Court of Appeal for Saskatchewan
Docket: CACV3863 **Date: 2021-11-02**

Kelly Kish	Applicant/Prospective Appellant (Plaintiff)
And	
Facebook Canada Ltd. and Facebook, Inc.	Respondents/Prospective Respondent (Defendants)

Before: Caldwell J.A. (in Chambers on September 20, 2021)

Fiat

I. Introduction

[1] Kelly Kish seeks leave to appeal against the decision of a Court of Queen's Bench Chambers judge (*Kish v Facebook Canada Ltd.*, 2021 SKQB 198), dismissing an application for certification of her claim as a class action pursuant *The Class Actions Act*, SS 2001, c C-12.01. For the reasons that follow, I deny leave to appeal and award costs to the respondents, Facebook Canada Ltd. and Facebook, Inc.

[2] Although her draft notice of appeal contains 29 separate grounds of appeal alleging errors of law, fact and mixed fact and law, Ms. Kish's appeal may be summarised asserting that the Chambers judge erred by:

(a) striking the affidavit of Dr. Norm Archer, which Ms. Kish had proffered as expert evidence to establish there was "some basis in fact" for certifying the action (see *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158) [*Hollick*];

(b) striking two affidavits she herself had sworn to establish there was "some basis in fact" for certifying the action;

(c) dismissing her application for certification because there was no evidence to support it;

(d) alternatively dismissing her application pursuant to s. 6(1) of *The Class Actions Act* because:

(i) the pleadings did not disclose a cause of action (s. 6(1)(a));

(ii) the class definition was unworkable (s. 6(1)(b));

(iii) a class action was not the preferrable procedure for resolving the common issues (s. 6(1)(d)); and

(iv) Ms. Kish was not a suitable representative plaintiff (s. 6(1)(e)); and

(e) awarding costs in the application and costs in respect of a "belated total rejigging of her definition of the class(es)" to the respondents (at para 91).

As the foregoing suggests, Ms. Kish's application failed to satisfy the Chambers judge that any of the evidentiary and legal requirements for certification of an action as a class action had been met.

II. Application for leave to appeal

[3] The threshold to an appeal against the Chambers judge's decision requires Ms. Kish to establish that the merit and importance of her proposed appeal weigh decisively in favour of granting leave to appeal under the criteria set forth in *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2002 SKCA 119, 227 Sask R 121 [*Rothmans*].

[4] In this matter, there are two aspects of appellate practice and class action law that further inform the assessment of merit under *Rothmans*. The first is that appeals are generally taken against a decision or the result of a decision, not the reasons for it. The second is that, to obtain certification as a class action, an action must satisfy all the requirements of s. 6(1) of *The Class Actions Act*. This means that, to obtain a different result, Ms. Kish would have to persuade a panel of this Court that the Chambers judge had erred in his handling of the evidence as well as under each leg of s. 6(1) of *The Class Actions Act*.

A. An evidentiary foundation for certification

[5] Principally, the Chambers judge dismissed Ms. Kish's application because, having struck her affidavits, he found there was no evidentiary foundation to support the certification of her action as a class action. Ms. Kish seeks to appeal against the Chambers judge's decision under several grounds related to his handling of the affidavits and his conclusion that there was "no evidence before the Court from the plaintiff" or "no evidence on the record" to support certification of her action as a class action (at paras 57 and 63).

[6] In the draft notice of appeal, the Chambers judge is said to have erred in law by finding that Dr. Archer lacked expertise (which is a question of fact) with respect to "information systems and privacy". On this issue, the Chambers judge observed that "[n]owhere in [Dr. Archer's] CV is there any expertise described in the area of information systems and privacy" (at para 40). I am not persuaded the Chambers judge's finding is subject to being overturned on the basis of the evidence that was before him. While Dr. Archer's curriculum vitae states he is a professor emeritus at DeGroote School of Business in the "Information Systems Area", it does not identify any qualifications, training or experience related to privacy or information systems.

