed pursuant to this Division by one or more parties or by the Court has a duty to assist the Court and is not an advocate for any party.

**(2)** The expert's duty to assist the Court requires the expert to provide evidence in relation to the proceeding as follows:

(a) to provide opinion evidence that is objective and non-partisan;
(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and
(c) to provide any additional assistance that the Court may reasonably require to determine a matter in issue.

**(3)** If an expert is appointed pursuant to this Division by one or more parties or by the Court, the expert shall, in any report the expert prepares pursuant to this Division, certify that the expert:

(a) is aware of the duty mentioned in subrules (1) and (2);
(b) has made the report in conformity with that duty; and
(c) will, if called on to give oral or written testimony, give that testimony in conformity with that duty.

### *Expert Evidence in Class Actions*

[25] In the context of class action certifications, the admissibility requirements for expert evidence are not diminished. The expert evidence in certification hearings, however, must be of some probative value to "determining whether there is some basis in fact for one or more of the evidence-based criteria": *Wiegers* at para 65. That is, the evidence must address whether there is an identifiable class, whether the issue is common to all class members, or that a class proceeding is the preferable procedure. There are several Saskatchewan class action cases to assist us in this matter: *Brooks*; *Dembrowski*; *Stout*; and *Tluchak*, aff'd 2019 SKCA 64; *Wiegers*.

[26] In *Brooks*, the defendants sought to strike the affidavits of two experts. In that case, the plaintiff had claimed that he suffered exposure to toxic chemicals and

was experiencing various health problems. Due to the complexity of the issues in question, Justice Zarzeczny stated:

> [39] Insofar as expert opinion evidence is concerned, the Supreme Court, in the seminal case of *R. v. Mohan,* [1994] 2 S.C.R. 9, outlined the four pre-conditions that must be satisfied before expert opinion evidence can be admitted . . .
>
> [40] **These criterion are as equally applicable to certification proceedings in a class action as they are to any other civil or criminal proceeding** (see *Risorto, infra* [*Risorto v State Farm Mutual Automobile Insurance Co.* (2007), 38 CPC (6th) 373]; *White v. Merck Frosst Canada*, [2004] O.J. No. 623 (S.C.J.)).
>
> ...
>
> [43] I have concluded that a generous approach should be taken to the determination of relevance and admissibility issues, particularly where, as is the case presently before the court, the claim of the plaintiff and the application for certification raises complex multi-disciplinary (that is — scientific/medical/biological) factual and causation issues not easily addressed in a preliminary way.
>
> [44] That is not to say that the court need not be aware of the distinction between depositions primarily advanced to demonstrate the merits of the case on the one hand and those directed to the legitimate purpose of establishing the factual basis for the certification requirements (of the *Act*). **Nor should the court ignore the long established criterion for the admissibility of expert opinion evidence and the need to identify the qualifications of an individual proffered to give it as laid out in *Mohan, supra*.** Both must be considered and the principles applied to assess the objections raised to the admissibility of the affidavits that are challenged.
>
> [Emphasis added]

[27] In that case, Justice Zarzeczny found that an expert deponent cannot express opinions based substantially on a review of literature published by those who do actually possess the necessary expertise.

[28] *Williams*, although not a Saskatchewan case, also followed Saskatchewan case law and is often mentioned by this Court. In *Williams*, the defendants had brought a motion to strike evidence of two affiants on the grounds that they were not qualified experts. After reviewing the case law on expert evidence, the court found that the threshold for admissibility of evidence is not lower in a certification hearing:

> [65] While the evidentiary burden on a certification motion is the low, "basis in fact" test, that burden must be discharged by admissible evidence. The evidence tendered on a certification motion must meet the usual criteria for admissibility: *Schick v. Boehringer Ingelheim (Canada) Ltd.*, [2011] O.J. No. 17, 2011 ONSC 63 at para. 13; *Ernewein v. General Motors of Canada Ltd.* (2005), 260 D.L.R. (4th) 488, 2005 BCCA 540 at para. 31, leave to appeal to SCC dismissed, [2005] S.C.C.A. No. 545.
>
> [66] This applies to all forms of evidence, including expert evidence: *Schick v. Boehringer Ingelheim (Canada) Ltd.* at para. 14. In *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319, 158 A.C.W.S. (3d) 193 (S.C.J.), Cullity J. observed at para. 19:
>
> > I accept, also, [counsel's] submission that the fact that only a minimum evidential foundation need be provided for each of the statutory requirements for certification - other than that in section 5(1)(a) - does not mean that the standards for admissibility can properly be ignored, or are to be relaxed for this purpose. However, insistence that the general rules of admissibility are applicable to expert evidence filed on motions for certification does not entail that the nature and amount of investigation and testing required to provide a basis for preliminary opinions for the purpose of such motions will necessarily be as extensive as would be required for an opinion to be given at trial.
>
> [67] This means that expert evidence tendered on a certification motion must meet the test of admissibility but, once found admissible, the quality of evidence required to establish a "basis in fact" is not the same as would be required for proof "on a balance of probabilities" at a trial on the merits.

[29] In applying the principles to the case, Justice Strathy found that the experts were not properly qualified and could be disqualified for that reason alone. Additionally, they also could have been inadmissible due to the use of unreliable "internet chatter" (see paras. 77-113).

[30] In *Dembrowski*, the defendant was seeking to strike the affidavits from an expert pursuant to Rules 5-37, 7-9 and 13-30 of *The Queen's Bench Rules*. In that case, after following the law set in *Brooks,* Justice Gabrielson allowed some of the expert evidence since the deponent had training in pharmacoepidemiology and was giving their opinion in the general area of epidemiology. However, other evidence was excluded as the expert did not have qualifications to depose on all matters before the court.

