

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Crawford v. FCA Canada Inc.*,
2026 BCSC 1223

Date: 20260729
Docket: S226271
Registry: Vancouver

Between:

Samantha Crawford

Plaintiff

And

FCA Canada Inc. and FCA US LLC

Defendants

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

Corrected Judgment: The text at para. 156 of the Judgment has been corrected on
July 31, 2026

Before: The Honourable Mr. Justice Milman

Reasons for Judgment on Certification

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I. INTRODUCTION

[1] The plaintiff, Samantha Crawford, applies under s. 2 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA], to certify this action as a class proceeding.

[2] The Amended Notice of Civil Claim (“ANOCC”) alleges that the defendants, an American automobile manufacturer and its Canadian subsidiary, designed, developed, manufactured, distributed, leased or sold seven models of vehicles that were on the market in Canada between 2013 and 2020 (the “Affected Vehicles”) and were prone to three dangerous defects. Those defects were as follows:

- a) a tendency for the engines in the Affected Vehicles (known as the 2.4L “Tigershark”, “TS” or “MultiAir” engine series) to burn or consume an inordinate amount of engine oil (the “Oil Consumption Defect”);
- b) a tendency for those engines to shut down suddenly and unexpectedly in certain circumstances when the oil level drops below a certain level (the “Oil Level Defect”); and
- c) a failure of the low oil level warning indicator light on the dash to illuminate as it should when the oil level is too low (the “Oil Indicator Defect”).

[3] The ANOCC advances causes of action in negligence (including failure to warn of the alleged defects), negligent misrepresentation (both express and by omission), and breach of federal and provincial consumer protection laws. The relief sought in the ANOCC includes damages of various kinds, including punitive damages, or alternatively, disgorgement of profits.

[4] On this application, the plaintiff seeks an order:

- a) certifying this action as a class proceeding under the CPA;
- b) allowing her to advance various causes of action pleaded in the ANOCC on behalf of a national class comprised of everyone in Canada who either owned or leased one or more of the Affected Vehicles;

- c) identifying 41 common issues to be tried in a common issues trial (the original notice of application listed 44 such issues, but three of them were abandoned by the time of the hearing before me);
- d) approving her litigation plan; and
- e) directing that notice of certification be provided to the class in accordance with that plan.

[5] The defendants oppose the application. They say that the plaintiff has failed to satisfy any of the conditions for certification, other than the requirement to demonstrate the existence of an identifiable class of two or more people (which, with the plaintiff's acceptance of the narrower class definition proposed by the defendants, is not controversial).

[6] Although the defendants acknowledge that some of the vehicles identified in the ANOCC were indeed prone to excessive oil consumption, they say that, for those affected, the problem has already been resolved by means of a repair campaign through which they have had their vehicles repaired, or have been given the opportunity to have them repaired, at no cost. Accordingly, the defendants contend that the certification test is not met because:

- a) the ANOCC fails to set forth any viable causes of action;
- b) the plaintiff has failed to adduce the requisite "basis in fact" demonstrating the existence of any common issues;
- c) a class proceeding would not be the preferable procedure to resolve the dispute because:
 - i. the defendants have already repaired, or offered to repair, the only defect that has been shown to exist; and

- ii. to the extent that there may be common issues, they would be overwhelmed by the individual issues that would remain to be tried following the proposed common issues trial; and
- d) the plaintiff is not a suitable representative for the proposed class because she:
 - i. has not pleaded a viable claim on her own behalf; and
 - ii. has not put forward a workable litigation plan.

[7] For the reasons that follow, I have concluded that the application should be refused, but with leave granted to the plaintiff to re-apply if certain conditions, specified at the end of these reasons for judgment, are satisfied.

II. THE CERTIFICATION TEST

[8] The requirements for certification are set out in s. 4(1) of the *CPA*, which states, in relevant part, as follows:

... the court must certify a proceeding as a class proceeding on an application under section 2 ... if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[9] In *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334 [Syngenta] MacNaughton J.A., writing for the Court, summarised the elements of the certification test as follows:

[15] Whether the class action pleadings disclose a cause of action is reviewed by applying the rule that a pleading should not be struck unless it is plain and obvious that no claim exists. The remaining four certification requirements are reviewed by considering whether there is “some basis in fact” for each of the requirements: *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 25; and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [Pro-Sys SCC] at paras. 99–105. If the plaintiff discharges this burden, the action must be certified.

[16] The “some basis in fact” standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence. The evidentiary burden is not an “onerous one”. It reflects that at the certification stage—the pleadings stage—the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 [Pro-Sys BCCA] at para. 65, leave to appeal ref’d [2010] S.C.C.A. 32, quoting *Cloud v. Canada (Attorney General)*, 247 D.L.R. (4th) 667 at para. 50, 2004 CanLII 45444 (O.N.C.A.), leave to appeal ref’d [2005] S.C.C.A. No. 50.

[17] Thus, the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action: *Pro-Sys SCC* at para. 102; *Charlton v. Abbott Laboratories, Ltd.*, 2015 BCCA 26 at para. 93.

III. EVIDENTIARY ISSUES

A. The Evidence

1. Overview

[10] In support of the application, the plaintiff has adduced the following affidavits:

- a) her own affidavit;
- b) an affidavit of Stacey McGregor, another putative class member;
- c) two affidavits of a paralegal employed by the law firm representing the plaintiff, who provides some information about the firm and attaches the plaintiff’s litigation plan and the following documents:
 - i. online sales figures relating to the Affected Vehicles;

- ii. some of the defendants' published advertisements promoting the Affected Vehicles;
- iii. the following technical service bulletins ("TSB"s) issued by the defendants:
 - (1) TSB 09-007-15 dated July 31, 2015 (the "2015 TSB"); and
 - (2) TSB 09-006-20 dated May 16, 2020 (the "2020 TSB");
- iv. two campaign information notices published by the defendants in relation to customer satisfaction notifications ("CSN"s) W20, W84 and W80, dated December 2020 and February 2021, respectively;
- v. Dealer Service Instructions for CSN W84, dated July 2021; and
- vi. Dealer Service Instructions for CSN W20, dated January 2022;
- d) two affidavits of Jeff Hall, an automotive technical consultant, each attaching an expert report, the second prepared in reply to the defendants' evidence; and
- e) an affidavit of Dr. Brandon Schaufele, an economist, attaching an expert report prepared by him and Dr. Adam Fremeth for the plaintiff in a parallel action in Ontario.