[7] Ms. Kish also says the Chambers judge erred by finding "that Dr. Archer's opinion evidence was not admissible due to his reliance upon publications, research, and facts which were

not solely within his personal knowledge". In his decision, the Chambers judge found that "*none* of the information relied upon by Dr. Archer was within his personal knowledge or expertise" (at para 43; emphasis added).The merit of this aspect of the proposed appeal is not assisted by the fact that Dr. Archer admitted in cross-examination that he lacked personal knowledge of the facts and that he had obtained the information upon which he based his opinion on the internet and from Ms. Kish without verifying its accuracy or reliability.

[8] Moreover, Ms. Kish does not allege that the Chambers judge misidentified the governing law or misapprehended the principles it sets forth for determining whether someone is qualified to give an expert opinion or whether expert evidence is admissible. I make that observation to underscore that the nature of the errors Ms. Kish alleges are not particularised in the draft notice of appeal. Putting her allegations at their highest, Ms. Kish says the Chambers judge must have erred in his handling of Dr. Archer's affidavit *because* it was not admitted into evidence. It is, however, difficult to gauge the prospects of success of an allegation of that nature.

[9] The proposed grounds related to the two affidavits tendered by Ms. Kish are more precise. In one, Ms. Kish alleges the Chambers judge erred by finding that she "had not read various documents attached to her first affidavit prior to signing the same". In his reasons, the Chambers judge, having quoted from Ms. Kish's cross-examination (where she said "No", when asked if she had *seen* a document prior to swearing her affidavit), stated that she had given "an unequivocal 'No' to having *read* [some exhibits] before signing her first affidavit" (at para 48). To the extent this proposed ground relies on that difference in verbs, it is prima facie destined to fail. The standard of appellate review of findings of fact is palpable and overriding error and it only takes the application of a little common sense to understand that someone who as not *seen* a document cannot have *read* it either.

[10] Under a second ground, Ms. Kish alleges that the Chambers judge erred "by finding that newspaper articles and media reports were wholly inadmissible for the purposes of establishing *some basis in fact* for the purposes of certification" (emphasis in original draft notice of appeal). That, however, is not what the Chambers judge found. He said that, while they had "some degree of reliability", "simply attaching these exhibits does not make them admissible under these circumstances", explaining that "there has to be some basis offered by the deponent to make the content relevant or connected" (at para 52). As such, this proposed ground does not come to grips with why the Chambers judge struck the two affidavits of Ms. Kish.

[11] A third ground attempts to grapple with the Chambers judge's conclusion on relevance but fails. Under it, Ms. Kish alleges the Chambers judge erroneously required her to "*argue relevance* within her affidavit in order to establish the admissibility of otherwise germane and reliable publications" (emphasis in original draft notice of appeal). This ground is perplexing because *germane* is a synonym for *relevant* and evidence is admissible only if it is relevant and not subject to exclusion under any other rule of law or policy (see *R v Swietlinski*, [1994] 3 SCR 481 at 486, and *R v Jabarianha*, 2001 SCC 75 at para 17, [2001] 3 SCR 430, each citing what is now John Sopinka et al, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis Canada Inc., 2018). That is, I am unpersuaded it is even arguable that the Chambers judge erred by requiring some indication that the information in question was relevant before he admitted it into evidence.

[12] Under other grounds, Ms. Kish says the Chambers judge erred in fact and law by concluding that the exhibits to her second affidavit were not proper reply and by striking the whole of all three affidavits. None of these grounds, however, address the principal reason why the Chambers judge struck her two affidavits. He did so because it was "apparent that Ms. Kish, although she has sworn that she has personal knowledge of the facts, has not provided a basis for the belief or anything to suggest that the information *in all the exhibits* is true, accurate, reliable and unaltered" (emphasis added at para 49) and, later, "the affiant has not stated her grounds for belief" (at para 52).