[31] In *Stout*, the defendants sought an order to strike expert evidence on the basis that the affiants were not properly qualified experts. In that case, the first expert affiant admitted that her opinions were based entirely on literature review, material review, and studies. Similarly, the second expert affiant was found to have drawn his opinion based exclusively on material he reviewed. Justice Elson first reviewed the proper approach the court should take in assessing evidence in certification hearings:

> [44] The threshold evidence necessary for class action certification proceedings is well known. Simply stated, a representative plaintiff is obliged to present sufficient evidence to establish "some basis in fact" for each of the certification requirements set out in ss. 6(1)(b) to (e) of the *Act*: the existence of an identifiable class; that the claims raise common issues; that a class action would be a preferable procedure for the common issues; and that there is a person willing to serve as a fair and properly prepared representative plaintiff. The only requirement for which evidence is not permitted is that the claim discloses a cause of action in law; *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 SCR 158. Evidence going to the merits of the allegations in a representative plaintiff's

> claim is admissible, but only insofar as such evidence is also relevant to an issue to be determined on the certification application. *Hoffman v Monsanto Canada Inc.*, 2003 SKQB 174, [2004] 4 WWR 632.
>
> [45] It is not uncommon for a proposed representative plaintiff to present expert opinion evidence particularly with respect to the definition of the proposed class and the proposed common issues. **Where such evidence is presented, its admissibility is determined under the *Mohan* test, as restated in *White Burgess*.** Although much of the jurisprudence on this particular point predates the decision in *White Burgess*, **I find that it embraces the threshold requirements from *Mohan*, as well as the residual discretion to exclude evidence that fails to meet the cost-benefit analysis, which Cromwell J. identified as the second component to the *Mohan* framework.** In this respect, I note the decisions of this court in *Dembrowski v Bayer Inc.*, 2015 SKQB 286, 482 Sask R 211 [*Dembrowski*], and *Brooks v R*, 2009 SKQB 509, [2010] 6 WWR 81 [*Brooks*], as well as the decision of the Ontario Superior Court of Justice in *Williams v Canon Canada Inc.*, 2011 ONSC 6571 [*Williams*].
>
> [Emphasis added]

[32] After reviewing several cases (see paras. 46-48), Justice Elson concluded that:

> [49] ... **While the "some basis in fact" standard of proof is clearly less than the balance of probabilities standard, it does not diminish the application of admissibility requirements, including those applicable to expert opinion evidence. It follows that the two-component test in *Mohan*, as restated in *White Burgess*, must apply, with full vigour, to the challenged affidavits.**
>
> [50] As to the application of the test, the first step is to determine whether the plaintiff has established the four threshold requirements for admissibility - relevance, necessity, absence of an exclusionary rule and proper qualifications.
>
> [Emphasis added]

[33] In applying these requirements to the case, Justice Elson noted that the first affiant, although a nutritional epidemiologist, was not qualified to comment on medical device epidemiology, regulation or use, and that her "expertise in one field is

not transferable to another simply by the acquisition of information without knowledge" (para. 53). As for the second affiant, Justice Elson made similar conclusions, finding that an expert opinion cannot be "derived exclusively from the reviewed material of others" (para. 54).

[34] In *Tluchak*, the plaintiffs sought to strike an affidavit, arguing that the deponent was not an independent expert as he had been paid consulting and advisory board fees by the defendant and was on the defendant's advisory board for the drug in question. Barrington-Foote J.A. (*ex officio*), following *Dembrowski, Williams* and *Brooks,* found that affidavits must comply with *The Queen's Bench Rules* and must meet the standard of admissibility of evidence (paras. 56-57). However, in commenting on the proper analysis of expert evidence, Barrington-Foote J.A. found that:

> [58] The *Mohan* rules (*R v Mohan*, [1994] 2 SCR 9 [*Mohan*]) relating to the admissibility of expert evidence were refined and restated in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182 [*White Burgess*]. Cromwell J. there described a two stage analysis. The court first considers whether the evidence meets the threshold requirements for admissibility. …
>
> [59] Evidence that meets these threshold requirements is normally subject to the second-step analysis, when the trial judge decides whether the benefits of admitting the evidence outweigh its potential risks. **However, it is my view that it will generally not be necessary or appropriate to undertake the second-step analysis when considering the admissibility of expert evidence on a certification application, and that the second-step analysis is not called for in this case.** That is so for essentially the same reason as in *White Burgess*. *White Burgess* related to an application for summary judgment. Under Nova Scotia's *Civil Procedure Rules*, as they then were, a judge did not weigh evidence, draw inferences and assess credibility on an application for summary judgment. As a result, Cromwell J. concluded (at para. 55) as follows:

> **55** ...A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves assigning weight - or at least potential weight - to the evidence.

[60] Similarly, a judge does not weigh conflicting evidence on a certification application. **The issue is whether there is "some basis in fact" for all but the first of the five certification criteria**: see the discussion below relating to certification criteria, and, for example, *Pederson v Saskatchewan*, 2016 SKCA 142 at para 28, 408 DLR (4th) 661 (CA) [*Pederson*]. The scrutiny of the evidence is modest. I note that in *Stout*, the court suggested (at paras. 45-49), relying on cases decided prior to *White Burgess*, the second-step analysis should apply. However, the court then found it was not necessary to consider that issue as the expert evidence there at issue failed at the first step.

[61] The question of expert independence and impartiality — the basis for the plaintiffs' position as to Dr. Crowther's opinion — was a key issue in *White Burgess*. Cromwell J. there confirmed (at para. 45) that "an expert's lack of independence and impartiality goes to the admissibility of the evidence in addition to being considered in relation to the weight to be given to the evidence if admitted". The expert "must be fair, objective and non-partisan...[and]...the appropriate threshold for admissibility flows from this duty"(para. 46). It is generally sufficient if the expert swears under oath that they recognize and accept that duty. As to the evidentiary burden, Cromwell J. said this:

> **48** Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence...

> **49** This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it...
>
> [62] **Dr. Crowther deposed that he was aware he has a duty to assist the court and not be an advocate for any party. He also deposed that he reviewed Rule 5-37 of *The Queen's Bench Rules* and prepared his report in conformity with his duty under that Rule. That evidence meets the evidentiary burden on the defendant**. In my view, having considered all of the evidence, the plaintiff did not show, on a balance of probabilities, that Dr. Crowther is unwilling or unable to comply with that duty. Accordingly, his report is admissible. The issues raised by the plaintiffs are relevant to weight, and, given the test for certification, the weight of Dr. Crowther's evidence is of little moment on this is of little moment on this application.
>
> [Emphasis added]

[35] In *Wiegers*, the defendants argued that the expert's affidavits did not comply with Rule 5-37. Justice Elson found that the expert's opinion was based solely on review of the documents supplied to him, and did not include any evidence of independent research, analyses or tests performed by the affiant. Additionally, there was no evidence before the court regarding the credentials or qualifications of the authors of some of the Internet articles relied on by the deponent. In commenting on the current approach to expert opinion evidence in certification hearings, Justice Elson highlighted the key challenges:

> [47] It is not unfair to say that the admission of expert opinion evidence in class action certification proceedings has presented somewhat of a conundrum for parties, counsel and, occasionally, judges. The root of this problem centres on the confluence of two established legal principles. The first principle is that certification proceedings are not contests on the merits of the action, itself. Rather, and as articulated by the Supreme Court of Canada in *Hollick v Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 SCR 158 [*Hollick*], the named plaintiff need only present sufficient evidence to establish "some basis in fact" in respect of the four evidence-based certification criteria set out in s. 6(1)(b) through (e).