[11] In support of their application response opposing the application, the defendants have adduced:

- a) two affidavits of Anna Langlois, the Product Analysis Engineer of the defendant, FCA Canada Inc.; and
- b) an affidavit of James Smith, a mechanical engineer, attaching an expert report prepared in response to the first expert report of Mr. Hall.

[12] The parties have raised two preliminary evidentiary issues. First, the plaintiff asserts that the defendants' evidence ought to receive only limited weight, inasmuch as they have failed to comply with s. 5(5) of the *CPA*. Second, the defendants object to the admissibility of the reports attached to Mr. Hall's affidavits, on various grounds.

[13] After summarising the evidence in greater detail, I will address those preliminary evidentiary issues.

2. The Plaintiff's Evidence

a) The Plaintiff

[14] In her own affidavit, Ms. Crawford has deposed that in 2019 she purchased a 2019 model year Jeep Cherokee 4 x 4 Sport, which is one of the Affected Vehicles. To do so, she traded in her previous vehicle, a 2016 model year Chrysler 200, which was also an Affected Vehicle. She says that she decided to trade in the Chrysler 200 because it tended to consume more engine oil than had any of her previous vehicles. However, when she acquired the Jeep, she noticed that it too appeared to consume an inordinate amount of oil. She and her spouse began tracking it. They found that, over the year and a half that they were doing so, they were having to add about a quart of oil per week. In May 2021, she brought the Jeep in for a service at the dealership where she had purchased it. She was advised that it could be a software issue and that a software update to remedy the issue may be forthcoming. On May 14, 2021, she traded in the Jeep for a new vehicle. She says that she would not have purchased the Jeep had she known of its defects.

b) Ms. McGregor

[15] Ms. McGregor resides in Toronto, Ontario. She has deposed that on April 27, 2015, she purchased a 2015 model year Jeep Cherokee Sport, one of the Affected Vehicles. About one year after doing so, she began to notice problems with it. The most serious issue was that it began stalling unexpectedly, causing dangerous situations for herself and others. She says that when this occurred, no warning light illuminated and there was no other indication of a problem before the stall.

[16] On December 27, 2016, she took the Jeep in for a service at the dealership where she had purchased it. She was told that the engine oil was low, which had caused the engine to stall and struggle to restart. She was given an oil and filter replacement, but the problem persisted. She began to keep a record and noted that between September 2015 and September 2021, she spent \$1,400 on oil changes. On August 11, 2017, she took the Jeep back to the dealership to have the oil and stalling problem checked again. On that occasion, the service technician checked the oil level and found it to be very low. He advised her to manually check the oil level and to top it up herself if it got too low.

[17] She returned to the dealership again on September 25, 2017, at which time the dealership initiated a more formal test of the rate of oil consumption. Over the next year, she continued to report excessive oil consumption and returned to the dealership three times in order to monitor the oil levels as part of the test. In the summer of 2018, she received a replacement of the engine long block, at no charge to her, but even this did not solve the problem completely. She still continued to experience unexpected stalling and she continued to be concerned about the rate of oil consumption.

[18] On March 6, 2019, the Jeep's engine light illuminated while she was driving. She pulled over and turned the vehicle off but could not start it again, so she had to have it towed to the dealership.

[19] On May 6, 2020, she took the vehicle into the dealership again because it appeared to be low in power and unable to accelerate as usual. Once again, she was told that the oil level was too low and that she should monitor the oil level regularly and refill it as necessary.

[20] As of September 2023, when she made her affidavit, she continued to be concerned about the vehicle's tendency to consume too much oil.

c) Mr. Hall

[21] In his affidavits, Mr. Hall describes himself as an Automotive Technical Consultant. He says he is a duly qualified, licensed and certified master automotive technician and has worked in that field for 30 years.

[22] His first report is divided into four sections, as follows:

- a) Part I (Professional Qualifications);
- b) Part II (Information Reviewed);
- c) Part III (Factual Assumptions); and
- d) Part IV (Opinion and Discussion).

[23] After setting out his qualifications in Part I, he referred in Part II to the letter of instruction he received from plaintiff's counsel and its enclosures, which were as follows:

- a) the notice of civil claim ("NOCC") filed in this action on August 3, 2022, prior to its amendment;
- b) the 2015 TSB; and
- c) the 2020 TSB.

[24] Under the heading "Factual Assumptions" in Part III, there are only two paragraphs. The first stated as follows:

FCA CANADA INC. and FCA US LLC (the "Defendants") design, develop, manufacture, distribute, lease, and sell engines and vehicles in Canada. One of their products – the Multiair Engine series - contains a dangerous, latent defect that causes the engines to improperly burn off or consume abnormally high amounts of oil. The Defendants are well aware of such defects but continue to permit the engines to be sold.

[25] The second paragraph under that heading states that "[t]he affected models are listed below". The list of affected models that follows appears to have been taken

from para. 16 of the NOCC, in which the term “Affected Vehicles” is defined by reference to the same chart.

[26] In Part IV of the report Mr. Hall’s sets out his answers to the questions he was asked in the letter of instruction from plaintiff’s counsel, which were as follows:

- a) Do the materials enclosed with the letter of instruction disclose the existence of a potential common defect in the Affected Vehicles;
- b) If yes, what is the possible nature of the defect;
- c) Does a methodology exist to determine whether there is a common defect, and if so, what the defect is; and
- d) What repairs would be required for the possible common defects you have identified.

[27] Mr. Hall’s response to the first question was that those materials disclose the existence of three common defects in the Affected Vehicles, namely, the Oil Consumption Defect, the Oil Level Defect and the Oil Indicator Defect.

[28] In answer to the second question, Mr. Hall discussed the nature of each of those alleged defects. In that discussion, there is no direct mention of the two TSBs, which were said in the previous section to have disclosed the existence of those defects (the TSBs are discussed at some length elsewhere in the report, in his answer to the third question). Instead, in answering the second question, he appears to rely on an extensive body of information, the source of which is not identified other than, in a few cases, by way of images that were drawn from various identified online websites.