[13] Even though he had struck Ms. Kish's affidavits, the Chambers judge nonetheless examined, "as though it was admissible", a joint report issued by the federal and British Columbia privacy commissioners, which was exhibited to her first affidavit (at para 59). In that regard, with reference to the reasons of Belobaba J., who had examined the same report in *Simpson v Facebook*, 2021 ONSC 968, the Chambers judge concluded, from his review of it, that the Commissioners' report "does not provide 'some evidence'" (at para 62). Ms. Kish says that conclusion is in error. She also says that, in reaching it, the Chambers judge improperly relied on what are described as the *peephole analysis* and the *affiliate argument* in *Simpson*. However, in oral argument it became clear that, even put at its highest, the report stated only that there was "no assurance that Canadians' personal information was not shared with [Cambridge Analytica]" (Joint investigation of Facebook, Inc. by the Privacy Commissioner of Canada and the Information and Privacy Commissioner for British Columbia, PIPEDA Report of Findings #2019-002, 2019 CanLII 35606 (PCC) at para 46)—which is a double-negative phrase with little face value as evidence—particularly since Ms. Kish asserts that her action is not about Cambridge Analytica.

[14] Ms. Kish also seeks to assert other ways in which, even though the affidavits were struck, there remained "some basis in fact" upon which to certify her action as a class action. She observes that the record contains cross-examinations of the respondents' deponents and affidavits from her lawyers. The respondents point out, however, that *The Queen's Bench Rules* state that "an application for a certification order pursuant to section 4 of [*The Class Actions Act*] must be supported by an affidavit of the proposed representative plaintiff" and none of Ms. Kish's affidavits were admitted into evidence (Rule 3-93(2); see also *Hollick* at paras 22–25). Overall, I am persuaded there is general merit to Ms. Kish's contentions because, as the Court noted in *Hollick*, quoting from *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 at 319, the "adequacy of the record" will "vary in the circumstances of each case" (at para 23). As such, an issue as to whether the Chambers judge had misapprehended the record would fall to be resolved by a panel under the palpable and overriding error standard.

[15] Ms. Kish also proposed that the fact a similar action has been "certified" in Quebec (see *Thiel c Facebook Inc.*, 2021 QCCS 3694) could satisfy the some-basis-in-fact requirement set out under *Hollick*. However, I am unable to find any support for that proposition in the jurisprudence. The decision nearest to that point is *Monnier v Honda Canada Inc.*, 2007 QCCS 2661, where Hardy-Lemieux J.C.S. allowed a plaintiff to adduce evidence of extra-jurisdictional class proceedings but cautioned that it was merely evidence that others had allegedly suffered similar problems to those alleged in the action that was at hand in that case (at para 17). In this matter, however, Ms. Kish did not attempt to adduce evidence of what had occurred before the Quebec court in *Thiel*.

[16] In summary, while there is arguably merit to a few of her allegations of error in the Chambers judge's handling of the evidence, other of her allegations of error are prima facie without merit.

B. The allegations of error under *The Class Actions Act*

[17] If Ms. Kish were successful in overturning the Chambers judge's rulings on her affidavits and his conclusion as to whether there was some basis in fact for certifying her action as a class action, she would then have to address the Chambers judge's findings on the certification requirements under s. 6(1) of *The Class Actions Act*.

1. Section 6(1)(a)—the pleadings disclose a cause of action

[18] The Chambers judge agreed with the respondents' assessment of the pleadings as suffering from an "overarching defect", namely, that "the Claim combines a litany of unrelated allegations under terms like 'User Data Abuse' and 'Facebook Breaches,' but fails to particularize any of these claims" (at para 79).

[19] Ms. Kish seeks to appeal against this overall assessment by alleging that the Chambers judge failed "to read the pleadings holistically, as a whole, as they stood or as they could be amended". Under other grounds, she proposes to take issue with the Chambers judge's critiques of her claims in contract and tort, for breach of multiple statutes, for breach of fiduciary duties and for intrusion upon seclusion. Ms. Kish does not seek to address his rejection of her other causes of action, such as breach of confidence and unjust enrichment.

a. Claims in contract

[20] Looking first to the claims in contract, it is difficult to see any merit to the contention that the Chambers judge erroneously concluded "that the Statement of Claim failed to plead 'the relevant terms of the contract, which terms were breached, the conduct giving rise to the breach and the damages that might flow from the breach'". This difficulty arises because the pleadings do not set out the terms of the contracts that the respondents have supposedly breached, how they were breached or what damages might have flowed from their breach. This ground of appeal appears prima facie destined to fail.