> [48] The second principle arises when a party adduces expert opinion to address the evidence-based criteria. Despite the "less-than-a-trial" evidentiary foundation of "some basis in fact", the admission of expert evidence to establish that foundation must still be determined according to the general rules of admissibility applicable to expert evidence. Subject to one arguable qualification, which I will discuss later in this decision, the less-than-a-trial foundation does not engage a lesser standard of admissibility. This is made clear in a number of authorities …
>
> [49] At first glance, the generosity of the "some basis in fact" standard seems to contrast sharply with the increasingly strict limits placed on the admissibility of expert opinion evidence. This contrast likely accounts for the misunderstandings that often arise as to the purpose for which the expert opinion evidence is adduced. This misunderstanding, in turn, leads to a tendency for certification judges to receive voluminous evidence that tends not to focus on the existence of any evidence-based criteria. In *Joanisse v Barker* (2003), 46 CPC (5th) 348 (Ont Sup Ct) [*Joanisse*], Cullity J., when addressing an assessment of costs, lamented this tendency at para. 7:
>
> > 7 ... There is, also a marked tendency to inflate the record with evidence — and the transcripts of lengthy cross examinations — that have more relevance to the merits of the action than to the issues with which the motion is concerned. ...
>
> Cullity J reiterated this concern somewhat more forcefully in *Lambert v Guidant Corp.* (2009), 72 CPC (6th) 120 (Ont Sup Ct) at paras 56-71.
>
> [50] In my view, a meaningful analysis is required to avoid this misunderstanding, and the tendency that may be attributed to it. Such an analysis necessarily begins with consideration of the general rules for the admissibility of expert opinion evidence. Given the use Mr. Blackburn made of the articles given to him by the plaintiff's counsel, I should also address the extent to which admissible expert opinion can include third party sources. Finally, consideration will be given to the application of the admissibility rules to expert evidence presented in class action certification proceedings.

[36] Justice Elson then proceeded to review the general rules for the admissibility of expert opinion (see paras. 51-71). As related to class action certification, Elson J. outlined the following principles:

> [65] Expert evidence is not always necessary in class action certification applications. When it is adduced, its probative value is confined to determining whether there is some basis in fact for one or more of the evidence-based criteria. Typically, such evidence is directed to the definition of an identifiable class, the presence of common issues and/or, to a much lesser extent, the preferability of a class action to resolve the class members' claims. For these three criteria, the evidence, expert or not, is expected to address the following questions:
>
> > a. Is there some basis in fact to find an identifiable class that is narrowly defined and not unnecessarily broad? See *Hollick*, paras 20-21.
> >
> > b. Is there some basis in fact to find that there are issues raised by the claim that are common to all class members, even minimally so? See *Hollick*, para 18.
> >
> > c. If there are common issues, is there some basis in fact to conclude that a class proceeding would be the preferable procedure for resolving those issues? See *AIC Limited v Fischer*, 2013 SCC 69 at para 1, [2013] 3 SCR 949.
>
> ...
>
> [72] From the foregoing references to the use of expert opinion evidence in class action certification proceedings, particularly on the common issues criterion, **I have come to the conclusion that it is misleading to describe the "some basis in fact" standard as a "lesser evidentiary foundation".** This label, commonly used by many litigants, does a disservice to an understanding of what the standard truly means. In my view, the standard is not so much a "lesser" foundation as it is a distinct factual issue for which the evidence, expert or otherwise, is proffered.
>
> [73] **Where expert opinion evidence is adduced, it can only be considered in determining whether an evidence-based criterion, such as commonality, is established.** It follows that, where expert opinion evidence is proffered for such a purpose, application of the *Mohan/White Burgess* inquiries must be confined to the scope of that particular factual issue. An opinion on the merits of the action, at this stage, plays no role. Indeed, an affiant, properly qualified to

express an opinion on the merits, may not be similarly qualified to opine on the presence, or not, of any evidence-based criteria.

...

[75] In *White Burgess*, Cromwell J. noted that the second component of the admissibility framework, the cost-benefit analysis, does not apply universally to all cases in which expert evidence is proffered. In his view, application of the second component depends on the nature of the proceeding and the extent to which the Court is expected to weigh the evidence. Indeed, this very point arose on the facts of the *White Burgess* case, which involved the admission of expert evidence in a summary judgment application brought under the Rules of the Nova Scotia Supreme Court (*Nova Scotia Civil Procedure Rules*). Cromwell J. noted that, unlike the Rules in other jurisdictions, the Nova Scotia Rules for summary judgment did not contemplate weighing the evidence. As such, he concluded that the cost-benefit analysis did not apply. In this respect, Cromwell J. said the following at para. 55:

> **55** I must say a brief word about the procedural context in which this case originates — a summary judgment motion. (I note that these comments relate to the summary judgment regime under the Nova Scotia rules and that different considerations may arise under different rules.) It is common ground that the court hearing the motion can consider only admissible evidence. However, under the Nova Scotia jurisprudence, which is not questioned on this appeal, it is not the role of a judge hearing a summary judgment motion in Nova Scotia to weigh evidence, draw reasonable inferences from the evidence or settle matters of credibility: *Coady v Burton Canada Co.*, 2013 NSCA 95, 333 NSR (2d) 348 (N.S.C.A.), at paras. 42-44, 87 and 98; *Fougere v Blunden Construction Ltd.*, 2014 NSCA 52, 345 NSR (2d) 385 (N.S.C.A.), at para 6 and 12. Taking these two principles together the result in my view is this. A motions judge hearing a summary judgment application under the Nova Scotia rules must be satisfied that proposed expert evidence meets the threshold requirements for admissibility at the first step of the analysis, but should generally not engage in the second step cost-benefit analysis. That cost-benefit analysis, in anything other than the most obvious cases of inadmissibility, inevitably involves

> assigning weight — or at least potential weight — to the evidence.

[76] The significance of the Nova Scotia Summary Judgment Rules, in this analysis, becomes particularly apparent when one reviews the judgment of the Nova Scotia Court of Appeal in *Fougere v Blunden Construction Ltd.*, 2014 NSCA 52, 345 NSR (2d) 385. There, Saunders J.A., speaking for a unanimous court, emphasized that Nova Scotia's Rules did not include an equivalent Rule to Ontario's Rule 20 (the equivalent to Saskatchewan's Rule 7-5(2)(b)). As such, at para. 6 of the judgment, he categorically stated that the powers to weigh evidence, draw a reasonable inference from evidence and settle matters of credibility "... are foreign to the well-established procedures and settled law which operate in Nova Scotia."

