CITATION: Doucet v. The Royal Winnipeg Ballet 2018 ONSC 4008
COURT FILE NO.: CV-16-564335-00CP
DATE: 20180627

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Sarah Doucet and L.K.	)	*Margaret L. Waddell* and *Gillian Hnatiw* for the Plaintiffs
Plaintiffs	)	
– and –	)	
	)	
The Royal Winnipeg Ballet (carrying on business as the Royal Winnipeg Ballet School) and Bruce Monk	)	*Paul Tushinski* and *Gillian B. Eckler* for the Defendant The Royal Winnipeg Ballet
Defendants	)	*Susan Adam Metzler* and *Baktash Waseil* for the Defendant Bruce Monk
	)	**HEARD**: June 7-8, 2018

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Plaintiff, Sarah Doucet, was a student at the ballet school operated by the Defendant, the Royal Winnipeg Ballet. The Plaintiff, L.K., is Ms. Doucet's common-law partner. The Defendant. Bruce Monk, was employed as a member of the dance company as an instructor/teacher, and also, as a photographer at the ballet school.

[2] In this proposed class action under the *Class Proceedings Act, 1992*,[1] Ms. Doucet and L.K. allege that between 1984 and 2015, Mr. Monk photographed students of the school in private settings; and because of his misconduct at those photo shoots, he and the Royal Winnipeg Ballet perpetrated a variety of statutory and common law wrongdoings. Pursuant to s. 61 of the *Family Law Act*,[2] they also allege that Mr. Monk and the Royal Winnipeg Ballet's wrongdoings support derivative claims for damages suffered by the family members of the students.

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[1] S.O. 1992, c. 6.
[2] R.S.O. 1990, c. F.3.

[3] Ms. Doucet alleges three core wrongdoings: (1) by his conduct of taking intimate photographs in the private settings, Mr. Monk sexually assaulted the students he photographed; (2) Mr. Monk's taking of intimate images of the students was a breach of fiduciary duty by abusing his position of power and trust; and (3) Mr. Monk's disseminating and selling the intimate photographs without the students' consent was a breach of a variety of statutory and common-law privacy and confidentiality torts.

[4] The Plaintiffs assert that the Royal Winnipeg Ballet is vicariously liable for Mr. Monk's misdeeds, and that it was negligent in failing to supervise Mr. Monk and failing to take action when it knew about Mr. Monk's misconduct.

[5] Ms. Doucet and L.K. sued Mr. Monk and the Royal Winnipeg Ballet on behalf of the following class:

> All persons who attended the Royal Winnipeg Ballet School (the "School") from 1984 to 2015 and who, while enrolled at the School, were photographed by Bruce Monk in a private setting (the "Student Class"); including a subclass of:
>
> > All members of the Student Class whose intimate photographs taken by Bruce Monk were posted on the internet, sold, published or otherwise displayed in a public setting (the Privacy Subclass); and
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> All dependants of members of the Student Class, as defined by s.61 of the *Family Law Act*, RSO 1990, c. F.3 (the "Family Class").

[6] The Student Class and the Privacy Subclass claim special damages and general damages of $50 million, aggravated damages of $25 million, pre-judgment and post-judgment interest pursuant to the *Courts of Justice Act*,[3] plus costs pursuant to the *Victims Bill of Rights Act, 1995*,[4] *the Canadian Victims Bill of Rights*[5], or the *Courts of Justice Act*. The Family Class Members claim damages of $10 million.

B. Procedural Background

[7] This action was commenced on November 17, 2016 by Notice of Action and the Statement of Claim was delivered in December 2016.

[8] The Statement of Claim was amended on September 13, 2017. The Plaintiffs plead the following causes of action: (a) negligence; (b) vicarious liability; (c) breach of fiduciary duty; (d) breach of contract; (e) breach of trust; (f) intrusion upon seclusion; (g) breach of confidence; (h) public disclosure of private facts; (i) unjust enrichment; (j) sexual assault and sexual abuse; (k) occupiers' liability; (l) privacy statute violations; and (m) dependents' derivative claims under s.61 of the *Family Law Act*.

[9] The Plaintiffs delivered their certification motion materials on November 29, 2017.

[10] Mr. Monk delivered a Statement of Defence dated December 20, 2017, in which he denies, among other things, having acted inappropriately, breaching any duties, causing any

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[3] R.S.O. 1990, c. C.43
[4] S.O. 1995, c. 6
[5] S.C. 2015, c. 15.

harm or loss, or having publicly displayed, distributed, transmitted, sold or made available photographs without the person's consent or knowledge.

[11] The Royal Winnipeg Ballet delivered a Statement of Defence dated December 21, 2017. In its Statement of Defence, the school pleads that that it was not aware of any of the alleged inappropriate photography sessions taking place either on or off its property.

C. Evidentiary Background

[12] The Plaintiffs supported their motion for certification with the following evidence:

- the affidavit of the Plaintiff **Sarah Doucet**, sworn September 16, 2017. Ms. Doucet (born October 23, 1971) was a student of the General Division of the Royal Winnipeg Ballet between 1981 (age 10) and the summer of 1991 (age 19). Ms. Doucet was cross-examined.
- the affidavit of **Dr. Mary Anne Franks**, sworn October 30, 2017. Dr. Franks, of Miami, Florida, is a professor of law at the University of Miami, where she has developed an expertise in the areas of cyberlaw, privacy law, online abuse, and the non-consensual dissemination of intimate imagery.
- the affidavit of [redacted], sworn September 20, 2017. Miss [redacted] (born [redacted], [redacted]), of Winnipeg, Manitoba, was a student at the Royal Winnipeg Ballet School from September 1983 to June 1992, when she was between the ages of 12 and 20 years old. She was enrolled in the school's General Division. Ms. [redacted] was cross-examined.
- the affidavit of **L.K.**, sworn September 16, 2017. L.K. is Ms. Doucet's common law spouse. They met and became life partners in 2007. L.K was cross-examined.
- the affidavit of [redacted], sworn September 21, 2017. Ms. [redacted] (born [redacted], [redacted]), of Montreal, Québec, attended the school's summer program in 1989 and then in the fall she was offered a place and was enrolled in the school's Professional Division. She was a student in the Professional Division beginning in September 1989 (age14), and she graduated in June of 1993 (age 18). Ms. [redacted] was cross-examined.
- the affidavit of [redacted], sworn September 19, 2017. Ms. [redacted] (born [redacted]) of the City of Toronto, was a student in the Professional Division of the Royal Winnipeg Ballet between the ages of 13 and 17. Ms. [redacted] was cross-examined.
- the affidavit of **John Kingman Phillips**, sworn September 14, 2017. Mr. Phillips, of the City of Toronto, is a partner of the law firm Waddell Phillips Professional Corporation, lawyers for the Plaintiffs and proposed Class Counsel.
- the affidavit of **John D. Snowdy**, sworn November 3, 2017. Mr. Snowdy, of Oakville, Ontario, is a private investigator. He was retained by the Plaintiffs' counsel to investigate an eBay vendor known as "paperboy46", who is now known to be Mr. Monk.

[13] The Defendants proffered no evidence for the certification motion.

D. Facts

1. Introductory Caveat about the Facts

[14] A certification motion is an interlocutory and procedural motion, and it is not about the truth or the ultimate merits of the claims and defences. A certification motion typically involves a considerable use of hearsay evidence, and, as described below, the evidentiary standard for a certification motion is the distinctive, eccentric, and meagre (low bar) "some-basis-in-fact" standard. In the immediate case, much of the evidence of the facts would not be admissible as proof of anything, because it was double, triple, or quadruple hearsay and there is no attendant hearsay exception. However, in advancing some of their arguments about such matters as the commonality of the proposed common issues and as whether a class action was the preferable procedure, both parties relied on the hearsay evidence.

[15] While Mr. Monk and the Royal Winnipeg Ballet cross-examined the Plaintiffs' affiants, they did not proffer any evidence of their own, and with some exceptions, Mr. Monk's and the Royal Winnipeg Ballet's position accepts that the events involving Mr. Monk described in affiants' testimony and answers to undertakings did happen - but not exactly as described. There is, so to speak, another side to the story, but Mr. Monk has not yet told his version of the events under oath.

[16] Thus, it appears that the Defendants' position is that the events happened but with qualifying facts and details that would substantially change the factual inferences and the legal conclusions to be drawn from those facts. For example, the Defendants challenged whether some of the events described by the affiants took place after the putative Class Members had reached the age of majority or after the putative Class Members were no longer students at the school. (It is pertinent to know that the Manitoba *Age of Majority Act* and the Ontario *Age of Majority and Accountability Act, 1990* provide that a person reaches the age of majority and ceases to be a minor at the age of 18.[6])

[17] In the immediate case, however, based on the direct and also the hearsay evidence, there is enough in the motion record to make the findings of fact set out below. These findings of fact are made solely for the purposes of the certification motion.