[21] Ms. Kish also seeks to assert that the Chambers judge erred by concluding it was "impermissible for the Plaintiff to assert, in the alternative, that any contract may not have been binding or enforceable". I fail to see, however, where he made that ruling or reached that conclusion. It is true that, when addressing the absence of any particulars to the claims in contract, the Chambers judge wrote, "[a]dding to this overall fuzziness is the plaintiff's contention that perhaps Facebook users may not have had binding or enforceable contacts in any event" (at para 68). However, he did not rule that Ms. Kish's contention was impermissible—he was simply acknowledging what she had contended. There is little prospect of overturning the Chambers judge's assessment of the claims in contract under this ground.

b. Claims of breach of privacy and consumer protection legislation

[22] In her statement of claim, Ms. Kish identified 15 privacy and 11 or 12 consumer-protection statutes from various jurisdictions that the respondents are said to have breached. The Chambers judge observed that the pleadings did not identify which provisions of those statutes have been breached, how they were breached or when the breaches had occurred. Ms. Kish does not seek to appeal against these findings.

[23] If leave were granted, Ms. Kish would allege that the Chambers judge erred in law "in his conclusion that the pleadings relating to privacy and consumer protection legislation (*as they were proposed for amendment*) were insufficient for certification purposes" (emphasis added). Setting the italicised clause aside for the moment, Ms. Kish does not take issue with the principle that a plaintiff must plead its case with sufficient precision and clarity to permit a court and the defendant to understand what causes of action are being asserted and why (see, generally, *Ducharme v Davies* (1983), 29 Sask R 54 at para 16 (CA), and *The Queen's Bench Rules*, Pt. 13, Div. 3). Her proposed ground of appeal suggests, however, that the principle is relaxed or more loosely applied when class action certification is at issue. That does not, however, appear to be the law (see *Wildeman v Bell Mobility Inc.*, 2015 SKQB 125 at paras 11–21, 473 Sask R 259 and *White v GlaxoSmithKline Inc.*, 2010 SKQB 174 at paras 24–27, 358 Sask R 6).

[24] Nonetheless, in that a judge's assessment of whether a cause of action has been sufficiently plead often involves questions of law, a subjective assessment of the pleadings, and the exercise of judicial discretion, I cannot conclude this ground is prima facie destined to fail. However, when the ground is read with "pleadings related to privacy and consumer protection legislation" being modified by "as they were proposed for amendment", it loses much of its prospects for success because it then alleges error in what must be understood as *obiter dicta*.

[25] As such, the proposed appeal would not, in my assessment, address the Chambers judge's core findings that the pleadings were deficient because they failed to identify which provisions of the 27 or so pieces of privacy and consumer protection legislation had been breached, how they had been breached or when the breaches had occurred.

c. Claims in tort

[26] Relying on Rule 13-11(4) of *The Queen's Bench Rules*, which allows that "conclusions of law may be pleaded but only if the material facts supporting the conclusions are pleaded", the Chambers judge found Ms. Kish's claims in tort were not properly plead. He found her statement of claim contained only "bald conclusions that prevent the defendants from having a meaningful basis to understand and reply to the claim" (at para 71). Ms. Kish does not, however, seek to appeal against this finding.

[27] Ms. Kish seeks to take issue with the Chambers judge's finding that a plaintiff must plead harm that is more than fleeting to support a claim in tort. There is merit to this allegation because the Chambers judge seems to have relied on Alberta and Ontario caselaw in privacy class actions to reach his conclusion. Whereas, in Saskatchewan, *The Privacy Act*, RSS 1978, c P-24, s. 2, states that violation of the privacy of another person is a tort "actionable without proof of damage". While this ground addresses the damages side of the claims in tort, Ms. Kish's proposed appeal

does not address the deficiencies found by the Chambers judge in how she had plead the liability side of her claims.

d. Claims of breach of fiduciary duty

[28] When assessing the sufficiency of Ms. Kish's claims that the respondents had breached fiduciary duties, the Chambers judge wrote:

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

[29] Ms. Kish would assert that the Chambers judge erred in law in this paragraph "by concluding that sufficient particulars were not pled to establish a claim for breach of fiduciary duty in respect of children and minors within the class". However, it is not apparent to me where, and Ms. Kish did not say where, in her statement of claim she refers to or pleads that the respondents owed fiduciary duties to children and minors or the facts that would support such claims. As such, the allegation seems nothing more than a conclusionary statement of error, which is difficult to assess under *Rothmans*.