[29] The first sub-heading in this section discusses the Oil Consumption Defect. The discussion under that sub-heading begins with his observation that the Affected Vehicles all possess MultiAir Engines, which, he says, differ in design from other engines because they use electrical solenoids to actuate the intake valves, whereas conventional engines use camshafts to actuate the intake and exhaust valves. He

illustrates this point by reproducing two images taken from online websites, the first a photograph of an electronic solenoid and the second a photograph of the combustion cycle of a typical internal combustion engine, said to be very similar to the MultiAir Engine.

[30] He then asserts that the main design or manufacturing flaw in the MultiAir engines involves the piston oil control ring and the compression rings, which, he says, are unable to control the bypass of oil and gasses and instead allow oil to bypass the rings and burn off in the combustion chamber. This can cause stalling, he says, because another side effect of excessive oil in the combustion chamber is that the spark plugs will become contaminated, which can cause the engine to run unevenly, surge, misfire or stall. The problem may also reduce the viscosity of the oil, which, he says, can also cause catastrophic damage to the engine.

[31] The next sub-heading deals with the Oil Level Defect. He explains that defect by asserting that MultiAir engines “have a low oil switch that will kill (stall) the Engines to protect them if the oil gets below a certain level”. In some circumstances, he says, oil waves can be generated in the pan that may activate that switch.

[32] With respect to the Oil Indicator Defect, Mr. Hall asserts that the oil indicator system used in the Affected Vehicles is flawed insofar as it is unable to detect and notify the driver of the actual condition and level of the oil. He adds that other manufacturers use a more sophisticated system that will, among other things, measure both the oil level and its quality.

[33] In response to the third question, Mr. Hall offers the following methodologies for identifying the defects and determining if they exist:

- a) taking stock of customer complaints, dealership observations and warranty claims (the TSBs he was given are said to be an example of this, inasmuch as they show, according to Mr. Hall, that the defendants were aware of a high volume of concerns being raised in relation to the common defect of oil burning in the engines);

- b) testing several of the affected engines for burning oil and emissions and to determine if the check engine indicator light was illuminated, preferably using the defendants' own diagnostic software; and
- c) dismantling and inspecting several engines to check the piston rings, cylinder condition, valve seating conformity and carbon buildup, among other things.

[34] In answer to the last question, Mr. Hall asserted that the preferred but most expensive repair option is to replace the engine. He also suggests that the oil indicator system should be redesigned and replaced with a new system that is more reliable and effective.

d) Dr. Schaufele

[35] Dr. Schaufele and Dr. Fremeth were asked to provide a methodology for quantifying the losses of the class as alleged in a parallel action in Ontario. Their report (the "Ivey Report") focuses on the "excess expenditures" method to quantify the losses attributable to the Oil Consumption Defect. Using that method, they say, it is possible to measure the economic magnitude of two aspects of the harm attributable to that defect. The first measures the direct expenditures incurred by the class members for items such as excess maintenance. The second, referred to as "premature scrappage", measures the loss of residual value attributable to the shortened lifespan of the Affected Vehicles.

3. The Defendants' Evidence

a) Ms. Langlois

[36] Ms. Langlois has deposed that the original version of the TS engine was installed in 91,898 vehicles that were produced for the Canadian market between the 2013 and 2019 model years. That version of the TS engine was replaced in August 2018 by a new design which improved the seal on the piston rings, thereby permanently eliminating the excess oil consumption issue. Accordingly, only a few of

the vehicles built for model year 2019 and none for model year 2020 and later were prone to the issue described in the ANOCC.

[37] Ms. Langlois acknowledges that some of the vehicles with that original version of the TS engine may be prone to consuming larger amounts of oil than usual under certain conditions, such as continuous stop-and-go driving. The reason that may occur, she says, is that during certain deceleration events, the "Interactive Deceleration Fuel Shut-Off" ("iDFSO") calibration could create a low-pressure environment in the engine cylinders that could cause oil to flow into the engine cylinders, leading to excessive oil consumption and lowered oil level. She also acknowledges that, if left unaddressed, a low oil level could eventually result in a stall.

[38] To remedy the problem, the defendants implemented a repair campaign that consisted of three CSNs, each targeting a different subset of the Affected Vehicles.

[39] The first of these, CSN W20, was launched in December 2020 and applied to 38,676 vehicles. The defendants determined that, for those vehicles, the potential oil consumption problem could be resolved by eliminating the iDFSO calibration through a reprogramming of the software for the powertrain control module. The owners/lessees of vehicles in that group were directed to take their vehicles to an authorised dealer for an inspection and, if necessary, receive the software update at no cost. As of August 21, 2025, 73.4% of the vehicles in the group had been inspected and, if required, received that software update.

[40] The second subset, covered by CSN W84, was launched in early 2021 and applied to 44,703 vehicles. For those vehicles, the defendants determined that the oil consumption issue could be resolved by eliminating the iDFSO calibration through a reprogramming of the software for both the powertrain and the transmission control modules. As of August 21, 2025, 66.7% of those vehicles were inspected and if necessary, received that software update.

[41] According to Ms. Langlois, the software updates carried out pursuant to CSNs W20 and W84 did not affect the vehicles' fuel economy as described on the Monroney label (the colloquial name for the windshield sticker that is required by law to display a new vehicle's fuel economy rating) or otherwise affect the customer driving experience. Both of those CSNs remain available to the remaining owners/lessees of the vehicles to which they apply.

[42] However, for a smaller subset of the Affected Vehicles (8,519 in total), the software update could not be carried out without affecting the vehicles' fuel economy rating. For those vehicles, the defendants issued CSN W80 concurrently with the other two. While it was extant, CSN W80 directed owners/lessees to an authorised dealer for an oil consumption test. Those that failed the test received a long block replacement at no cost. The defendants' records indicate that a total of 2,238 vehicles were inspected pursuant to CSN W80 and that of these, 206 (or 9.2%) failed the test and received the long block replacement. Although the CSN W80 campaign was terminated on May 30, 2024, the owners/lessees with vehicles in that subset were notified that the oil consumption test, and if necessary, long block replacement, remain available to them by way of a warranty extension (the warranty period was extended to seven years, regardless of the number of kilometres driven or, for those already beyond the seven-year extended warranty period, to April 30, 2026).