2. The Royal Winnipeg Ballet

[18] The world renowned Royal Winnipeg Ballet, which is located in Winnipeg, Manitoba, is incorporated under the laws of Manitoba. It operates a professional dance company, and it runs the Royal Winnipeg Ballet School, which trains both professional and also amateur (recreational dance) students in a wide variety of dance styles.

[19] In January 1988, the Royal Winnipeg Ballet moved its facilities to 380 Graham Avenue in downtown Winnipeg. It previously operated from a space on Portage Avenue in Winnipeg. The school operates two divisions and has summer camp programs. The two divisions are the

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[6] *Age of Majority Act*, C.C.S.M. c. A.7 s.1; *Age of Majority and Accountability Act*, R.S.O. 1990 c.A.7 s.1.

General Division and the Professional Division.

[20] The General Division does not require auditions, and it is open to both amateurs and to those aspiring to dance as professionals. The General Division offers classes in ballet, jazz, modern dance, tap, and musical theatre in the evenings and on Saturday during the day. There are approximately 130 classes per week with approximately 20 to 30 students per class. Many students take classes in more than one dance style.

[21] Admission to the Professional Division is by audition, and to continue in the professional program, those admitted have to be invited back each year based on an assessment of their skills and their progress at the school. There are seven levels to the professional program plus graduate studies. Annually, there were approximately 100 students in the professional program, 85% of whom were female. Approximately 10 students graduated each year.

[22] The Royal Winnipeg Ballet is prestigious and world renowned, and its dance programs are very demanding, particularly the programs of the Professional Division, where there is a mandate for pursuing excellence. Dance students at the Royal Winnipeg Ballet are subject to a very strict command structure of discipline and obedience.

[23] Most of the students who complete the professional program go on to professional dance careers. Of the graduates, typically two per year, are offered places in the Royal Winnipeg Ballet dance company.

3. Class Size

[24] There was a paucity of information about class size.

[25] My guess is that the base line enrollment for the General Division was 1000 students per year of which 850 would be female. I would guess that the average turnover was 170 female students per year in the General Division over the 31 years of the Class Period.

[26] I would guess that the base line for the Professional Division was 100 students per year, of which 85 would be female. My guess is that the average turnover for the Profession Division would be 12 female students per year over the 31 years of the class period.

[27] Thus, my guess for the number of female students who attended the school during Mr. Monk's employment would be approximately 5,000 for the General Division and 450 for the Professional Division.

[28] To date, 53 former students have contacted Class Counsel self-identifying as potential class members, or they have been identified by the witnesses on this motion as students whose photographs are on the internet and who may have been photographed by Mr. Monk in a private setting.

[29] I have no way of guessing or estimating how many of the female students who attended the school were photographed by Mr. Monk in a private setting.

4. Bruce Monk

[30] Mr. Monk is a former student of the ballet school. He is a former member of the Royal Winnipeg Ballet's dance company from 1984 to 1987. From 1987 to 2015, Mr. Monk was

employed as a member of the school's faculty. He was an instructor and teacher. He also served as a photographer for the Royal Winnipeg Ballet. His photographs of students and of dance company members in rehearsal and in performance were used in the school's promotional materials including brochures, posters, and programs.

[31] From time to time, students and former students of the school would ask Mr. Monk to photograph them for inclusion in their dance portfolio. This was a private business endeavor of Mr. Monk. The parties disagree about whether Mr. Monk had a studio in his apartment, but nothing turns on that contested fact, because there is no dispute that Mr. Monk photographed students and former students in his apartment in Winnipeg and at locales around the premises of the Royal Winnipeg Ballet.

[32] Mr. Monk's photography of the female form is known outside dance circles and is highly regarded as photographic art. Some of his photos are part of the Canadian Museum of Contemporary Photography's collection in the National Gallery in Ottawa. His work has been shown in privately run art galleries.

[33] There is evidence that using his own name and also using the alias "paperboy46", Mr. Monk posted photographs for sale on online websites, including eBay and Worthpoint.

[34] Starting in 2012, several women who had been photographed by Mr. Monk in sexually implicit poses, decided to report what had happened at their photo shoots to the police with the result that several police departments opened investigations.

[35] In January 2015, the police executed a search warrant of Mr. Monk's apartment and the Royal Winnipeg Ballet learned that Mr. Monk was the subject of several police investigations. He was placed on paid leave.

[36] In April 2015, various media outlets released stories about Mr. Monk, and the investigations became a matter of public knowledge. Mr. Monk's employment with the Royal Winnipeg Ballet was then terminated.

5. The Police Investigations

[37] In October 2012, Amanda Todd (age 15) committed suicide after topless images of her went viral on the internet. The news of Ms. Todd's suicide prompted Ms. [redacted] to consult a lawyer about her experiences at the Royal Winnipeg Ballet. The lawyer advised her to speak to the police, and in December of 2012, she reported the details of her 1991 photo shoot with Mr. Monk to the Montreal Police Department. Shortly thereafter, she was informed that the Internet Child Exploitation Unit at Winnipeg Police Services would investigate the matter.

[38] In 2012, a Toronto police officer interviewed Ms. [redacted] at her home in Toronto to take a statement about her encounter with Mr. Monk, and in 2013, she provided a statement to the Winnipeg Police Services about her experience with Mr. Monk. In November 2014, Ms. Doucet contacted the Winnipeg and the Toronto police to report her photo shoot experience with Mr. Monk.

[39] In January 2015, the Internet Child Exploitation Unit at Winnipeg Police Services executed a search warrant of Mr. Monk's apartment in Winnipeg and seized a large quantity of materials.

[40] In April 2015, after a Maclean's Magazine article about Mr. Monk's was published, Ms. [redacted] was contacted by the police and interviewed.

[41] In March 2016, the Crown Attorneys in Winnipeg who had received the report of the Internet Child Exploitation Unit's investigation informed Ms. Doucet, Ms. [redacted], and Ms. [redacted] that Mr. Monk's conduct was not unlawful under the child pornography laws in force in 1990 - 1992 when their photos were taken and therefore, the police would not be laying criminal changes.

[42] As noted above, this action was commenced on November 17, 2016 by Notice of Action and the Statement of Claim was delivered in December 2016.

6. Scandal at the Ballet

[43] Between April 16 and 18, 2015, the Globe and Mail, the Kelowna Daily Courier, the Huffington Post, the Toronto Star, the Winnipeg Free Press, CTV News, CITY News, and Global News published articles reporting that Mr. Monk was dismissed by the Royal Winnipeg Ballet because of allegations that he had photographed young female students in the nude.

[44] On April 18, 2015, Maclean's Magazine published a cover story entitled "*Scandal at the Ballet*." The article tells the stories of four former Royal Winnipeg Ballet students who were photographed by Mr. Monk in nude or partial nude poses. It was reported that Mr. Monk had published and sold some of the images, including sales over the internet. One of the women is anonymous. The three other women in the article are Ms. Doucet, Ms. [redacted], and Ms. [redacted], who were affiants in the case at bar.

[45] On April 29, 2015, Maclean's Magazine published a follow-up article with reports of four more former students, *i.e.*, [redacted] and three anonymous students. The former students stated that they had posed for explicit photographs taken by Mr. Monk. Ms. [redacted] subsequently was video interviewed by CBC News and repeated her story.

[46] In these proceedings, Ms. Doucet deposed that she was never taught by Mr. Monk, and although she had heard rumors that he had taken inappropriate nude photographs of dance students, she approached him to take her photo for her dance portfolio. In the approximate time frame of 1989-91, she met him at the school on a Sunday for the photo shoot, which took place in two locations. The first location was in a large dance studio at the school, and there was no nudity involved. The second location was an office on the third floor of a school building. Mr. Monk took photographs of Ms. Doucet's exposed breasts. Ms. Doucet deposed that she was coerced or intimidated into being photographed topless. She has no evidence that her own photographs have been disseminated by Mr. Monk. She spoke to several of the former students whose photos she has seen online and confirmed that some were minors and some were adults in the photos.

[47] Although she has no evidence of it, Ms. Doucet was concerned that Mr. Monk distributed and may have sold her photographs over the internet. Ms. Doucet deposed that she was traumatized by these incidents, and her mental health suffered.