e. Claims of intrusion upon seclusion

[30] When addressing the tort of intrusion upon seclusion as plead in Ms. Kish's statement of claim, the Chambers judge wrote:

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

[31] Under this heading, Ms. Kish alleges that the Chambers judge erred in law "by concluding that the claim for intrusion upon seclusion could not be certified because not *all* 'of the categories of information set out in the definition of personal information' could be considered a 'significant invasion'" (emphasis in original draft notice of appeal). While I might interpret paragraph 74 differently, as though the Chambers judge was reiterating his difficulty with the scope and vagueness of the pleadings, Ms. Kish's allegation is a reasonable interpretation of the paragraph and the error she alleges is arguable on that basis.

f. Rejecting amendments to the pleadings

[32] Under several proposed grounds of appeal related to the sufficiency of her causes of action pleadings, Ms. Kish alleges the Chambers judge erred because he failed to let her amend the pleadings to particularise her claims or failed to read her pleadings "as they could be amended". In one example of this, she proposes that the Chambers judge erred by "refusing necessary amendments to the pleadings to particularize privacy and consumer protection claims for class members in each affected province".

[33] The Chambers judge provided some of the context that is necessary to assess Ms. Kish's allegations when he wrote:

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

[34] The respondents add to the context by pointing out that there were two, five-day hearings into whether this action should be certified. At the end of the first, Ms. Kish sought to recast her claims and the Chambers judge granted her leave to amend the class definition. Under *The Queen's Bench Rules*, leave or consent to amend the pleadings in an action proposed as a class action is required once an application for certification has been filed (*Queen's Bench Rules*, Rule 3-72(2)(b)). In the second hearing, Ms. Kish filed an amended statement of claim that amended the class definition *and* amended her pleadings in ways that had not been approved by the Chambers judge or consented to by the respondents. This is what the Chambers judge is referring to in paragraph 70 of his reasons.

[35] As such, I find Ms. Kish's draft notice of appeal mischaracterises the circumstances by stating that the Chambers judge erred *by rejecting or refusing* proposed amendments to the pleadings. He could not have so erred because Ms. Kish had never applied to amend her statement of claim in the ways she says the Chambers judge erroneously rejected or refused.

[36] To summarise, the proposed appeal against the Chambers judge's findings under s. 6(1)(a) of *The Class Actions Act* leaves considerable room to doubt its prospects for success.

2. Section 6(1)(b)—there is an identifiable class

[37] The Chambers judge found the proposed class, despite the late-in-the-day amendments to the pleadings, would include two mutually exclusive groups of persons. Ms. Kish seeks to appeal against this finding on the basis that the Chambers judge erred in law by "concluding that it was not permissible to certify two distinct classes within the same action". The law, however, seems

well settled. A class action may involve various subclasses, but s. 6(1)(b) of *The Class Actions Act* requires that there be a single, identifiable class (*Merck Frosst Canada Ltd. v Wuttunee*, 2009 SKCA 43 at paras 125–126, [2009] 5 WWR 228; *Caputo v Imperial Tobacco Ltd.* at para 45). While this proposed ground would be adjudicated on the standard of correctness, it would have to be heard by a panel of five judges (given the decision in *Wuttunee*) and its prospects of success are questionable.

3. Section 6(1)(c)—the claims of the class members raise common issues

[38] Ms. Kish has not sought to appeal against the Chambers judge's conclusion that the proposed common issues were not common and their resolution would not meaningfully advance matters. It is fair to say, however, that the Chambers judge's conclusions under s. 6(1)(c) are in some part a derivative of his conclusions under s. 6(1)(a) and (b). However, if his conclusion under s. 6(1)(c) remains undisturbed following the proposed appeal, the Chambers judge's root decision—that the claim was not suitable for certification—could not be overturned. This, in my assessment, weighs against a grant of leave to appeal.