[77] In the present case, the question arises whether the above recited comments from *White Burgess* are similarly applicable to the admission of expert evidence in the certification of class actions. This question came to the fore in *Tluchak*, where Barrington-Foote, J.A. drew a favourable comparison between the two types of proceedings. In doing so, he observed that the "some basis in fact" requirement for the evidence-based certification criteria involved only modest scrutiny, suggesting that the second step of the *White Burgess* framework did not apply. In passing, Barrington-Foote J.A. noted my decision in *Stout*, where I opined, albeit in *obiter*, that both components should apply to the proposed expert evidence in that certification proceeding. After reciting a portion of the above referenced passage from *White Burgess*, Barrington-Foote J.A. described the comparison to a certification proceeding in para. 60 (of 2018 SKQB 311):

> 60 Similarly, a judge does not weigh conflicting evidence on a certification application. The issue is whether there is "some basis in fact" for all but the first of the five certification criteria: see the discussion below relating to certification criteria, and, for example, *Pederson v. Saskatchewan*, 2016 SKCA 142 (Sask. C.A.) at para 28, (2016), 408 D.L.R. (4th) 661 (Sask. C.A.) [*Pederson*]. The scrutiny of the evidence is modest. I note that in *Stout*, the court suggested (at paras. 45-49), relying on cases decided prior to *White Burgess*, the second-step analysis should apply. However, the court then found it was not necessary to consider that issue as the expert evidence there at issue failed at the first step.

> [78] The comments in *Tluchak* present food for thought. In *Stout*, I neglected to consider the possible comparison between a Nova Scotia summary judgment application and a class action certification proceeding. It is to the credit of Barrington-Foote J.A. that he did so. Importantly, the observation about the "modest scrutiny" to which certification evidence is subject, is well taken. It is axiomatic that modest scrutiny suggests a lesser role in weighing evidence, including expert opinion evidence.
>
> [79] All of this said, **I am not convinced that this more modest role obliges a certification judge to ignore the relative force of the presented evidence** – at least not in as categorically as is done under the Nova Scotia Summary Judgment Rules. The judgments in *Infineon* [*Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2009 BCCA 503, 312 DLR (4th) 419] and *Pro-Sys* [*Pro-Sys Consultants Ltd. v Microsoft Corporation.*, 2013 SCC 57 at para 110], [2013] 3 SCR 477 [*Pro-Sys Consultants Ltd. v Infineon Technologies AG*, 2009 BCCA 503, 98 BCLR (4th) 272], and the authorities since, suggest that **a certification judge can weigh the extent to which expert evidence presents an opinion on the existence of common issues, such as is done in the presentation of a methodology for that purpose.** Indeed, where parties present conflicting expert opinions on the presence, or not, of common issues and/or an identifiable class, it would be difficult for the certification judge to avoid a weighing exercise, albeit a rather modest one.

[37] Justice Elson found in that case that the affiant lacked the required qualifications and the necessary independence. In coming to this conclusion Justice Elson commented that:

> [84] … While it is clearly not inappropriate to share the pleadings and other factual evidence submitted for the certification application, **it is somewhat questionable for the plaintiff's counsel to insert itself into the opinion making process by supplying the proffered expert with commentary from websites for the proposed expert to rely on**. Even if this exercise is not questionable or otherwise inappropriate**, a properly independent expert is obliged to demonstrate his/her own independent analysis in arriving at the opinion presented.** There is no evidence in Mr. Blackburn's affidavit or his report to suggest that he applied any independent analysis or conducted any independent research in drawing the conclusions set

> out in his report. Indeed, as I earlier remarked, his report does not illustrate the exercise of any independent judgment based on qualifications that the plaintiff suggests are adequate.
>
> [85] More importantly, Mr. Blackburn's report contains little more than an unimaginative parroting of the conclusion and commentary drawn from the Microsoldering and Ifixit websites. There is no evidence before the Court to show that these are "official" websites from well-known organizations. Moreover, there is no information before the Court to verify the information presented in the websites. Indeed, Mr. Blackburn did not depose to any reason why the information and commentary in the websites could reasonably be regarded as objective and reliable. In my view, the circumstances under which the evidence was rejected in *Thorpe*, *Rosetim* and *McKinnon* [*McKinnon v Martin No. 122 (Rural Municipality)*, 2010 SKQB 374, 361 Sask R 249] are no less applicable here.

### *Application to This Case*

#### *Application to strike the affidavit evidence of Dr. Norm Archer*

[38] Given the preceding case law, the proper approach is to first assess whether Dr. Norm Archer meets the *Mohan* requirements for admissibility: (1) relevance; (2) necessity in assisting the trier of fact; (3) the absence of any exclusionary rule; and (4) a properly qualified expert.

[39] In Dr. Archer's affidavit, sworn November 13, 2019, he describes his expertise as "related to identity theft and fraud" (para. 2). His education includes a BSc in Engineering Physics, MS in Operations Research, and a PhD in Physics. He is also a Professor Emeritus in the Information Systems Area of the DeGroote School of Business at McMaster University (para. 3). Exhibit 1 to the affidavit is Dr. Archer's *curriculum vitae* [*CV*]. Dr. Archer has served as a consultant on 10 different legal cases involving the breach of customer data bases and loss of various forms of data.

He describes his extensive background related to identity theft and fraud, most of which focuses on consumer identity theft prevention and identity fraud detection.

[40] In this case, plaintiff's counsel has asked Dr. Archer for his opinion on personal information, privacy, and data collection (questions are listed on pages 2 and 3 of his affidavit). Nowhere in his *CV* is there any expertise described in the area of information systems and privacy. Additionally, many of the questions are worded in a way that would expect Dr. Archer to have personal knowledge of Facebook's data system. For example, the first question is:

> (1) Is there information and documents in the possession of the Defendants that would allow for the determination of the types of Personal Information, User Data, Biometric Data, and Location Data of the Class that the Defendants' have collected?

Dr. Archer could not have such information; nor could he be expected to.

[41] Additionally, many of the questions are related to the statutory and regulatory responsibilities of the defendant. This is not something Dr. Archer has expertise in, and nor is it something this Court would need assistance with.