[48] Ms. Doucet and L.K. became a couple in 2007. L.K. deposed that she was a witness of how the photo shoot incident and also Ms. Doucet's anxiety about whether her intimate

photographs had been disseminated over the Internet had a lasting effect and were adversely affecting Ms. Doucet's health.

[49] Because the Defendants made much of it in fashioning an argument that Ms. Doucet was not qualified (or perhaps rather should be disqualified) as a representative plaintiff, her involvement with [redacted] needs to be mentioned. In November 2014, Ms. Doucet made a complaint of having been sexually assaulted by [redacted], and it was around the same time, when Ms. Doucet contacted the Winnipeg and the Toronto police to report her photo shoot experience with Mr. Monk, which had occurred decades earlier.

[50] At [redacted] criminal sexual assault trial, Ms. Doucet was one of the complainants and a witness. In acquitting [redacted], Mr. Justice [redacted] made credibility findings against Ms. Doucet. Justice [redacted] was cautious in receiving Ms. Doucet's evidence because she a conspicuous animus toward [redacted] that went beyond the anger of a victim of sexual abuse to a commitment to bring him to justice even if this meant telling half-truths. In the case at bar, Ms. Doucet exchanged numerous e-mail messages with Ms. [redacted], Ms. [redacted], Ms. [redacted] and other former students about Mr. Monk, and from all these circumstances, the Defendants submit that Ms. Doucet should be disqualified as a Representative Plaintiff. I shall consider the merits of this argument later in these Reasons for Decision.

[51] Turning to other affiants, in these proceedings, Ms. [redacted] deposed that she participated in two photo shoots with Mr. Monk. The first photo shoot took place at a studio at the school in April or May of 1992, when she was 17 years of age. Mr. Monk asked her to put on a bodice that did not fit properly but there was nothing other to note about the photo shoot.

[52] Later that year, in June, when Ms. [redacted] was 17 years of age, she attended a second photo shoot with Ms. Monk at his apartment. She was not a student of the school at the time of the session, and her mother came with her to Mr. Monk's apartment. During the session, which took place behind a screen, at Mr. Monk's request, she lowered the top half of her body suit, but she refused his request to lower her arms, which were covering her breasts. Ms. [redacted]'s mother was concerned about what was occurring and the photo shoot was ended. Ms. [redacted]'s mother did not contact the school or the police to report the incident. Ms. [redacted] has no evidence that her photographs have been disseminated by Mr. Monk.

[53] In these proceedings, Ms. [redacted] deposed that in the spring of 1991, when she was 16 years of age, she asked Mr. Monk to take her photo. The shoot took place at Mr. Monk's apartment and she was photographed in the nude. She has no evidence that her photographs have been disseminated by Mr. Monk.

[54] Ms. [redacted] also deposed that in 1994, she attended Mr. Monk's exhibition at a commercial gallery in downtown Winnipeg that included two nude photos of [redacted], a former Royal Winnipeg Ballet student. Ms. [redacted] acknowledged that Ms. [redacted] had consented to the exhibition but advised that Ms. [redacted] did not consent to the images being sold online.

[55] In her affidavit for these proceedings, Ms. May attached nude or partially-nude photos of Royal Winnipeg Ballet students allegedly photographed by Mr. Monk. The photographs were semi-nude and nude photographs of Ms. [redacted], J.M., J.S., J.W., and E.P., former Royal Winnipeg Ballet students who had been photographed by Mr. Monk.

[56] By way of an answer to undertakings, Ms. Doucet advised that Mesdames [redacted], J.M. and E.P. had consented to have their photographs being taken but not to their being sold over the Internet.

[57] In these proceedings, Ms. [redacted] deposed that in 1991, when she was 19 years of age, she asked Mr. Monk to take headshots of her, and she attended at his apartment. By the end of the photo shoot, Ms. [redacted] was naked. Mr. Monk took photographs of her genitals. He dribbled water on her labia and arranged her pubic hair to pose her in the photographs.

[58] After the photo shoot, Ms. [redacted] was terrified of what Mr. Monk might do with the photos. She blamed herself for allowing the session to get out of control and over the years she has suffered from feelings of low self-esteem, self-loathing and suicidal ideation as a result to the incident. She has no evidence that her photographs have been disseminated by Mr. Monk. There is evidence that Mr. Monk may not have returned Ms. [redacted]'s photographs to her as she had requested.

[59] Filed in these proceedings is the Statement of Claim of Brooke Noble (born April 16, 1981), filed in the Manitoba Court of Queen's Bench in an action against Mr. Monk and the Royal Winnipeg Ballet. Ms. Noble was a student between 1991 and 1998 in the Professional Division. She alleges that when she was sixteen years old at a photo shoot in a boiler room at the school, Mr. Monk photographed her in sexually explicit poses.

[60] In answers to undertakings, Ms. Doucet provided the double hearsay evidence of [redacted], the mother of [redacted], who was a student at the Royal Winnipeg Ballet in 2012-2013. Ms. [redacted] reported that her daughter had been photographed by Mr. Monk. The poses were not in the nude but the photographs were pornographic in nature.

E. Discussion and Analysis

1. Overview

[61] As discussed below, under the *Class Proceedings Act, 1992*, there are five certification criteria, and all must be satisfied for an action to be certified as a class proceeding.

[62] In the immediate case, the Defendants made the routine challenges to the common issues and preferable procedure criteria. The routine argument is that the class members' claims are intrinsically idiosyncratic and with the result that the individual issues trials will overwhelm what might be achieved at the common issues trials. The Defendants in the immediate case, thus, submit that the case is not certifiable.

[63] Further, in the immediate case, the Defendants make the abnormal, and in the instance of Ms. Doucet, a nasty challenge to the representative plaintiff criterion. The Defendants submit that L.R. and Ms. Doucet are not qualified to act as a Representative Plaintiffs.

[64] As I shall explain below, in my opinion, all of the certification criteria are satisfied and the inevitability of individual issues trials is not a bar or impediment to certification.

2. General Principles: Certification

[65] The court has no discretion and is required to certify an action as a class proceeding

when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[66] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.[7] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.[8] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources.[9]

[67] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim.[10] However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.[11] The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[12]

[68] In particular, there must be a basis in the evidence to establish the existence of common issues.[13] To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.[14] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of

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[7] *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).
[8] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[9] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[10] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 28 and 29.
[11] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.
[12] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[13] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.);
[14] *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.

its own to challenge certification.[15] Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.[16]

[69] The evidence on a motion for certification must meet the usual standards for admissibility.[17] While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.[18]

3. Cause of Action Criterion

(a) General Principles: Cause of Action Criterion

[70] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada,*[19] is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.[20] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.[21]

(b) Analysis: Cause of Action Criterion

[71] The Plaintiffs plead the following causes of action: (a) negligence;[22] (b) vicarious

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[15] *Hollick v. Toronto (City),* 2001 SCC 68 at para. 22.
[16] *Williams v. Canon Canada Inc.,* 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[17] *Martin v. Astrazeneca Pharmaceuticals PLC,* 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd*., 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.
[18] *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.); *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.
[19] [1990] 2 S.C.R. 959.
[20] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476;
[21] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50; *Hollick v. Toronto (City),* 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).
[22] *Mustapha v. Culligan of Canada Ltd*., 2008 SCC 27

liability;[23] (c) breach of fiduciary duty;[24] (d) breach of contract;[25] (e) breach of trust;[26] (f) intrusion upon seclusion;[27] (g) breach of confidence;[28] (h) public disclosure of private facts;[29] (i) unjust enrichment;[30] (j) sexual assault and sexual abuse;[31] (k) occupiers' liability;[32] (l) privacy statute violations;[33] and (m) dependents' derivative claims under s. 61 of the *Family Law Act*.

[72] Mr. Monk does not dispute that the Plaintiffs' proposed class action satisfies the cause of action criterion.

[73] Except for the claim based on the *Occupiers' Liability Act*[34] and the breach of contract claim, the Royal Winnipeg Ballet accepts that the cause of action criterion is satisfied.

[74] The Royal Winnipeg Ballet submits that it is not an "occupier" of Mr. Monk's apartment. The Royal Winnipeg Ballet submits that there can be no breach of contract claim because there was no evidence of any written contract before the court and there could not be a contract claim when a putative Class Member was not a student at the school.

[75] I shall not be certifying the common issue associated with the *Occupiers' Liability Act*[35] because it is a bit of a stretch to conceptualize this case as about dangerous premises as opposed to a case about a dangerous person on safe premises and because, in any event, the claim is redundant. It does not satisfy the common issues and the preferable procedure criterion. It is, therefore, academic or moot whether this claim satisfies the cause of action criterion.