4. Section 6(1)(d)—a class action would be the preferable procedure

[39] In respect of s. 6(1)(d), the Chambers judge wrote:

> [87] I find that the generalization of the potential class proceeding would cause considerable problems for the trial court. It appears that there would have to be an individualized inquiry that would be the antithesis of judicial economy and create lengthy delay (*R v Brooks*, 2009 SKQB 509 at paras 139, 174, 179, [2010] 6 WWR 81).
>
> [88] Additionally, the plaintiff seems to argue that the proposed class action is the preferable procedure because she contends class members would be entitled to nominal damages that would be easy to establish, particularly under the statutory claims. However, I agree with the defendants that it is more likely that the claims would require a lot of individual inquiries and even nominal damages might not be available across the class. In any event, this type of argument has recently been rejected (*Setoguchi*; *Maginnis and Magnaye v FCA Canada*, 2020 ONSC 5462 at para 41).

[40] Ms. Kish seeks to argue that the Chambers judge erred "by concluding that certification could not be ordered *because* an 'individual inquiry' would eventually be required" (emphasis added). I do not, however, read the Chambers judge's reasons in the same way as she does.

[41] As I understand it, the Chambers judge was concerned about the nature of the individualised inquiries that might be required, not the fact they would be required, when he described the process as the "antithesis of judicial economy" and as a process that would "create lengthy delay" (at para 87). As these are factors relevant to determining whether a class action is preferrable to individual actions, I am not persuaded that the proposed ground of appeal would grapple with the reasons why the Chambers judge found the requirement under s. 6(1)(d) had not been met.

5. Section 6(1)(e)—there is a person willing to be appointed as representative plaintiff

[42] Under s. 4(1) of *The Class Actions Act*, a "resident of Saskatchewan *who is a member of a class* of persons may commence an action in the court on behalf of members of that class" (emphasis added). Section 4(4), however, permits a court to appoint a person who is not a member of the class as the representative plaintiff for the class action where "it is necessary to do so in order to avoid a substantial injustice to the class".

[43] The Chambers judge's conclusion that Ms. Kish was not a suitable representative plaintiff follows from his finding that the action proposed two mutually exclusive classes of plaintiffs. He noted that, while Ms. Kish may well be a suitable representative plaintiff for one of the proposed classes under s. 6(1)(e) of *The Class Actions Act*, she was not a member of the other proposed class.

[44] The statute is unambiguous and the facts relevant to this point are not in dispute. Therefore, even if Ms. Kish were successful in her appeal under s. 6(1)(b) of *The Class Actions Act*, the two classes she proposes would be comprised of entirely discrete groups of plaintiffs with their own distinct causes of action. Given that circumstance and because it seems no argument was made under s. 4(4), I am hard pressed to conclude that there is any prospect of overturning the Chambers judge's finding that she was not a suitable representative plaintiff for both classes.

C. The adjudicative framework

[45] Lastly, the overall nature and number of the issues Ms. Kish seeks to raise and the scope of the right of appeal weigh against the prospects for a successful appeal. While questions of law are reviewable on the standard of correctness, the Chambers judge's rulings on the admissibility of evidence, absent questions of law, are subject to deference. Moreover, the Chambers judge's factual findings and his conclusions on the legal requirements of certification, absent extricable questions of law, are reviewable on the standard of palpable and overriding error (*Pioneer Corp v Godfrey*, 2019 SCC 42 at paras 110–11, [2019] 11 WWR 191; *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142 at para 26, [2017] 5 WWR 669).

[46] While a standard of review does not render a proposed appeal "prima facie destined to fail in any event", the multitude of grounds under the proposed appeal that invoke a deferential standard of review, particularly recognising that Ms. Kish must successfully set aside every aspect of the Chambers judge's decision, detracts considerably from its overall prospects of success.

[47] In the result, I conclude the proposed appeal lacks sufficient merit to be heard by a panel of this Court. Given that conclusion, I have not addressed the *Rothmans* criteria related to the importance of the proposed grounds of appeal.

III. Disposition

[48] Under *Rothmans*, the merit and importance of an appeal must weigh decisively in favour of leave being granted. Ms. Kish has not, however, persuaded me that there is a realistic prospect of overturning the Chambers judge's decision.

[49] The application for leave to appeal is dismissed with one set of costs to the respondents.

"Caldwell J.A."

Caldwell J.A.

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