[43] In her second affidavit, Ms. Langlois produced a copy of a sample warranty booklet that is said to be similar to the warranty for all of the Affected Vehicles.

b) Mr. Smith

[44] In response to Mr. Hall's first report, the defendants adduced the report of Mr. Smith, who was asked three questions.

[45] First, he was asked if he agreed with Mr. Hall that the materials given to Mr. Hall disclosed the three defects that Mr. Hall identified. Mr. Smith's response was that they did not. Second, Mr. Smith was asked to list other reasons, apart from the Oil Consumption Defect, that might lead to excessive oil consumption. In his

response to that question, he listed the following: leaking internal seals, worn internal components, poor engine maintenance, a malfunctioning PCV valve, a leak or bad driving habits. Finally, Mr. Smith was asked if it would be possible to determine if a vehicle was consuming excess oil, and if so, the reason it was doing so, without inspecting the vehicle. His response was that it would not.

4. The Plaintiff's Reply Evidence

[46] The plaintiff adduced a second affidavit from Mr. Hall attaching his second report, prepared in reply to the defendants' evidence. This time, Mr. Hall was asked three questions.

[47] The first question was whether Ms. Langlois' description of the oil consumption issue impacted his understanding of the Oil Consumption Defect as described in his first report. His response was that it did not.

[48] Second, Mr. Hall was asked about the iDFSO—in particular, how it worked and whether its elimination would reduce the vehicles' fuel economy. After explaining what it is and how it functions, he expressed the opinion that its elimination would indeed reduce the vehicles' fuel economy, contrary to Ms. Langlois' assertion.

[49] Third, Mr. Hall was asked to clarify the basis for his opinion in relation to the Oil Indicator Defect in light of Mr. Smith's report. In his response, he asserted that the oil life notification system to which Mr. Smith referred is unrelated to the Oil Indicator Defect.

[50] Finally, Mr. Hall concluded his reply report with a statement, unresponsive to any of the questions he was asked, denying that he had assumed in his first report that the Oil Consumption Defect exists, as Mr. Smith stated.

B. The Defendants' Compliance with s. 5(5) of the CPA

[51] Subsection 5(5) of the CPA states as follows:

(5) A person filing an affidavit under subsection (2) or (4) must

- (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
- (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
- (c) provide the person's best information on the number of members in the proposed class.

[52] Although Ms. Langlois' first affidavit includes the attestation required by s. 5(5)(b), the plaintiff argues that the defendants have omitted material facts that they should have included in their affidavits, thereby entitling that evidence to less weight (citing *Cantlie v. Canadian Heating Products Inc.*, 2017 BCSC 286 [*Cantlie*] at para. 171). In particular, the plaintiff lists the following alleged omissions in support of that submission:

- a) Ms. Langlois deposed that owners/lessees who qualified for the software reprogramming under CSNs W20 and W84 received it "if necessary", which is said to be inconsistent with the dealer instructions pertaining to those CSNs, which indicate that the reprogramming was to be done for all vehicles;
- b) Ms. Langlois did not specify the standard that the defendants used to test whether a vehicle's oil consumption was excessive so as to qualify for a long block replacement under CSN W80;
- c) Ms. Langlois did not disclose that a vehicle may be prone to excessive oil consumption at a later time, even if it passed the oil consumption test;
- d) Ms. Langlois did not disclose when the defendants first became aware of the oil consumption problem, or began receiving complaints about it; and
- e) Ms. Langlois did not explain the function of the iDFSO.

[53] I agree with the defendants that none of these complaints are meritorious. The defendants' obligation was to ensure that all information relevant to certification appeared in Ms. Langlois' affidavit or one or more of the other affidavits previously or

concurrently filed on the application. The “missing” information listed by the plaintiff was either included in the record elsewhere or is more properly seen as falling under the rubric of documentary discovery, which is for later.

[54] In summary, I am not persuaded that the defendants have withheld any significant information relevant to certification. I therefore see no reason to reduce the weight to be given to the defendants’ evidence on this ground.

C. Admissibility of the Hall Reports

[55] The defendants argue that the two reports of Mr. Hall are inadmissible, or should be accorded no weight, on the following two grounds:

- a) many of the opinions he has expressed are outside of his field of expertise as a mechanic; and
- b) he displays a disqualifying bias insofar as he appears to have assumed that the allegations in the ANOCC are true and reached his conclusions accordingly, while conducting no independent research, investigation or analysis.

[56] The defendants cite *Syngenta* and *O’Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 [*O’Connor*], for the proposition that the ordinary rules of evidence, particularly those governing the admissibility of expert reports, apply with the usual rigour on a certification application.

[57] The plaintiff responds that expert evidence should not be subjected to the same level of scrutiny as would be appropriate at a trial, citing *Mueller v. Nissan Canada Inc.*, 2021 BCSC 338 [*Nissan BCSC*], var’d in part on other grounds, 2022 BCCA 338 [*Nissan BCCA*]; *Cantlie*; and *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*].

[58] In response to the defendants’ first objection, the plaintiff says that Mr. Hall’s expertise is similar to that of the expert whose opinions were accepted as part of the evidentiary basis for the certification order that was made in *Nissan BCSC* and

upheld in *Nissan BCCA*. It follows, in her submission, that the same kind of evidence, from the same kind of expert, ought to be admissible here as well.

[59] In response to the defendants' second objection, the plaintiff submits that the defendants' allegation of bias is groundless, inasmuch as Mr. Hall did not simply assume that the allegations in the NOCC were true. Not only did he deny doing so in his second report, it is argued, the NOCC did not allege the existence of the Oil Level Defect and the Oil Indicator Defect until it was amended later, in light of his report. Rather, the plaintiff says that Mr. Hall's conclusions are firmly grounded in his years of experience as a mechanic.