[76] While the particulars of it are lacking and while the pleading of breach of contract is poor, the pleading is not so poor as to negate the breach of contract claim satisfying the cause of action criterion.

[77] I, therefore, conclude that the Plaintiffs' action satisfies the cause of action criterion.

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[23] *B.(K.L.) v. British Columbia*, 2003 SCC 51; *E.D.G. v. Hammer*, 2003 SCC 52; *M.B. v. British Columbia*, 2003 SCC 53; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *Elwin v. Nova Scotia Home for Coloured Children*, 2013 NSSC 411

[24] *B.(K.L.) v. British Columbia*, 2003 SCC 51; *E.D.G. v. Hammer*, 2003 SCC 52; *M.B. v. British Columbia*, 2003 SCC 53; *H. (S.G.) v. Gorsline*, 2001 ABQB 163, aff'd 2004 ABCA 186

[25] *J.O. v. Strathcona-Tweedsmuir School*, [2010] A.J. No. 994 (Q.B.).

[26] *R. v. Audet*, [1996] 2 S.C.R. 171.

[27] *Jones v. Tsige*, 2012 ONCA 31; *Daniells v. McLellan*, 2017 ONSC 3466; *Bennett v. Lenovo*, 2017 ONSC 1082.

[28] *Grant v. Winnipeg Regional Health Authority*, 2015 MBCA 44; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574.

[29] *Jane Doe 464533 v. N.D*., 2016 ONSC 541.

[30] *Pettkus v. Becker*, [1980] 2 S.C.R. 834.

[31] *R. (S.) v. R. (J.)*, 2014 ONSC 317; *Tremblay v. Lavoie*, 2014 QCCS 3185; *R.S. v. A.W.T., No. 3 Corp*., [2002] O.J. No. 5053 (Master); *R. v. Chase*, [1987] 2 S.C.R. 293.

[32] *Cox (Guardian of) v. Marchen*, [2002] O.J. No. 3669 (S.C.J.); *Waldick v. Malcom*, [1991] 2 S.C.R. 456.

[33] *Bennett v. Lenovo*, 2017 ONSC 1082

[34] CCSM, c.08, ss. 3(1) and 3(2).

[35] CCSM, c.08, ss. 3(1) and 3(2).

4. Identifiable Class Criterion

(a) General Principles: Identifiable Class Criterion

[78] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.[36] In identifying the persons who have a potential claim against the defendant, the definition cannot be merits-based.[37] A proposed class definition is not overbroad because it may include persons who ultimately will not have a claim against the defendants.[38]

[79] In defining the persons who have a potential claim against the defendant, the definition, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[39] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[40] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[41] The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[42]

(b) Analysis: Identifiable Class Criterion

[80] In the factums of the parties, there was a dispute about whether the Plaintiffs' proposed definition was unclear or overbroad because it was uncertain whether former students who were photographed by Mr. Monk after they had severed their connection with the Royal Winnipeg Ballet were included as putative Class Members. This controversy, however was resolved when the Plaintiffs added the words "while enrolled at the School" to the proposed class definition.

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[36] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[37] *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 at paras. 159-167; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 21 (S.C.J.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 38.
[38] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (S.C.J.), leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.)
[39] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).
[40] *Robinson v. Medtronic Inc*., [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).
[41] *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 22 (S.C.J.).
[42] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.

With this dispute resolved, the proposed class definition complies with the requirements for a certifiable class definition. I, therefore, conclude that the identifiable class criterion is satisfied.

5. Common Issues Criterion

(a) Overview

[81] The Defendants content that the Plaintiffs' 45 proposed common issues want for commonality. The Defendants also argue that if any of the Plaintiffs' 45 proposed common issues have commonality, then the common issues do not significantly advance the litigation with the consequences that: (a) the Plaintiffs' proposed common issues do not satisfy the common issues criterion; and (b) the action overall does not satisfy the preferable procedure criterion because the individual issues overwhelm the meagre common issues and thus a class action is not the preferable procedure to resolve the inherently individual disputes between the Class Members and the Defendants.

[82] I agree with the Defendants that some of the Plaintiffs' 45 proposed common issues want for commonality. To be more precise, I shall conclude below that there are 23 common issues for which there is some basis in fact for commonality in the requisite senses that questions are common to all the class members.

[83] I agree with the Defendants that individual issues trials are inevitable in the case at bar, and that very significant forensic work will occur at the individual issues trials. However, I disagree that the case at bar is like *Fehringer v. Sun Media Corp.*,[43] *Egglestone v. Barker*,[44] *Dennis v. Ontario Lottery and Gaming Corporation*,[45] *Green v. The Hospital for Sick Children*,[46] *Vaugeois v. Budget Rent-A-Car of B.C. Ltd.*,[47] and *Bennett v. Lenovo*,[48] where the common issues criterion or the preferable procedure criterion or both were not satisfied.

[84] The Defendants rely most heavily on *Fehringer v. Sun Media Corp.*, which at first blush is factually similar to the case at bar. In that case, Justice Nordheimer, in a decision affirmed by the Divisional Court, dismissed a motion for certification.

[85] In *Fehringer v. Sun Media Corp*., Ms. Fehringer sued the *Toronto Sun* newspaper and Norman Betts, a photographer employed by the newspaper. She alleged that Mr. Betts used his position to force Ms. Fehringer and the putative Class Members to pose nude or topless and that he subjected them to lewd comments and scandalous behaviour. She sued for negligence, systemic negligence, misrepresentation, breach of contract, breach of fiduciary duty, and

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[43] [2002] O.J. No. 4110 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.).
[44] [2003] O.J. No. 3137 (S.C.J.), aff'd [2004] O.J. No. 5443 (Div. Ct.), leave to appeal to the C.A. ref'd May 18, 2005.
[45] 2010 ONSC 1332, aff'd 2011 ONSC 7024 (Div. Ct.).
[46] 2017, ONSC 6545.
[47] 2017 BCCA 111.
[48] 2017 ONSC 1082.

vicarious liability.[49] The class was defined as all persons who claimed to have been subject to the conduct. After identifying the common issues in the immediate case, I shall return below to distinguish *Fehringer v. Sun Media Corp.*

(b) **General Principles: Common Issues Criterion**

[86] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.[50] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[51] In *Pro-Sys Consultants v. Microsoft*,[52] the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation issues in common ought to be able to resolve those common issues in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

[87] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[53] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[54] However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.[55] The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.[56]

[88] Commonality is a substantive fact and commonality is not to be semantically manufactured by overgeneralizing; *i.e.*, by framing the issue in general terms for the class but in

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[49] Before the certification motion in *Fehringer v. Sun Media Corp.*, the Court of Appeal restored the breach of fiduciary duty claim as sufficiently pleaded: *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 2912 (C.A.).
[50] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[51] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40
[52] 2013 SCC 57 at para. 106.
[53] *Fehringer v. Sun Media Corp*., [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).
[54] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).
[55] *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44–46.
[56] *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 48; *McCracken v. CNR*, 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40.

terms that will ultimately break down into issues to be resolved by individual inquiries for each class member.[57]

[89] The common issue criterion presents a low bar.[58] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[59] Even a significant level of individuality does not preclude a finding of commonality.[60]A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.[61]

[90] In the context of the common issues criterion, the "some-basis-in-fact" standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.[62]

(c) **The Proposed Common Issues**

[91] The Plaintiffs seek to certify the following 45 common issues:

Negligence

1. Did Mr. Monk owe a duty of care to the Student Class?

2. If the answer to (1) is yes, what is the applicable standard of care?

3. If the answer to (1) is yes, did Mr. Monk breach the duty of care that he owed to the Student Class? If so, when and how?

4. Did the Royal Winnipeg Ballet owe a duty of care to the Student Class?

5. If the answer to (4) is yes, what is the applicable standard of care?

6. If the answer to (4) is yes, did the Royal Winnipeg Ballet breach the duty of care that it owed to

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[57] *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 at para. 132; *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at para. 48-50, leave to appeal refused, [2012] S.C.C.A. No. 42; 197; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, leave to appeal refused, [2008] S.C.C.A. No. 512; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29.

[58] *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp*., [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50; *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[59] *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[60] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[61] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[62] *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Dine v. Biomet*, 2015 ONSC 7050, aff'd 2016 ONSC 4039 (Div. Ct.); *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *McCracken v. Canadian National Railway Company*, 2012 ONCA 445; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc*., 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68.

the Student Class? If so, when and how?

Breach of Fiduciary Duty and Breach of Trust

7. Did Mr. Monk owe a fiduciary duty to the members of the Student Class?

8. If the answer to (7) is yes, did Mr. Monk breach the fiduciary duty he owed to the Student Class? If so, when and how?