[42] In my opinion, Dr. Archer is clearly not a qualified expert for this matter, however, even if he was qualified, there are concerns regarding the admissibility of the attached "research" that Dr. Archer undertook. The attached exhibits include:

> (1) Exhibit 2: A web page from "cnet.com"
>
> This has no apparent badges of reliability. There is no information on the author of the article and by all accounts appears to be a blog post or media article.

(2) Exhibit 3: Canada: Consumer Protection Law Overview from Stikeman Elliott

This Court does not need a review of Consumer Protection Law. Additionally, this is clearly not in the expertise of the affiant.

(3) Exhibit 4: *The Consumer Protection and Business Practices Act*.

I am not sure where this exhibit is derived from and, again, this is outside the scope of the expertise of the affiant, nor is it of value to this Court.

(4) Exhibit 5: *Business Practices and Consumer Protection Act*, SBC 2004, c 2.

Again, this is not within the expertise of the affiant and is of no value to this Court.

(5) Exhibit 6: *Business Practices Act*, CCSM c B120.

Not in expertise, of no value to this Court.

(6) Exhibit 7: A web page printout from the Office of Consumer Affairs, Government of Canada.

This is also outside the expertise and knowledge of the affiant and is of no help to this Court.

(7) Exhibits 8 - 11: Web pages from the Office of the Privacy Commissioner of Canada re: *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 [*PIPEDA*].

Again, same as above, is outside the expertise and knowledge of this affiant and is not necessary to assist this Court.

(8) Exhibit 12: Joint Investigation of Facebook, Inc. by the Privacy Commissioner of Canada and Information and Privacy Commissioner for British Columbia.

This is clearly outside the expertise and knowledge of the affiant.

(9) Exhibit 13: Facebook's Data Policy.

Again, this is outside the expertise and personal knowledge of the affiant.

(10) Exhibits 14 and 15: Web pages from "disruptiveadvertising.com" and "digiday.com"

Again, no badges of reliability.

[Compendium of the Defendants, Vol 2, Exhibit 16]

[43] From the above list of exhibits, it is quite obvious that none of the information relied upon by Dr. Archer was within his personal knowledge or expertise. As is clear from the case law, an expert deponent cannot express opinions based exclusively on a review of materials published by those who do actually possess the necessary expertise: *Stout* at para 54. Finally, I note with concern the combative demeanour of Dr. Archer during affidavit cross-examination that raises concerns about his ability to fulfil the role of an expert witness as contemplated under *The Queen's Bench Rules*. There is no reason to go beyond the general rules of admissibility, and discuss weight, in order to strike this affidavit. Dr. Archer's affidavit is clearly inadmissible.

***Admissibility of the first affidavit of Kelly Kish (sworn May 17, 2019)***

[44] The defendants have submitted that Ms. Kish has attached numerous internet articles to her affidavit evidence, and that she never took any steps to verify their reliability or read them before swearing her affidavit. The plaintiff has not appeared to respond to this allegation. (At least I did not catch a response in court, nor is there one in her filed materials.)

[45] In the plaintiff's certification brief, she has listed the exhibits attached to Ms. Kish's affidavit (p. 8-15). Those same exhibits are also listed in the plaintiff's affidavit (p. 6-17). There are some 50 listed exhibits, the majority of which are pulled from the internet. The plaintiff has sworn that she has "personal knowledge of the facts to which [she] hereinafter depose, except where stated to be on information and belief, in which case I disclose the source of my information and I believe these facts are true." She has also sworn that she has "reviewed a draft of the amended statement of claim, a draft certification application, and the workable method/litigation plan. I have similarly considered the other documents exhibited to this my affidavit, many of which were provided to me by my lawyers at Merchant Law Group LLP ("**MLG**") and have a general understanding of their contents and the reasons they are being provided to the court."

[46] In cross-examination (Mr. Gelowitz cross-examining Ms. Kish) the following occurred (Questions 49-77 and 131-133):

> Q. I asked a question and I want an answer to it. Ms. Kish, did any of the content of this affidavit come from you rather than your lawyers?
>
> A. No.
>
> Q. Okay. And what steps did you take to verify the accuracy or the truth of the statements in the affidavit?

A. Can you repeat that again?

Q. What steps did you take to verify the accuracy or the truth of the statements in your affidavit?

A. I did my own research on it.

Q. What research?

A. Online, Google searching, reviewing information.

Q. Did you keep track of any of that research?

A. Well, of course.

Q. I would like production of that.

Mr. Brar: I'll take it under advisement.

Q. And, Ms. Kish, if I asked you the same questions about your second affidavit, would the answers be the same?

A. Yes.

Q. Okay, still looking at your first affidavit –

A. Okay.

Q. – if you could look at paragraph 1, please.

A. Correct, I'm looking at it.

Q. And in that paragraph you say that you have: "[…] personal knowledge of the facts to which I hereinafter depose, except where stated to be on information and belief, in which case I disclose the source of my information and I believe these facts are true." Correct?

A. Correct.

Q. What do you mean by "information and belief"?

A. Well, the information that is contained and gathered in this affidavit, I believe the facts are true.

Q. And so that would include things like media reports?

Mr. Brar: She has answered your question. Move on.

Q. The information that you refer to in your affidavit that you believe to be true includes media reports; correct?

A. Correct.

Q. Do you always believe media reports, Ms. Kish?

A. No. It depends on what it is about. Mainstream media, I don't necessarily believe everything that comes out of mainstream media, if that is what you are asking me.

Q. It wasn't, but I thank you for that. Let's go to paragraph 2 of your affidavit.

A. Okay, I'm looking at it.

Q. You indicate in paragraph 2 that: "I have similarly considered the other documents exhibited to this my affidavit, many of which were provided to me by my lawyers at Merchant Law Group [...]" Do you see that?

A. Yes, I do.

Q. **Is it correct to say, Ms. Kish, that all of these documents were provided to you by Merchant Law Group, not just many of them?**

A. **Yes.**

Q. And you say that, in the remainder of that sentence, you say you have a "general understanding of their contents and the reasons they are being provided to the Court"; do you see that?

A. Yes, I do.

Q. **What is your understanding of the reason the documents that are attached to your affidavit are being provided to the Court?**

Mr. Brar: Litigation privileged, don't answer that question.

Q. She has made a declarative statement to that effect in her affidavit. I am entitled to understand what she means by it.

Mr. Brar: What is your question again. Mr. Gelowitz?

[...]