[60] I agree with the defendants that Mr. Hall's reports must meet the usual test for the admissibility of expert opinion evidence if they are to be accepted into evidence on this application. The authorities cited by the plaintiff that call for a reduced level of scrutiny for such evidence derive from *Pro-Sys*, which simply reiterated that the outcome on certification should not turn on a "battle of the experts". Where the standard for the plaintiff to meet is merely some basis in fact, resolving disagreements between the opposing parties' respective experts is more properly seen as a matter for trial. There is no authority for the proposition that the admissibility test itself should be applied with any less rigour in the context of a certification application.

[61] That point was recently reiterated by MacNaughton J.A., writing for the Court, in *Syngenta*, as follows:

[63] ... the rules of evidence themselves are not relaxed on a certification application: *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 at para. 31, leave to appeal to SCC ref'd. 31218 (23 March 2006). To be admissible at a certification hearing, evidence must be otherwise admissible. In other words, it must be relevant, not subject to any exclusionary rule, and more probative than prejudicial: *R. v. Calnen*, 2019 SCC 6 at para. 107; see Sidney N. Lederman, Michelle K. Fuerst & Hamish C. Stewart, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 6th ed (Toronto: LexisNexis Canada Inc, 2022) at § 2.02.

[62] Justice MacNaughton went on to highlight the unique dangers of admitting expert opinion evidence without the requisite gatekeeping scrutiny mandated by the authorities, stating as follows:

[65] Opinion evidence is only admissible in certain circumstances. Lay people may give opinion evidence in limited circumstances: *Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 835, 1982 CanLII 33. Otherwise, to be admissible, opinion evidence must: be relevant to an issue; be necessary to assist the trier of fact; not contravene an exclusionary rule; and be from a witness properly qualified as an expert: *R. v. Mohan*, [1994] 2 S.C.R. 9 at 20-25, 1994 CanLII 80.

[66] Even evidence which meets this threshold may be excluded if the potential risk of its admission outweighs its benefits: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 24. As explained by Justice Cromwell in *White Burgess*, this framework recognizes the unique dangers of admitting opinion evidence:

[18] The point is to preserve trial by judge and jury, not devolve to trial by expert. There is a risk that the jury “will be unable to make an effective and critical assessment of the evidence”: *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, at para. 90, leave to appeal refused, [2010] 2 S.C.R. v. The trier of fact must be able to use its “informed judgment”, not simply decide on the basis of an “act of faith” in the expert’s opinion: *J.-L.J.*, at para. 56. The risk of “attornment to the opinion of the expert” is also exacerbated by the fact that expert evidence is resistant to effective cross-examination by counsel who are not experts in that field: *D.D.*, at para. 54. The cases address a number of other related concerns: the potential prejudice created by the expert’s reliance on unproven material not subject to cross-examination (*D.D.*, at para. 55); the risk of admitting “junk science” (*J.-L.J.*, at para. 25); and the risk that a “contest of experts” distracts rather than assists the trier of fact (*Mohan*, at p. 24). Another well-known danger associated with the admissibility of expert evidence is that it may lead to an inordinate expenditure of time and money: *Mohan*, at p. 21; *D.D.*, at para. 56; *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387, at para. 76.

[Emphasis added by MacNaughton J.A.]

[63] A similar note of caution was sounded by Hinkson C.J. in *O’Connor*, as follows:

[72] On an application for certification, the Court has an important gate-keeping role with respect to the admissibility of evidence. In *Huebner Estate v. PR Seniors Housing Management Ltd. (cob Retirement Concepts)*, 2021 BCSC 837 at para. 15, Justice Murray commented that “it is neither

appropriate nor fair to shirk that responsibility by saying let it in and the objections go to weight rather than admissibility.”

[73] In *Mostertman v. Abbotsford (City)*, 2022 BCSC 1769 [*Mostertman*], Justice Dley wrote that to be admissible in a certification application, the expert opinion must still meet the test from *R. v. Mohan*, [1994] 2 S.C.R. 9, 1994 CanLII 80, and set out the “essential components of qualifications, education, experience, information and assumptions on which the opinion is based, the instructions given, and the research”: *Mostertman* at paras. 19, 21.

[64] Applying that test here, I agree with the defendants that there are significant problems with Mr. Hall’s reports.

[65] First, although I accept that Mr. Hall has a background that is similar to that of Mr. Wong, the mechanic whose expert report (or more accurately, part of it) was accepted into evidence in *Nissan BCSC*, Mr. Hall was less constrained than Mr. Wong with regard to the matters on which he saw fit to express opinions. In *Nissan BCSC*, Ross J. described the limits of Mr. Wong’s opinion as to the existence of the defect at issue in that case as follows:

[155] Mr. Wong’s affidavit does not purport to say that he can determine whether the defect was due to unsound design, negligent manufacture, or the use of inferior materials. Instead, he says that a mechanical or design engineer will be able to provide an opinion on those questions. However, the defendants note, Mr. Wong jumps to the conclusion that a defect exists.

[66] Unlike Mr. Wong, Mr. Hall does indeed purport to render opinions on those matters. In paras. 7 and 8 of his first report, he speaks of various “concerns” he has with the TS engine’s design. In para. 9, he describes what he calls the “main design and/or manufacturing flaw of the Engines”. I agree with the defendants that such assertions fall beyond the ambit of his expertise. No part of his experience or training qualifies him to comment on alleged shortcomings of design or manufacture, as he purports to do. It follows that those parts of his reports in which he does so are inadmissible on that basis.

[67] On the other hand, I accept that he is qualified to provide opinion evidence about the various parts of automobile engines, how they are supposed to function, how they may malfunction and how they can be repaired if they do. It is also within

the purview of his expertise to explain the role that TSBs may play in the repair and maintenance of automobiles. That does not mean, however, that it is helpful for him simply to paraphrase the TSBs that he was given in this case, while commenting that they are, in his view, “vaguely written” or “likely generated to minimize costs” as he did in paras. 25 and 26 of his first report. I therefore find those paragraphs to be inadmissible on that basis.

[68] The most serious flaw in the two reports is the lack of transparency as to the sources of information Mr. Hall drew upon in reaching his conclusions.