9. Did the Royal Winnipeg Ballet owe a fiduciary duty to the members of the Student Class?

10. If the answer to (9) is yes, did the Royal Winnipeg Ballet breach the fiduciary duty it owed to the Student Class? If so, when and how?

11. Was Mr. Monk a trustee of the Student Class with respect to the intimate photographs, and if so, did he breach the duty of trust imposed upon him with respect to maintaining the confidentiality of the photographs?

Breach of Contract

12. Was it an express and/or implied term of the Student Class' contracts with the Royal Winnipeg Ballet, that the Royal Winnipeg Ballet would take all reasonable steps to safeguard the safety, security and well-being of the Student Class while attending the Royal Winnipeg Ballet School?

13. If the answer to (12) is yes, did the Royal Winnipeg Ballet breach that term of the contracts?

Breach of Confidence

14. Were the intimate photos of the Student Class members taken by Mr. Monk confidential?

15. If the answer to (14) is yes, did the circumstances in which the photographs were taken import an obligation of confidence upon Mr. Monk?

16. If the answer to (15) is yes, was posting the intimate photos of the Privacy Subclass on the internet, selling the photographs, or otherwise publishing or displaying the photographs in public an unauthorized use of the photos?

17. If the answer to (15) is yes, did the unauthorized use of the intimate photographs harm the Privacy Subclass members?

18. If the answer to (15) is yes, did the unauthorized use of the Privacy Subclass members' photographs also cause harm to the rest of the Student Class?

Intrusion Upon Seclusion

19. Did Mr. Monk intentionally abuse his position of power or trust over the members of the Student Class or otherwise coerce them to pose in the nude or semi-nude, and did he intentionally take intimate photographs of the members of the Student Class?

20. Did Mr. Monk invade, without lawful justification, the private affairs or concerns of the members of the Student Class?

21. Would a reasonable person regard the invasion of privacy as highly offensive causing distress, humiliation or anguish?

22. Is Mr. Monk liable for the tort of intrusion upon seclusion?

Public Disclosure of Private Facts

23. Would the publication, public display, posting on the internet and/or sale of the intimate photographs of the Privacy Subclass be highly offensive to a reasonable person of ordinary sensibilities?

24. Was the publication, public display, posting on the internet and/or sale of the intimate photographs of the Privacy Subclass of legitimate concern to the public?

25. If the answer to (23) is yes and (24) is no, is Mr. Monk liable to the Privacy Subclass for the tort of public disclosure of private facts?

Unjust Enrichment

26. Was Mr. Monk enriched at any time between 1984 to the date of certification of this action as a class proceeding as a result of the publication, public display or sale of the intimate photographs of the Privacy Subclass?

27. If the answer to (26) is yes, did the members of the Privacy Subclass suffer a corresponding deprivation?

28. If the answer to (27) is yes, was there a juristic reason for Mr. Monk's enrichment?

Sexual Assault and Sexual Abuse

29. Did Mr. Monk sexually assault the Student Class?

30. Did Mr. Monk sexually abuse the Student Class?

Occupiers' Liability

31. Did the Royal Winnipeg Ballet owe a duty as an occupier pursuant to *The Occupiers' Liability Act*, C.C.S.M. c. O8 to take reasonable care to ensure the safety of the Student Class members while on the its premises?

32. If the answer to (31) is yes, did the Royal Winnipeg Ballet breach its statutory duty as an occupier?

Privacy Statutes

33. Has Mr. Monk violated the privacy of the Student Class or the Privacy Subclass under:

a. section 2(1) of *The Privacy Act*, C.C.S.M. c. P125,

b. sections 1 and 3 of the *Privacy Act*, RSBC 1996 c. 373,

c. section 2 of *The Privacy Act*, RSS 1978, c. P-24,

d. section 3 of the *Privacy Act*, RSNL 1990 c. P-22, and/or

e. sections 3 and 35-37 of the *Civil Code of Quebec*, CQLR c CCQ-1991?

34. Has Mr. Monk breached section 11(1) of the *Intimate Image Protection Act*, CCSM c. I87 with respect to the Privacy Subclass?

35. If the answer to (34) is yes, is the Privacy Subclass entitled to damages, including general, special, aggravated, and or punitive damages?

36. If the answer to (34) is yes, is Mr. Monk required to account to the Privacy Subclass for all the profits that have accrued to him as a result of the non-consensual distribution of the Privacy Subclass' intimate images, pursuant to s. 14 of the *Intimate Image Protection Act*, CCSM c. I87?

Vicarious Liability

37. Is the Royal Winnipeg Ballet vicariously liable for the wrongful conduct of its employee, Mr. Monk?

Family Law Act Dependants Liability

38. Is either Mr. Monk or the Royal Winnipeg Ballet liable to the Family Law Class for any damages they have incurred pursuant to s. 61 *Family Law Act*, RSO 1990, c. F.3?

Aggregate Damages

39. If Mr. Monk and/or the Royal Winnipeg Ballet are liable on a class-wide basis, can damages sustained by members of the Student Class, the Privacy Subclass and/or the Family Class be

assessed, in whole or in part, on an aggregate basis?

40. If the answer to (42) is yes, what is the quantum of aggregate damages owed to those class members?

41. If the answer to (42) is yes, what is the appropriate method or procedure for distributing the aggregate damages award to those class members?

Punitive Damages

42. Does the conduct of Mr. Monk justify an award of punitive, exemplary and/or aggravated damages?

43. If the answer to (42) is yes, can those damages be assessed on a class wide basis, and if so, in what amount?

44. Does the conduct of the Royal Winnipeg Ballet justify an award of punitive, exemplary and/or aggravated damages?

45. If the answer to (44) is yes, can those damages be assessed on a class wide basis, and if so, in what amount?

(d) **Analysis: Common Issues Criterion**

i. Negligence (Issues No.'s 1-6)

[92] Questions 1, 2, 4, and 5 satisfy the common issues criterion. Questions 3 and 6 are individual issues that do not satisfy the common issues criterion.

[93] Visualize, if the court were to answer Question 1 affirmatively, *i.e.*, to hold that Mr. Monk had a duty of care to Student Class Members, Question 3 could not be answered at the common issues trial and the answers to Question 3 would have to be determined at individual issues trials designed to determine whether the general duty of care was specifically broken. Thus, the case at bar is different from, for example, a class action after a train crash, where the railroad company's liability could be determined for all the passengers on the train with the quantification of their damages to be determined at the individual issues trial. In the immediate case, liability cannot be determined at the common issues trial, all that could be determined is the parameters of the defendants' duty of care.

ii. Breach of Fiduciary Duty and Breach of Trust (Issues 7-11)

[94] Questions 7, 9, and 11 satisfy the common issues criterion. Questions 8 and 10 are individual issues that do not satisfy the common issues criterion.

[95] In the immediate case, an examination of the breach of fiduciary duty and breach of trust issues may be particularly productive and provide useful issue estoppels for the individual issues trials. In the immediate case, there are some interesting legal issues about the scope of both Mr. Monk's and the Royal Winnipeg Ballet's fiduciary duties, which may move from categorially fiduciary relationships to *ad hoc* relationships of vulnerability that may give rise to fiduciary responsibilities. There is an interesting legal issue about the extent to which a vulnerable person may consent to a breach of fiduciary duty. For present purposes, the point to make is that the fiduciary duty issues present meaningful and productive common issues.

iii. Breach of Contract (Issues 12-13)

[96] Question 12 satisfies the common issues criterion. Question 13 does not satisfy the common issues criterion because it is an issue to be determined individually.

iv. Breach of Confidence (Issues 14-18)

[97] Questions 14, 15, and 16 satisfy the common issues criterion. Questions 17 and 18 are individual issues that do not satisfy the common issues criterion.

v. Intrusion Upon Seclusion (Issues 19-22)

[98] Questions 20 and 21 satisfy the common issues criterion. Questions 19 and 22 are individual issues that do not satisfy the common issues criterion.

vi. Public Disclosure of Private Facts (Issues 23-25)

[99] Questions 23 and 24 satisfy the common issues criterion. Question 25 is an individual issue that does not satisfy the common issues criterion.

vii. Unjust Enrichment (Issues 26-28)

[100] In the circumstances of the immediate case, questions 26, 27, and 28 are individual issues that and do not satisfy the common issues criterion.

viii. Sexual Assault and Sexual Abuse (Issues 29-30)

[101] A serious of repeated individual harms is not commonality. Questions 29 and 30, which are about sexual assault and sexual abuse, are individual issues and do not satisfy the common issues criterion. There is no commonality across the class with respect to the perpetration of sexual assault and sexual abuse.

ix. Occupiers' Liability (Issues 31-32)

[102] Questions 31 and 32 are not common issues and do not satisfy the common issues criterion.