Q. **What is that general understanding?**

A. **The general understanding is that the information provided goes along with the claim that I have before the Courts with regard to Facebook Canada and Facebook Inc.**

[…]

Q. Okay. What steps did you take, Ms. Kish, to verify the truth or accuracy of the things that are in the exhibits to your affidavits?

A. Repeat that again.

Q. **What steps did you take to verify the truth or the accuracy of the things that are set out in the exhibits to your affidavits?**

Mr. Brar: Mr. Gelowitz, that is a broad question. That is –

A. This is a repeat question. **I have based – I have done my own research online via Google searching, YouTube videos, Senate hearings.**

Mr. Brar: So, Mr. Gelowitz, if you have a specific exhibit you want Ms. Kish to – if you have a question about a specific exhibit that is attached to one of Ms. Kish's affidavits, we can certainly go there.

[…] [Emphasis added]

[Defendant's Compendium, Vol 2, Exhibit 21]

[47] More concerning in this case, however, is that the plaintiff appears to have not read all of the attached exhibits before signing her affidavit. In her cross-examination the following occurred (Questions 156-162):

Q. So you consider the New York Times to be a reliable source?

A. For the most part, I would say yes, but I would always question everything.

Q. I see. And this article was, on the face of it, it was published in June of 2019, so almost a year prior to your first affidavit; correct?

A. Correct.

Q. And had you seen that document prior to swearing your first affidavit?

A. No.

> Q. And Exhibit 22 of your second affidavit, let me know when you have turned that up.
>
> [...]
>
> Q. What is your understanding of what this document is?
>
> A. It is a certification document.
>
> Q. And on its face it appears to be dated April of 2018, so more than a year prior to your first affidavit. Had you seen this document prior to swearing your first affidavit?
>
> A. No.
>
> ...
>
> [Defendant's Compendium, Vol 2, Exhibit 21]

[48] Notably, both exhibits were exhibits in Ms. Kish's first affidavit, but then also appeared in her second affidavit. From these statements she gives an unequivocal 'No' to having read them before signing her first affidavit.

[49] Just as in *Thorpe*; it is apparent that Ms. Kish, although she has sworn that she has personal knowledge of the facts, has not provided a basis for the belief or anything to suggest that the information in all the exhibits is true, accurate, reliable and unaltered. The grounds for such information and belief must be adequately disclosed and the information reliable: *Thorpe* at para 27.

[50] Exhibits 8-13, 15, 17-19, 21-38, and 40, are all news media articles from a variety of media outlets and web sites. None of these exhibits appear to have been verified for reliability and the affiant has not stated the grounds for her belief for each of the exhibits. Both *Thorpe* and *Rosetim* support this criticism. Additionally, even had these not been pulled from the internet, in *Alves v First Choice Canada Inc.,* 2010 SKQB 104, [2010] 9 WWR 301, I also held that news articles were inadmissible without stating the belief in the contents and the grounds for that belief:

> [78] Ms. Sanche has attached as exhibits to her second affidavit an article from the Star Phoenix newspaper and a transcript from a news segment that was apparently broadcast on a CTV station in Montreal. In her affidavit, Ms. Sanche simply states that she read these exhibits and reproduced portions of the exhibits in her affidavit. [Second Sanche Affidavit, para. 12]
>
> [79] The contents of these documents are clearly hearsay and are not saved by Rule 319 as Ms. Sanche does not state her belief in the contents of the exhibits and the grounds for that belief.
>
> [80] I find that even if I were to consider these exhibits, they are not reliable evidence in any event.

[51] These media exhibits would be inadmissible pursuant to Rule 13-30.

[52] The other exhibits include Facebook's Annual reports (Exhibits 44-50), government documents or reports (Exhibits 5, 20), other class action complaints (Exhibit 6), academic articles (Exhibits 7, 16), and Facebook content (Exhibits 14, 39). The affiant has only made a specific statement about Exhibit 5, the "Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada…"; the affiant stated: "I believe the findings provide some basis in fact for the claims asserted in the Claim." Unlike the media articles, these do appear to come from official websites and may have some degree of reliability. However, at the same time, the affiant has not stated her grounds for belief. I find that simply attaching these exhibits does not make them admissible under these circumstances. There has to be some basis offered by the deponent to make the content relevant or connected.

***Admissibility of the second affidavit of Kelly Kish (sworn May 28, 2020)***

[53] The defendants have argued that this reply affidavit is inadmissible since it does not respond to matters raised in the defendants' affidavits and suffers

from the same issues with admissibility as the first affidavit. The plaintiff has not responded to these arguments.

[54] As with the first affidavit, Ms. Kish swore that she "has personal knowledge of the facts to which I hereinafter depose, except where stated to be on information and belief, in which case I disclose the source of my information and I believe these facts are true." Yet, again, if I simply look to admissibility as I did with the first affidavit: I can see that Exhibits 5, 19-21, and 24, are media articles and inadmissible.

[55] The rest of the exhibits are various documents pulled from government and company websites. As previously noted, the source of the documents does add some reliability. However, the affiant again has not stated her grounds for belief besides making statements such as "On the basis of the information in Exhibit 3 and information provided to me by MLG, I understand and do verily believe the Report II states, among other things, that…" and provides a summary of what is in most exhibits. There is no evidence however of their reliability or even that Ms. Kish read the documents.

[56] All the documents appear to have been available prior to the signing of the first affidavit, and indeed, it does not appear that this is a "reply" affidavit. Ms. Kish simply seems to be providing further documents that do not appear to respond in any fashion to the defendants' affidavit evidence.

[57] I wish to point out that this Court is not weighing the evidence. What the court is doing is addressing the admissibility issue. In the end, I have decided not to accept either Dr. Archer's affidavit or Ms. Kish's two affidavits for the reasons set out above. In that sense, the three affidavits are struck from the record as offending

*The Queen's Bench Rules*. This results in there being no evidence before this Court from the plaintiff and this is fatal to the plaintiff's application and the application is dismissed on this basis.

[58] In the event I have misdirected myself on the law regarding admissibility of the affidavits; I will now comment on other issues.

***Is There Any Evidence?***

[59] Justice Belobaba concluded in *Simpson* that the plaintiff did not provide any evidence to support her certification application that Facebook shared data with CA. I acknowledge that Ms. Kish does not specifically reference sharing information with CA as part of her class description. I will get back to that shortly. In the case at bar, I have concluded that Dr. Archer's opinion affidavit should be struck and I need not comment further. I have also decided that Ms. Kish's affidavits should also be struck. However, in the event that I have misdirected myself and somehow her two affidavits should remain; the question arises what to make of her affidavits? This query, by necessity, requires a look at her evidence as though it was admissible. However, I will only accommodate that to the extent that I find just one exhibit could be admissible – that being the Joint Investigations of Facebook Inc. by The Privacy Commission of Canada and The Information and Privacy Commission of British Columbia [JI] dated April 25, 2019 (Exhibit 5 to her affidavit sworn May 17, 2019).