[69] In his first report, in answer to the first question he was asked, Mr. Hall stated that the three specific defects he identified were disclosed in the materials he was given, which included only the NOCC and the two TSBs. However, in his second report, in answer to Mr. Smith’s criticism, he denied that he assumed that a defect exists, or that he relied on the allegations in the NOCC or assumed that they were true. At the same time, he acknowledged that the “Factual Assumptions” listed in Part III of his first report (including that the MultiAir Engine series “contains a dangerous, latent defect that causes engines to improperly burn off or consume abnormally high amounts of oil” and that the defendants “are well aware of such defects but continue to permit the engines to be sold”) summarised allegations that he took from the NOCC. The inconsistency undermines the weight that his associated opinions can be given in the balancing that the court must do at the gatekeeper stage of the admissibility test.

[70] That being said, I would not go so far as to conclude, as the defendants urge me to do, that Mr. Hall displays a bias insofar as he could only have reached the conclusions he did by accepting the allegations in the NOCC as true. As the plaintiff argues, Mr. Hall reached conclusions and provided particulars that could not have come from the NOCC, particularly not the original version of it that he was given.

[71] If, as I accept, Mr. Hall did not base his conclusions on the NOCC, the only other source of information he identified are the two TSBs. In answering the second question put to him in his first report (inviting him to describe the possible nature of

the common defects he identified), he did not refer to the NOCC or the TSBs, but rather to other, mostly unidentified, sources of information. As I have already noted, he did refer to the TSBs in answering the third question (whether there is a methodology to determine if the defects exist), but only as a means of establishing the existence of the Oil Consumption Defect, not the other two.

[72] The TSBs themselves were not appended to Mr. Hall's first report, but they were attached as exhibits to the first affidavit of Ms. Langlois. According to her, the 2015 TSB was "a general information guideline about the acceptable rate of oil consumption". It states on its face that it "applies to all gasoline-powered 2012-2016 FCA US LLC vehicles equipped with gasoline engines." Ms. Langlois adds that it replaced a previous TSB that predated the class period. On that basis, she asserted that it does not support the plaintiff's pleaded allegation that the defendants were aware of a problem with excess oil consumption in the Affected Vehicles in 2015. Mr. Hall apparently disagrees with that assertion. In para. 25 of his first report, he asserted that "[i]ssues of known oil loss and burning oil scenarios were addressed in [the 2015 TSB]", but he does not explain how he arrived at that conclusion, or what part of the document supports it. Equally unhelpful is the bald opinion he expressed in that same paragraph to the effect that the "accepted rate of oil consumption" stated in the 2015 TSB was "not acceptable" in his view, but he does not identify any independent standard by which an "acceptable" rate of consumption should be measured. That particular opinion is therefore of no assistance to the Court either.

[73] The 2020 TSB relates more directly to the Oil Consumption Defect in that, according to Ms. Langlois, it anticipated the issuance of the relevant CSNs shortly thereafter. It prescribed a test for determining if the Affected Vehicles were consuming excessive oil and stated that, if they were, the problem may, at least in some cases, have to be repaired by way of a replacement of the engine's long block. Contrary to Mr. Smith's critique of Mr. Hall's analysis in this regard, Mr. Hall had at least some basis to conclude that the 2020 TSB discloses the existence of the Oil Consumption Defect.

[74] As I have previously observed, however, neither the NOCC nor the TSBs say anything about the Oil Level Defect or the Oil Indicator Defect. Mr. Hall makes no effort to justify his conclusions in relation to those alleged defects with reference to anything stated in the TSBs. His discussion of those alleged defects in answer to question #2 consists primarily of a recitation of new facts attested nowhere else in the evidence, with no indication as to their source. He does not claim to have examined any of the Affected Vehicles or their components, or to have reviewed any technical manuals describing their parts or how they operate. The reader is simply left to guess at the source of the information he imparts in relation to those things.

[75] It is insufficient for the plaintiff to argue that Mr. Hall is here relying simply on his years of experience as a mechanic. To accept such evidence on that basis would require the kind of “act of faith” that Cromwell J. warned against in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 18. Put simply, the court must be able to follow the expert’s reasoning, including the sources of information he has relied upon in arriving at his opinions. That is why the Rules of Court and the common law require an expert’s assumptions to be set out expressly in the report. In this case, that requirement was, at least to some extent, not met.

[76] That being said, it is also apparent that Mr. Hall has done more than just state bald and unsubstantiated conclusions, as the defendants contend. For example, he attributed the Oil Consumption Defect to the fact (the source of which is admittedly not identified) that the subject engines use electrical solenoids to activate the intake valves, rather than conventional camshafts. He then reproduced images that he apparently took from various websites to illustrate how he understands the subject engines to operate, and described the precise mechanism that renders them prone to consuming oil at an excessive rate. Image 4 in his report, which he downloaded from an identified website, depicts one of the subject engines; although having presented the image, he does not otherwise refer to it in his analysis.

[77] It is noteworthy in this regard that the defendants adduced no evidence directly denying the accuracy of Mr. Hall’s description of the subject engines, how

they differ from conventional engines, and why it is that they may at times consume oil at an excessive rate. Despite responding to Mr. Hall's first report in other ways, Ms. Langlois and Mr. Smith say nothing about those things. Ms. Langlois described the reason for the excessive oil consumption in somewhat different, but not necessarily contradictory terms. The main conflict in the parties' evidence in this regard relates to whether the tendency to burn excess oil is common to all engines in the class (per Mr. Hall) or only to some (per Ms. Langlois).

[78] On the contrary, Ms. Langlois appears to confirm, at least in part, the accuracy of Mr. Hall's opinion that the subject engines' tendency to consume oil excessively is attributable in the end to insufficient sealing of the piston rings. She describes the design change that ended the class period as follows:

Commencing in mid-August, 2018, FCA implemented for 2019 Model Year vehicles a design change to the TS Engine, which FCA determined improved piston ring sealability, thereby permanently eliminating the potential for the oil consumption issue to present itself in any vehicles with the TS Engine.

[79] Having weighed all of these factors in light of the two-stage admissibility test discussed above, I have concluded that the following paragraphs of Mr. Hall's reports should be excluded from the evidence:

- a) First report: paras. 1(b) and (c), 6–9, 19–21, 25–26 and 32; and
- b) Second report: the answer to question #3 (relating to the Oil Indicator Defect).