[103] I also note that insofar as the occupiers' liability claim might raise a common issue about alleged misconduct that occurred at the school's premises and not at Mr. Monk's apartment, that common issue is redundant to the negligence and vicarious liability claims advanced against the Royal Winnipeg Ballet. Also, in my opinion, the occupiers' liability issues would not satisfy the preferable procedure criterion.

x. Privacy Statutes (Issues 33-36)

[104] Questions 33, 34, 35, and 36 satisfy the common issues criterion.

xi. Vicarious Liability (Issue 37)

[105] With a modification of verb tense, Question 37 satisfies the common issues criterion. As presently written, the common issue is expressed to be: "Is the Royal Winnipeg Ballet vicariously liable for the wrongful conduct of its employee, Mr. Monk?" In the circumstances of the immediate case, where Mr. Monk's liability cannot be determined at the common issues trial, the appropriate common issue is: "Would the Royal Winnipeg Ballet be vicariously liable for the wrongful conduct of its employee, Mr. Monk?"

xii. *Family Law Act* Dependants Liability (Issue 38)

[106] Question 38 satisfies the common issues criterion.

xiii. Aggregate Damages (Issues 39-41)

[107] Questions 39, 40, and 41 do not satisfy the common issues criterion. Aggregate damages as specified by *The Class Proceedings Act, 1992* are not available in the circumstances of the immediate case. Liability cannot be established on a class wide basis.

[108] For an aggregate assessment of damages to be available, no questions of fact or law other than those relating to the assessment of monetary relief must remain to be determined in order to establish the amount of the defendant's monetary liability. An antecedent finding of liability is required before resorting to the aggregate damages provision of the *Class Proceedings Act, 1992*, and if liability cannot be established through the common issues, then an aggregate damages common issue cannot be certified.

[109] An aggregate assessment of damages is not available in the circumstances of the immediate case.

xiv. Punitive Damages (Issues 42-45)

[110] Questions 42 and 44 satisfy the common issues criterion; questions 43 and 45 do not.

(e) Conclusion: Common Issues Criterion

[111] The Plaintiffs satisfy the common issues criterion for the following list of 23 questions:

Negligence

1. Did Mr. Monk owe a duty of care to the Student Class?

2. If the answer to (1) is yes, what is the applicable standard of care?

3. Did the Royal Winnipeg Ballet owe a duty of care to the Student Class?

4. If the answer to (3) is yes, what is the applicable standard of care?

Breach of Fiduciary Duty and Breach of Trust

5. Did Mr. Monk owe a fiduciary duty to the members of the Student Class?

6. Did the Royal Winnipeg Ballet owe a fiduciary duty to the members of the Student Class?

7. Was Mr. Monk a trustee of the Student Class with respect to the intimate photographs, and if so,

did he breach the duty of trust imposed upon him with respect to maintaining the confidentiality of the photographs?

Breach of Contract

8. Was it an express and/or implied term of the Student Class' contracts with the Royal Winnipeg Ballet, that the Royal Winnipeg Ballet would take all reasonable steps to safeguard the safety, security and well-being of the Student Class while attending the Royal Winnipeg Ballet School?

Breach of Confidence

9. Were the intimate photos of the Student Class members taken by Mr. Monk confidential?

10. If the answer to (9) is yes, did the circumstances in which the photographs were taken import an obligation of confidence upon Mr. Monk?

11. If the answer to (10) is yes, was posting the intimate photos of the Privacy Subclass on the internet, selling the photographs, or otherwise publishing or displaying the photographs in public an unauthorized use of the photos?

Intrusion Upon Seclusion

12. Did Mr. Monk invade, without lawful justification, the private affairs or concerns of the members of the Student Class?

13. Would a reasonable person regard the invasion of privacy as highly offensive causing distress, humiliation or anguish?

Public Disclosure of Private Facts

14. Would the publication, public display, posting on the internet and/or sale of the intimate photographs of the Privacy Subclass be highly offensive to a reasonable person of ordinary sensibilities?

15. Was the publication, public display, posting on the internet and/or sale of the intimate photographs of the Privacy Subclass of legitimate concern to the public?

Privacy Statutes

16. Has Mr. Monk violated the privacy of the Student Class or the Privacy Subclass under:

a. section 2(1) of *The Privacy Act*, C.C.S.M. c. P125,

b. sections 1 and 3 of the *Privacy Act*, RSBC 1996 c. 373,

c. section 2 of *The Privacy Act*, RSS 1978, c. P-24,

d. section 3 of the *Privacy Act*, RSNL 1990 c. P-22, and/or

e. sections 3 and 35-37 of the *Civil Code of Quebec*, CQLR c CCQ-1991?

17. Has Mr. Monk breached section 11(1) of the *Intimate Image Protection Act*, CCSM c. I87 with respect to the Privacy Subclass?

18. If the answer to (17) is yes, is the Privacy Subclass entitled to damages, including general, special, aggravated and or punitive damages?

19. If the answer to (17) is yes, is Mr. Monk required to account to the Privacy Subclass for all the profits that have accrued to him as a result of the non-consensual distribution of the Privacy Subclass' intimate images, pursuant to s. 14 of the *Intimate Image Protection Act*, CCSM c. I87?

Vicarious Liability

20. Would the Royal Winnipeg Ballet be vicariously liable for the wrongful conduct of its employee, Mr. Monk?

Family Law Act Dependants Liability

21. Is either Mr. Monk or the Royal Winnipeg Ballet liable to the Family Law Class for any damages they have incurred pursuant to s. 61 *Family Law Act*, RSO 1990, c. F.3?

Punitive Damages

22. Does the conduct of Mr. Monk justify an award of punitive, exemplary and/or aggravated damages?

23. Does the conduct of the Royal Winnipeg Ballet justify an award of punitive, exemplary and/or aggravated damages?

[112] Unlike *Fehringer v. Sun Media Corp., supra*, these 23 common issues apply across the class and their determination does not depend upon first determining the factual circumstances of the individual class members.

[113] In the *Fehringer* case, there was no institutional relationship between the defendants and the putative class members, who had diverse personal backgrounds and whose only common attribute was that they were photographed by Mr. Betts inside or outside his position as a *Toronto Sun* photographer.

[114] In contrast, in the immediate case, the relationship between a teacher and student at the Royal Winnipeg Ballet arguably creates a duty of care and also a categorical fiduciary relationship or a common *ad hoc* fiduciary relationship based on vulnerability. Thus, in the immediate case, there is an institutional association that brought Mr. Monk and the putative Class Members together, and the dance students tell essentially the same story about their experiences with Mr. Monk.

[115] In the immediate course, by including the qualification “while enrolled at the School” in the class definition, there is no claims being advanced disassociated from the institutional setting. In the immediate case, while liability cannot be fully determined at the common issues trial, the parameters of liability would usefully be determined at a common issues trial and the issue estoppels of the common issues trial would put winds into the sails of the individual issues trials that follow.

[116] In the immediate, there is a common legal and factual issue about the boundaries of vicarious liability that would usefully be determined at a common issues trial. In the immediate case, unlike the situation in *Fehringer v. Sun Media Corp*., there have been ongoing developments in statute and in tort about breaches of confidence and intrusions on privacy, and the application of these legal developments to the circumstances of the former students of the Royal Winnipeg Ballet would usefully be determined at a common issues trial.

[117] In the immediate case, in my opinion, there is little reason to think that a class proceeding would quickly break down into an individual assessment of each proposed class member’s particular circumstances.

[118] The above analysis is sufficient to distinguish *Fehringer v. Sun Media Corp.* and the other cases relied on by the Defendants to dispute the common issues and/or the preferable procedure criteria. However, showing respect to the competing arguments some additional comments are necessary.

[119] In this regard, the Plaintiffs in their efforts to distinguish *Fehringer v. Sun Media Corp.*

relied on several institutional abuse and systemic negligence cases, most particularly *Cloud v. Canada (Attorney General)*,[63] *Rumley v. British Columbia*,[64] *Les Courageuses c. Rozon*,[65] and *A. C. Freres du Sacre-Coeur*.[66] The Defendants, in turn, sought to distinguish these cases, among other things, by pointing out that the class members' being in residence was a prominent feature of institutional abuse cases that have been certified but most of the Student Class Members in the immediate case were not students-in-residence.

[120] I do not regard the matter of being a student-in-residence, in contrast to being an evening class student or a Saturday class student as pertinent, and, in any event, I do not regard the case at bar as a systemic negligence case.