[60] I wish to address here any concern that the vagueness of the class definition in the Kish application somehow improves the definition beyond the wording in *Simpson* (*i.e. Simpson* refers to sharing with CA). I have already found that on a reading of the statement of claim and application for certification and supporting affidavit material – it appears obvious that Ms. Kish is focused on CA.

Therefore, while I find her class definition does not specifically mention CA (unlike *Simpson*), nevertheless Justice Belobaba's reasoning in *Simpson* is of considerable assistance.

[61] Justice Belobaba specifically considers the JI report in para. 27 of the *Simpson* decision and concludes that despite the reference to the JI report – there is "no evidence in the record of any Canadian user's personal data was shared with Cambridge Analytica (para. 28). In short, like here; the plaintiff argued the report creates "some evidence". I acknowledge Justice Belobaba's decision is not binding on this Court, but upon reviewing Exhibit 5, I have come to the same conclusion – there is no evidence.

[62] I am further attracted to Justice Belobaba's reasoning regarding the so-called "peephole" analysis found under his "Hail Mary" heading (para. 29-38). I concur with his findings and do not see how certification could arise regarding a third party beyond CA. Again, I conclude, as did Justice Belobaba, that the JI does not provide "some evidence" (para. 31).

[63] In conclusion, I find that there is no evidence on the record and dismiss the application on this basis.

[64] However, in the event I have misdirected myself on the law or evidence; I wish to briefly comment on the many other issues raised. In order to do this, I will go through the *Act*.

***Section 6(1)(a): Do the Pleadings Disclose a Cause of Action?***

[65] Ms. Kish must properly plead the causes of action (*Hoffman v Monsanto Canada*, 2007 SKCA 47 at para 53, 283 DLR (4th) 190; *Pederson v Saskatchewan*

*(Minister of Social Services)*, 2016 SKCA 142 at para 64, 408 DLR (4th) 661). A claim will be struck, assuming the facts can be proved, when it is plain and obvious that the claim cannot succeed (*Ross v Canada (Attorney General)*, 2018 SKCA 12 at para 37, [2018] 5 WWR 669). It is incumbent on Ms. Kish to clearly plead the material facts relied upon (*Alves v First Choice Canada Inc.*, 2011 SKCA 118 at para 23, 342 DLR (4th) 427).

[66] The problem in this application is the plaintiff, in an over-generalized way, lumps together a number of unrelated allegations but has not particularized any of these claims. This approach would make it difficult for the defendants to understand and then reply to such claims. I will go through the various causes of action to illustrate this concern.

[67] The plaintiff pleads breach of contract. The usual pleading of particulars is absent and therefore, it would be difficult for the defendants to identify the relevant terms of the contract, which terms were breached, the conduct giving rise to the breach and the damages that might flow from the breach. The pleadings should avoid such bald assertions of liability that prevents the defendants from sufficiently understanding the case to be met (*Wildeman v Bell Mobility Inc.*, 2015 SKQB 125 at paras 71-72, 473 Sask R 259).

[68] Adding to this overall fuzziness is the plaintiff's contention that perhaps Facebook users may not have had binding or enforceable contracts in any event (see Plaintiff's Supplementary Brief, para. 25).

[69] In any event, the pleadings are sufficiently deficient in this regard to support a proper claim in contract.

[70] A significant portion of the plaintiff's claim is devoted to a variety of pieces of privacy and consumer legislation. The court notes that the second amended claim contained a number of pages of unauthorized amendments setting out all kinds of privacy legislation (para. 64 (a)-(w)) and consumer legislation (pages 45 to 52) that are not properly before the court and accordingly I will not consider (*The Queen's Bench Rules*, Rule 3-72(2)(b)). Additionally, I agree with the defendants that most of these additions are simply conclusory and do not identify what facts are being relied upon (Rule 13-11(4)). Such pleading is not sufficient to meet certification requirements (*Sharp v Royal Mutual Funds Inc.*, 2020 BCSC 1781 at para 25). There are also significant concerns about whether some of the statutes pled would run into jurisdictional issues. Overall, these various statutes – whether properly before the court or not – are pled far too vaguely and lack sufficiency. The claim fails to specify which provisions were allegedly breached and when and how.

[71] The plaintiff has not properly pled negligence. Our *Queen's Bench Rules* allow that conclusions of law may be pled but only if the material facts supporting these conclusions are also pled (Rule 13-11(4)). Again, the claim simply makes bald conclusions that prevent the defendants from having a meaningful basis to understand and reply to the claim.

[72] Interestingly, the Alberta Queen's Bench recently decided, in *Setoguchi v Uber B.V.*, 2021 ABQB 18 [*Setoguchi*], that pleading the mere invasion of privacy, without evidence of harm that was more than "fleeting", is "not the kind of harm that suffices for a negligence claim" (*Setoguchi*, at para 69 citing *Stewart v Demme*, 2020 ONSC 83). I find Ms. Kish has failed to plead harm beyond the type of harm mentioned in *Setoguchi*.

[73] In my opinion, the plaintiff has not properly pled fiduciary duty because the claim consists of conclusory statements only that are insufficient for a claim of fiduciary duty. There are two types of fiduciary duties which are based on the relationship between the parties. *Per se* fiduciary duty arises in certain defined relationships such as trustee-*cestui que* trust or solicitor-client (see *Alberta v Elder Advocates of Alberta Society*, 2011 SCC 24 at para 33, [2011] 2 SCR 261 [*Elder Advocates*]). It appears there is no *per se* fiduciary duty owed to the plaintiff here and none was pled. Instead, any claim would need to be based on the second type – an *ad hoc* fiduciary duty which must be proven on a case by case basis (*Elder Advocates* at para 33). The Supreme Court, in *Professional Institute of the Public Service of Canada v Canada (Attorney General)*, 2012 SCC 71 at paras 124, 128, 138, [2012] 3 SCR 660, sets out a prescribed test that requires the pleading of plausible material facts to support such a finding. The plaintiff has not set out any such facts and, as such, the pleading is deficient.

[74] The tort of intrusion upon seclusion could not realistically apply to all of the categories of information set out in the definition of personal information and user data. This tort requires significant invasion of personal privacy (*Broutzas v Rouge Valley Health System*, 2018 ONSC 6315 at para 138). It does not appear that this level of invasion is applicable here.