IV. DISCUSSION OF THE ELEMENTS OF THE CERTIFICATION TEST

A. Causes of Action

1. Legal Principles

[80] The test to be applied under s. 4(1)(a) of the *CPA* in determining if the ANOCC discloses viable causes of action is the same as that applied in determining if a pleading should be struck on an application under s. 9-5(1)(a) of the *Supreme Court Civil Rules* as disclosing no reasonable claim—namely, a pleading should not

be struck on those grounds unless it is plain and obvious that no claim exists: *Syngenta* at para. 15.

[81] In *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495 [*Bowman*], Matthews J. helpfully summarised the principles to be applied on this branch of the test, as follows:

[11] Section 4(1)(a) of the *Class Proceedings Act* requires that the pleadings disclose a cause of action. Assuming all facts pleaded to be true, the pleadings disclose a cause of action unless it is plain and obvious that the claim cannot succeed: *Pioneer Corp v. Godfrey*, 2019 SCC 42 at para. 27 [*Godfrey* SCC], citing *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 63, *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 20 and *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25.

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

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

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

[15] A claim will be bound to fail if the pleading does not set out the elements of the cause of action and the material facts in support of them: *Imperial Tobacco* at para. 22. If the pleading is sound, then the question for a chambers judge is whether a superior court has held that even where the facts pleaded are assumed to be proven, the claim does not exist at law, as in *Elder Advocates of Alberta* at paras. 62–63; *Sangha v. Reliance Investment Group Ltd.*, 2010 BCCA 340 at para. 22; and *Carley Estate v. Allied Signal Inc.*, 35 B.C.L.R. (3d) 54 at paras. 8–9.

2. Negligent Design and Manufacture and Failure to Warn

[82] The defendants argue that the plaintiff's claims in negligence and negligent failure to warn are bound to fail insofar as the ANOCC untenably seeks damages in negligence for pure economic loss. In *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, it was held that claims of that kind can succeed only if they fall into one of a few exceptional categories. In the defendants' submission, the ANOCC fails to plead sufficient facts to bring the claim within any of those categories.

[83] I disagree. A similar argument was rejected in *Nissan BCCA*. One of those categories, the one asserted here, arises where it is alleged that a defective product poses an imminent risk of physical harm to persons or property. As in *Nissan BCCA*, the ANOCC pleads that the alleged defects pose a material risk to the operators and passengers of the Affected Vehicles, primarily because of their potential to cause the vehicle to stall unexpectedly (see for example paras. 20, 24, 34, 68, 71(c) and 74).

[84] The pleaded risk of stalling was held in *Nissan BCCA* to satisfy this element of the cause of action. The defendants argue that the risk is less imminent in this case, insofar as the vehicle operator can avoid any danger by topping up the oil before the level drops to the point that the engine is at risk of stalling. However, the plaintiff also pleads that, due to the Oil Indicator Defect and the Oil Level Defect, the vehicle may stall unexpectedly and without prior warning.

[85] I am therefore satisfied that this cause of action is adequately pleaded.

3. Misrepresentation

[86] The ANOCC pleads both express misrepresentations and misrepresentation by omission (the latter being similar to the claim of "failure to warn" discussed above). The defendants argue that both of these claims are inadequately pleaded.

[87] In particular, the defendants argue that the ANOCC fails to plead an essential element of the tort, namely, that the alleged representations were untrue or misleading. In their submission, the representations listed in the ANOCC are incapable of being proven true or untrue, but are more accurately described as

“puffery” of the kind that has previously been held to be incapable of grounding a claim of this nature (citing *Marcinkiewicz v. General Motors of Canada Co.*, 2022 ONSC 2180 and *Lam v. Flo Health Inc.*, 2024 BCSC 391). Further, the defendants argue that none of representations listed in the ANOCC relate to the defects alleged.

[88] With respect to the claim of misrepresentation by omission, the defendants repeat their argument about the plaintiff’s failure to plead a dangerous defect, a requirement which, they say, is essential in this context as well because the defendants have no duty to disclose defects that relate only to product quality (citing *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, aff’d 2013 ONCA 657, leave to appeal to SCC ref’d [2013] S.C.C.A. No. 498, and *Williams v. Canon Canada Inc.*, 2011 ONSC 6571).

[89] In addition, the defendants argue that the plaintiff’s pleading is also deficient for failure to plead material facts supporting the essential element of reliance, beyond a bald allegation that the plaintiff and other class members relied on the representations. They note that a similar deficiency led this court to find this cause of action inadequately pleaded in *Cantlie*.

[90] The plaintiff responds that it is sufficient for the ANOCC to plead that the Affected Vehicles were represented to be safe, durable and fit for use, and that, owing to the alleged defects, those representations turned out to be untrue (citing *N&C Transportation Ltd. v. Navistar International Corporation*, 2016 BCSC 2129, aff’d 2018 BCCA 312, leave to appeal to SCC ref’d [2018] S.C.C.A. No. 416 [*Navistar*]). With respect to the element of reliance, the ANOCC pleads “that the Plaintiff and Class Members had no choice but to rely on” the misrepresentations alleged (at para. 82(d)). It also pleads, at para. 88, that they reasonably relied on the alleged misrepresentations in purchasing or leasing the Affected Vehicles, and that they would not have done so had they known about the defects alleged. In para. 90, the ANOCC pleads that class-wide reliance can be inferred on the basis that the misrepresentation alleged “would naturally tend to induce the Plaintiff and the Class Members to act upon it (by purchasing the Affected Vehicles)”. In para. 91, the

ANOCC pleads that class-wide reliance can also be inferred on the basis that class members would not knowingly purchase a vehicle that poses a substantial safety risk to the driver, occupant and other road users.

[91] The plaintiff submits that similar claims were held to be adequately pleaded in *Nissan BCCA*, at least for purposes of s. 4(1)(a) of the *CPA*, even without the particulars of reliance pleaded in this case. In *Nissan BCSC*, Ross J. held (at paras. 58–59) that it was sufficient that the plaintiff pleaded that:

- a) Nissan knew of the problems with the timing chain but refused to disclose those problems;
- b) the proposed class members would not have purchased the vehicles if they had known of the alleged problems;
- c) they have suffered damages as a result; and
- d) if the members of the class had known about the problem, they would have brought their vehicles in for repair during the warranty period.