[121] In *Rumley v. British Columbia*,[67] the plaintiffs limited their allegations to systemic negligence to make their negligence action more amenable to certification, but this came at the expense of making the individual component of their claims more difficult to prove. In contrast, in the immediate case, the Plaintiffs have a certifiable action without a systemic negligence claim and the common issues do not make the individual issues more difficult to prove.

[122] Every proposed class action must be assessed in accordance with its own circumstances and exigencies, and, in my opinion, without being a systemic negligence case, the case at bar satisfies the criteria for certification.

[123] Although in the immediate case, none of the answers to the common issues will be determinative or conclusive of liability and although the Defendants may have defences that are available on an individual basis, in the immediate case, all Student Class Members share an interest in the questions about negligence, fiduciary duty, breach of contract and vicarious liability, and the Student Subclass Members share an interest in the breach of confidence and the statutory and common law breach of privacy causes of action.

[124] In my opinion, the common issues criterion is satisfied.

6. Preferable Procedure Criterion

(a) General Principles: Preferable Procedure Criterion

[125] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation,

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[63] (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.).
[64] [2001] 3 S.C.R. 184 at paras. 27-24.
[65] 2018 QCCS 2089.
[66] 2018 QCCS 1607.
[67] [2001] 3 S.C.R. 184.

and any other means of resolving the dispute.[68]

[126] In *AIC Limited v. Fischer*,[69] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.[70] Arguments that no litigation is preferable to a class proceeding cannot be given effect.[71] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.[72]

[127] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
>
> 2. The relief claimed relates to separate contracts involving different Class Members.
>
> 3. Different remedies are sought for different Class Members.
>
> 4. The number of Class Members or the identity of each Class Member is not known.
>
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

[128] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[73]

[129] In considering the preferable procedure criterion, the court should consider: (a) the nature

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[68] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[69] 2013 SCC 69 at paras. 24-38.
[70] *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50.
[71] *1176560 Ontario Limited v. The Great Atlantic and Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 45 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).
[72] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[73] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp*., 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).[74]

[130] The court must identify alternatives to the proposed class proceeding.[75] The proposed representative plaintiff bears the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.[76] It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.[77]

[131] In *AIC Limited v. Fischer,* Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case? (2) What is the potential of the class proceeding to address those barriers? (3) What are the alternatives to class proceedings? (4) To what extent do the alternatives address the relevant barriers? and (5) How do the two proceedings compare?[78]

[132] In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act*, *1992* envisions the prospect of individual claims being litigated and sections 12 and 25 of the *Act* empowers the court with tools to manage and achieve access to justice and judicial economy in those circumstances, and, thus, the inevitability of individual issues trials is not an obstacle to certification.

[133] In a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion.[79] Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue

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[74] *Cloud v. Canada (Attorney General),* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106.

[75] *AIC Limited v. Fischer*, 2013 SCC 69 at para. 35; *Hollick v. Toronto (City),* 2001 SCC 68 at para. 28.

[76] *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 48-49.

[77] *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at para. 62-67 (S.C.J.).

[78] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp*., 2014 ONCA 901 at para. 125; *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 27-38.

[79] *Arabi v. Toronto-Dominion Bank*, [2006] O.J. No. 2072 (S.C.J.), aff'd [2007] O.J. No. 5035 (Div. Ct.); *Mouhteros v. DeVry Canada Inc*. (1998), 41 O.R. (3d) 63 (Gen. Div.).

trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.[80] A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.[81]

(b) **Analysis: Preferable Procedure Criterion**

[134] In the discussion above, I have concluded that there are productive common issues that would justify the certification of the case at bar. That discussion carries the analysis of the preferable procedure criterion a very great distance and underlies my conclusion that the preferable procedure criterion is satisfied in the immediate case. For the above reasons, I conclude that the Plaintiffs satisfy the preferable procedure criterion.

7. Representative Plaintiff Criterion

(a) **General Principles: Representative Plaintiff Criterion**

[135] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[136] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.[82] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.[83]

[137] Whether the representative plaintiff can provide adequate representation depends on such factors as: (a) his or her motivation to prosecute the claim; *i.e.*, the court must be satisfied that the proposed representative will vigorously and capably prosecute the interests of the class; (b) the competence of his or her counsel to prosecute the claim; and (c) his or her ability to bear the

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[80] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp*., 2014 ONCA 901.
[81] *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 at para. 26.
[82] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).
[83] *Voutour v. Pfizer Canada Inc*., [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp*., [2008] O.J. No. 1397 at para. 44 (S.C.J.); *Matoni v. C.B.S. Interactive Multimedia Inc*., [2008] O.J. No. 197 at paras. 71-77 (S.C.J.); *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 at para. 22 (S.C.J.), leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 at paras. 41, 48 (Div. Ct.), varied [2003] O.J. No. 2218 (C.A.).

costs of the litigation.[84] Adequate representation is based on the notion that the representative plaintiff has a sufficient common interest with the class members and also the motivation and ability to pursue the action for their mutual benefit; however, a representative plaintiff need not share every characteristic of every member of the putative class or be typical of the class.[85]

[138] Because the plaintiff will have the advice of competent counsel, one should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative plaintiff.[86] If the access to justice concerns of the *Class Proceedings Act, 1992* are to be accomplished, the court should not subject the proposed representative plaintiff to some sort of Class Action Aptitude Test and the court should be skeptical of the defendant's arguments based on the personality of the candidate.[87]

[139] While the court should be skeptical of the defendant's attacks against the qualifications of the representative plaintiff, the court must nevertheless ensure that the proposed representative plaintiff is not a string puppet of an entrepreneurial champertous class counsel. The proposed representative plaintiff must be a genuine plaintiff with a real role to play and not a placeholder plaintiff recruited to cater to the entrepreneurial interests of class counsel.[88] A proposed representative plaintiff must demonstrate autonomy and a minimum level of general knowledge about the nature of class proceedings and his or her responsibilities to give instructions on behalf of the class.[89]

[140] A plaintiff with an interest in conflict with the interests of other class members does not qualify as a representative plaintiff.[90] However, a conflict in interest is not the same thing as there being differences in the circumstances of the representative plaintiff and the class members. To be a disqualifying conflict, the differences between the situation of the representative plaintiff and the class members must impact on the outcome of common issues and the differences must

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[84] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 41; *Axiom Plastics Inc. v. E.I. DuPont Canada Co.* (2007), 87 O.R. (3d) 352 at para. 174 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1973 (S.C.J.); *Defazio v. Ontario (Ministry of Labour)*, [2007] O.J. No. 902 (S.C.J.).

[85] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46; *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 44 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[86] *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271; *Frey v. BCE Inc.*, [2007] S.J. No. 476 at para. 7 (Q.B.).

[87] *Coulson v. Citigroup Global Markets Canada Inc.*, [2010] O.J. No. 1109 at para. 158 (S.C.J.), aff'd 2012 ONCA 108.

[88] *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 at paras. 208-29 (S.C.J.); *Chartrand v. General Motors Corp.*, [2008] B.C.J. No. 2520 at paras. 99-112 (S.C.).

[89] *Horse Lake First Nation v. R.*, 2015 FC 1149 at paras. 83-90; *Wilkinson v. Coca-Cola Ltd.*, 2014 QCCS 2631; *Sullivan v. Golden Intercapital (GIC) Investments Corp.*, 2014 ABQB 212 at paras. 42-62; *Singer v. Schering-Plough Canada Inc.*, [2010] O.J. No. 113 at paras. 208-29 (S.C.J.); *Frey v. BCE Inc.*, 2006 SKQB 328 at para. 86..

[90] *6323588 Canada Ltd. v. 709528 Ontario Ltd. (c.o.b. Panzerotto Pizza and Wing Machine)*, 2012 ONSC 2985; *T.L. v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Q.B.), aff'd [2009] A.J. No. 512 (C.A.); *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (S.C.J.), aff'd [2007] O.J. No. 573 (Div. Ct.), motion for leave to appeal ref'd, (C.A.), July 31, 2007; leave to appeal to S.C.C. ref'd [2007] S.C.C.A. No. 491; *Paron v. Alberta (Environmental Protection)*, [2006] A.J. No. 573 (Q.B.).

affect the representative plaintiff's ability to adequately and fairly represent the class.[91] It may be possible to address the possibility of a conflict developing between a representative plaintiff and the members of a class by creating a subclass or it may be necessary to decertify the proceeding if the conflict cannot be resolved.[92]

[141] The proposed representative plaintiff must present a workable litigation plan. The quality of the litigation plan reveals something about the competence of class counsel, although over the years, the profession has developed more or less boilerplate litigation plans. The production of a workable litigation plan assists the court in determining whether the class proceeding is the preferable procedure, and it allows the court to determine whether the litigation itself is manageable in its constituted form.[93] Litigation plans are a work in progress; they are meant to be malleable, and they are subject to revision and adjustment as the litigation progresses.[94]

(b) **Analysis: Representative Plaintiff Criterion**

i. L.K. as a Representative Plaintiff

[142] The Defendants assert that L.K. has no cause of action, and they challenge her as a proper representative of the proposed Family Class. They argue that she was not a family member within the meaning of the *Family Law Act* at the time when Mr. Monk allegedly wronged Ms. Doucet.