[75] I find that despite the dumping of a bunch of consumer legislation into the pleadings; there is a failure to plead the applicable sections of these pieces of legislation. Again, there is nothing linking a factual basis to the pleading of the legislation. It does not appear that the alleged breaches are identified. In short, the pleading is overly broad. This creates a difficulty for the defendants to respond (*Ladas v Apple Inc.*, 2014 BCSC 1821 at para 118).

[76] I find the plaintiff's pleading of breach of confidence also is deficient in that it is simply an assertion and conclusory.

[77] The claim for unjust enrichment also is pled insufficiently because the plaintiff has failed to plead any corresponding economic loss or any actionable deprivation or an absence of juristic reason for the enrichment (*Pacific National Investments Ltd. v Victoria (City)*, 2004 SCC 75 at para 14, [2004] 3 SCR 575).

[78] The plaintiff has raised disgorgement as a cause of action but since this really is an alternative remedy; it is not necessary to discuss this further under s. 6(1)(a) of the *Act*. In any event, the plaintiff seems to have dropped her claim for disgorgement or waiver of tort as a result of the recent Supreme Court decision in *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at paras 30-35 that confirms waiver of tort is not an independent cause of action.

[79] I find myself in agreement with the defendants that overall, the pleadings suffer from "one overarching defect: the Claim combines a litany of unrelated allegations under terms like "User Data Abuse" and "Facebook Breaches", but fails to particularize any of these claims. The result is overgeneralized claims that are plainly untenable" (Respondents' Brief of Law, September 28, 2020 at para. 49). In the end, I find that the deficiencies I have noted result in the court finding that the plaintiff has been unable to satisfy the requirements under this subsection of the *Act*.

***Section 6(1)(b): Is There An Identifiable Class?***

[80] The plaintiff asked the court to essentially certify one class action consisting of two discreet "classes" (*i.e.* – not subclasses). The plaintiff sets these out in her pleadings and application as a "User Class" and a "Shadow Profile Class". I find these two classes to be mutually exclusive since a person could only be a member

of the former if he registered for a Facebook account and a person could only be a member of the latter if he did not. The result seems to be: a class that includes every person in Canada. The court cannot certify a claim that consists of two discreet classes (*Merck Frosst Canada Ltd. v Wuttunee*, 2009 SKCA 43 at para 125, [2009] 5 WWR 228). Further, this is not an application to certify subclasses since subclasses must already be part of a single, overriding class, with its set of issues common to all members of a class.

[81] The overall effect of such a vast and generalized definition (*i.e.* practically everyone in Canada) defies the requirement to establish "an identifiable class". The proposed class is required to bear a "rational relationship to the common issues asserted by all class members" (*Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46 at para 38, [2001] 2 SCR 534). In my opinion, the proposed class lacks meaningful definition and there does not appear to have any rational relationship to the proposed common issues.

[82] Further, the so-called "Shadow Profile Class" presents its own problems. I agree with the defendants that there is no evidence identifying either any proposed representative or any member of the "Shadow Profile Class". A critical concern is that it would seem virtually impossible for a Canadian to be able to read the class definition and determine whether he or she is in the class (*Sun-Rype Products Ltd. v Archer Daniels Midland Company*, 2013 SCC 58 at para 67, [2013] 3 SCR 545).

[83] It is obvious that the plaintiff decided, at literally the last moment, to radically amend her pleadings and certification application to avoid the strong arguments presented by the defendants at the certification hearing. The result is an unworkable class definition that fails to meet the test under s. 6(1)(b) of the *Act*.

***Section 6(1)(c): Are There Common Issues That Would Meaningfully Advance the Litigation?***

[84] The court has already commented on the amended class definition and its resulting problematic overly generalized definition. In my opinion, this generalization prevents commonality simply because it does not restrict the class members in any way that would rationally connect members to the proposed common issues. Further, the plaintiff has not offered a sufficient evidentiary basis to certify the proposed common issues (see my above comments arising out of *Simpson*). Further, there is no evidence to support the "Shadow Profile Class" that emerged in the final amendment.

[85] I find that the prevailing problem for the certification application carries on under this subsection – the proposed common issues are not common nor would their resolution meaningfully advance matters.

***Section 6(1)(d): Is a Class Action the Preferable Procedure for the Resolution of the Common Issues?***

[86] Ms. Kish must establish, with evidence, that the proposed class action would be "fair, efficient and manageable" and capable of achieving the goals of the *Act* (*AIC Limited v Fischer*, 2013 SCC 69 at para 48, [2013] 3 SCR 949).

[87] I find that the generalization of the potential class proceeding would cause considerable problems for the trial court. It appears that there would have to be an individualized inquiry that would be the antithesis of judicial economy and create lengthy delay (*R v Brooks*, 2009 SKQB 509 at paras 139, 174, 179, [2010] 6 WWR 81).

[88] Additionally, the plaintiff seems to argue that the proposed class action is the preferable procedure because she contends class members would be entitled to nominal damages that would be easy to establish, particularly under the statutory claims. However, I agree with the defendants that it is more likely that the claims would require a lot of individual inquiries and even nominal damages might not be available across the class. In any event, this type of argument has recently been rejected (*Setoguchi*; *Maginnis and Magnaye v FCA Canada*, 2020 ONSC 5462 at para 41).

***Section 6(1)(e): Is the Plaintiff a Suitable Representative?***

[89] It is not necessary to comment on the criticism of Ms. Kish set out in the defendants' Briefs. However, it is obvious that she has not met the requirements with respect to the newly minted "Shadow Profile Class". She is not, by her own definition, a member of that class (see s. 4(1) of the *Act*). The plaintiff appears to be only a member of the "User Class". Therefore, on that test, she is not a proper representative. I find that it is not necessary to consider the other elements under s. 6(1)(e) of the *Act*.

**CONCLUSION**

[90] I find that the plaintiff's application for certification as a class action must be dismissed for all of the reasons set out above. This ranges from the admissibility issues, to the lack of evidence, to the lack of establishment of the criteria under s. 6(1) of the *Act*.

**COSTS**

[91] The plaintiff shall pay costs to the defendants, but only as one set of costs. The costs shall be under Column 3 of the Tariff. Additionally, to address the court's concern about the plaintiff's belated total rejigging of her definition of the class(es); I find that there should be a further imposition of costs payable by the plaintiff to the defendants which I fix at $2,000 in addition to the Tariff costs.

J.
T. J. KEENE