[143] Section 61(1) of the *Family Law Act* states:

> *Right of dependants to sue in tort*
>
> 61 (1) If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers

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[91] *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271; *T.L. v. Alberta (Director of Child Welfare)*, [2008] A.J. No. 157 (Q.B.), aff'd [2009] A.J. No. 512 (C.A.); *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (S.C.); *Hoy v. Medtronic*, [2001] B.C.J. No. 1968 (S.C.), aff'd [2003] B.C.J. No. 1251 (C.A.); *Endean v. Canadian Red Cross Society*, [1997] B.C.J. No. 1209 (S.C.), rev'd in part (1998), 157 D.L.R. (4th) 465 (C.A.), leave to appeal granted but appeal abandoned, [1998] S.C.C.A. No. 260.

[92] *Dhillon v. Hamilton (City)*, [2006] O.J. No. 2664 (S.C.J.); *1176560 Ontario Ltd. v. Great Atlantic and Pacific Co. of Canada* (2004), 70 O.R. (3d) 182 (Div. Ct.), aff'g (2002), 62 O.R. (3d) 535 (S.C.J.), leave to appeal granted, (2003), 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Peppiatt v. Royal Bank of Canada* (1996), 27 O.R. (3d) 462 (Gen. Div.).

[93] *Poulin v. Ford Motor Co. of Canada*, [2006] O.J. No. 4625 at para. 100 (S.C.J.), aff'd [2008] O.J. No. 4153 (Div. Ct.); *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242 (S.C.J.); *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 at paras. 76- 78 (S.C.J.); *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 at p. 203 (S.C.J.), aff'd (1999), 46 O.R. (3d) 315 (Div. Ct.), varied on other grounds (2000), 51 O.R. (3d) 236 (C.A.), application for leave to appeal to the S.C.C. ref'd October 18, 2001.

[94] *Ivany v. Financiere Telco Inc.*, 2013 ONSC 6347 at para. 104, leave to appeal ref'd 2013 ONSC 6969 (Div. Ct.); *French v. Investia Financial Services Inc.*, 2012 ONSC 1150 at para. 96; *Howard v. Eli Lilly & Co.*, [2007] O.J. No. 404 (S.C.J.); *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 at para. 28 (S.C.J); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 95 (C.A.), rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50; *Nantais v. Telectronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 at para. 15 (Div. Ct.).

> and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

[144] It is true that L.K. would not qualify as a spouse under s. 61(1) of the *Family Law Act* at the time when Ms. Doucet was a student at the school. It is also true that one cannot "marry into" a derivative claim under the *Family Law Act*.[95] However, some of Ms. Doucet's certified causes of action may have been perfected, after Ms. Doucet left the school; for example, the wrongdoings associated with breach of confidence and the breaches of the privacy torts may have perpetrated quite recently and they may be ongoing wrongs. Assuming either to be the case, Ms. Doucet would be injured under circumstances where she would be entitled to recover damages while she was L.K.'s spouse and L.K. as a spouse would be entitled to recover for her own pecuniary loss arising from Ms. Doucet's injuries. Thus, it is entirely possible that L.K may be entitled to maintain an action under the *Family Law Act*.

[145] Thus, L.K. is a proper representative plaintiff for the Family Class.

ii. Ms. Doucet as a Representative Plaintiff

[146] As noted above, in the [redacted] criminal proceedings against [redacted], Ms. Doucet was a complainant, and the trial judge made credibility findings that were not favourable to her. The Defendants combine the trial judge's comments in [redacted] with Ms. Doucet's correspondence with fellow former students, which correspondence manifests animosity towards Mr. Monk, and they further add alleged inconsistencies and deficiencies in Ms. Doucet's testimony under cross-examination for this certification motion to argue that she is disqualified to represent the Class Members whom, the Defendants submit, are entitled to a credible and non-fanatical representative.[96]

[147] In the immediate case, Ms. Doucet's credibility and the strength of her own class remains to be determined, but, so far, there is nothing that she has said or done or omitted to do that reveals that she is unqualified to represent the Student Class Members. The evidence on this certification motion was sufficient to certify this action without Ms. Doucet's evidence, which, in any event, was substantially collaborated by the evidence of the other affiants and not challenged by any evidence from Mr. Monk personally.

[148] Ms. Doucet is represented by competent counsel, and as I shall explain below, any deficiencies in her litigation plan are not a bar to certification. That Ms. Doucet is passionate about this case and that she may harbor animosity against Mr. Monk and anger at the Royal Winnipeg Ballet is understandable. In normal litigation, Plaintiffs are not expected to turn the other cheek, and in normal litigation, plaintiffs are not disqualified when they have no love lost for their opponent; the same is true in class proceedings. With competent counsel, there is no reason to think that Ms. Doucet's passion will override her reason or rationality in representing the class.

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[95] *Pole v. Hendery* (1987), 61 O.R. (2d) 486 (C.A.); *Lafrance Estate v Canada (A.G.)* (2003), 64 O.R. (3d) 1 (C.A.).
[96] *Shaw v. BCE Inc.*, [2003] O.J. No. 2695 (S.C.J.).

[149] As I indicated in *Sondhi v. Deloitte Management Services LP*,[97] courts should take a skeptical and guarded view of comments made by defendants about what is or is not in the interests of class members and about what sort of representation the class members are entitled to have. In the immediate case, notwithstanding the comments of the Defendants about whether Ms. Doucet can adequately represent the Student Class, it is manifest from her performance so far in succeeding to achieve certification that she is capable and has not disqualified herself.

iii. Litigation Plan

[150] In the immediate case, aggregate damages are not possible and individual issues trials are inevitable. The Defendants vigorously and harshly criticize the Plaintiffs' litigation plan largely because it minimizes the procedure available to the Defendants for the individual issues trials both in terms of the completion of the determination of liability and the quantification of damages. They also criticize some of the interlocutory steps provisions in the plan proposed for the run up to the common issues trial.

[151] I agree with the Defendants that there are serious deficiencies with the Plaintiffs' litigation plan and that the current plan, particularly at the individual issues stage, is quite unfair to the Defendants who are confronted with Student Class Members' claims of approximately $100 million and Family Class Members' claims of $10 million.

[152] The Defendants, however, have not identified any defects that cannot be fixed and they have not identified any defects in the litigation plan that reveal that the action is unmanageable or otherwise unsuitable for a class proceeding.

[153] At this juncture of a proposed class action, if it is established that the other certification criteria are satisfied and remembering that the litigation plan is a work in progress, it will never be the case that deficiencies in the litigation plan will disqualify a class action from certification. Under the *Class Proceedings Act, 1992*, the action both before and after certification is case managed. Adjusting the litigation plan as the action proceeds is part of the case management of the case.

[154] In the immediate case, the litigation plan will need to be fixed. It is, however, premature to even contemplate the details of a fair individual trials process for the Defendants, which details are best determined after the common issues trial, when the court can assess what issue estoppels will be carried forward into the individual issues trials.

[155] I conclude that while the proposed litigation plan will have to be amended as the action proceeds, the plan, which is not to be treated as settled or final, is adequate for the purposes of satisfying the certification criterion.

(c) Conclusion: Representative Plaintiff Criterion

[156] I conclude that the Representative Plaintiff criterion is satisfied.

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[97] 2018 ONSC 271.

F. Conclusion

[157] For the above reasons, the certification motion is allowed.

[158] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Plaintiffs' submissions within 20 days of the release of these Reasons for Decision followed by the Defendants' submissions with a further 20 days.

Perell, J.

Released: June 27, 2018

CITATION: Doucet v. The Royal Winnipeg Ballet 2018 ONSC 4008
COURT FILE NO.: CV-16-564335-00CP
DATE: 20180627

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

Sarah Doucet and L.K.

Plaintiffs

– and –

The Royal Winnipeg Ballet (carrying on business as the Royal Winnipeg Ballet School) and Bruce Monk

Defendants

REASONS FOR DECISION

PERELL J.

Released: June 27, 2018