[92] This aspect of his decision was upheld in *Nissan BCCA* at paras. 72–78.

[93] I agree with the plaintiff that this case is indistinguishable from *Nissan BCSC* and *Nissan BCCA* in this respect, and I therefore reject the defendants' arguments on that basis. However, as in *Nissan BCSC* and *Nissan BCCA*, the claim must be restricted to purchasers of new vehicles.

4. Implied Warranty

[94] The ANOCC pleads breaches of an express warranty as well as an implied warranty under the *Sale of Goods Act*, R.S.B.C. 1996, c. 410. During the exchange of written arguments in advance of the hearing before me, however, the plaintiff abandoned those claims and proposed instead to advance a new cause of action based on a warranty implied at common law.

[95] The defendants argue that such a claim is not viable either, on the basis that no warranty can be implied on terms that are inconsistent with the express warranty that was provided. However, the same argument was rejected by the Court of Appeal in *Nissan BCCA*. In upholding the certification judge's ruling that such a claim was not bound to fail, Griffin J.A., writing for the Court, reasoned that it was arguable that the express warranty limited but did not exclude implied warranties. In her view, the question of interpretation of the warranty was more properly seen as a triable issue (at para. 91). I have been given no reason to arrive at a different conclusion in this case.

[96] Accordingly, I am satisfied that this claim is adequately pleaded, provided it is restricted, as it was in *Nissan BCSC* and *Nissan BCCA*, to purchasers of new vehicles.

5. Breach of Consumer Protection Legislation

[97] The ANOCC advances causes of action alleging breaches of the *Competition Act*, R.S.C. 1985, c. C-34, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and parallel legislation in other provinces and territories of Canada. The defendants argue that these claims are deficient in two respects.

[98] First, they say that that such claims can only be successfully maintained if the deceptive or misleading conduct relates to a dangerous defect. The plaintiff disputes that such a requirement exists, but I need not resolve that dispute because I have already found that, to the extent it is required, the ANOCC adequately pleads a dangerous defect. I therefore reject this argument on the same basis.

[99] Second, the defendants argue that some of the parallel provincial statutes invoked in the ANOCC (namely, those of Ontario, Prince Edward Island, New Brunswick and Newfoundland) require the defendant to be in a relationship of direct contractual privity with the consumer before a successful claim can be brought under those statutes (citing *Bhangu v. Honda Canada Inc.*, 2021 BCSC 2381 and *MacKinnon v. Pfizer Canada Inc.*, 2023 BCSC 2223, rev'd in part on other grounds, 2022 BCCA 151 [*MacKinnon BCCA*]).

[100] The plaintiff responds that the law in Ontario is not as clear as the defendants say it is. They cite *Kalra v. Mercedes Benz*, 2017 ONSC 3795 [*Kalra*]; *Rebuck v. Ford Motor Company*, 2018 ONSC 7405; and *Drynan v. Bausch Health Companies Inc.*, 2021 ONSC 7423, as examples of cases in which Ontario courts have noted that Ontario law is in an uncertain state on this point, which therefore makes it impossible for this Court to find that the claim is bound to fail. Further, the plaintiff argues that Iyer J. (as she then was) in *Bhangu* misread the legislation of Prince Edward Island in reading it as she did. She also notes that this court has yet to find that the New Brunswick or Newfoundland statutes requires privity. In the decisions cited by the defendants, she says, the point was conceded rather than adjudicated.

[101] To this, the defendants argue that I am bound by the previous decision of this court finding the law in those provinces to be as this court has already found it to be.

[102] Complicating matters further in this already murky area is the fact that this Court and the Court of Appeal in *Nissan BCSC* and *Nissan BCCA* found that the cross-country claims under the same consumer protection legislation were adequately pleaded, without addressing this issue at all. Nevertheless, the plaintiff says I am bound to follow *Nissan BCCA* in this respect, rather than the decisions of this court upon which the defendants rely.

[103] One reason the Court of Appeal in *Nissan BCCA* omitted to address this issue may be that Griffin J.A. had already found, in addressing the viability of the claim for breach of an implied warranty, that the plaintiff in that case had adequately pleaded a relationship of contractual privity between the class and the defendant sufficient to ground that claim. In particular, she found that the plaintiff's pleading that the defendant was part of a common enterprise, and as such, a seller and therefore potentially liable on the basis of a contractual warranty, was not bound to fail (at paras. 93–98).

[104] In this case, the plaintiff advances similar allegations. In particular, in para. 11 of the ANOCC, she pleads that the defendants sell, lease and repair the Affected Vehicles through its network of dealers “*who are its agents*” [emphasis added]. In

para. 14 of the ANOCC, she alleges that the defendants operate as an integrated unit and are collectively responsible for the design, research, development, testing, manufacture, production supply, distribution, marketing, leasing *and sale* of the Affected Vehicles to residents of Canada [emphasis added].

[105] I agree with the plaintiff that those pleaded allegations suffice to raise a triable issue as to whether the defendants are “sellers” and, as such, in a relationship of contractual privity with the class members. On that basis, I reject the defendants’ argument that the statutory claims in those named jurisdictions are bound to fail for want of that element, to the extent it is required.

B. Identifiable Class

[106] It is common ground that this second element of the test is satisfied, given that the plaintiff has agreed to define the class as proposed by the defendants.

C. Common Issues

1. The Test

[107] The third element of the certification test at s. 4(1)(c) of the *CPA* requires the plaintiff to show that the claims of the class members raise common issues.

[108] At the hearing before me, the parties devoted a considerable part of their respective arguments to addressing whether the commonality inquiry should proceed in one step (as the plaintiff argued) or two – the first step being whether the plaintiff had adduced some basis in fact to show that the proposed common issue existed (as the defendants argued). While my decision was under reserve, the Court of Appeal released its decisions in *Noramco LLC v. British Columbia*, 2026 BCCA 272 (“Noramco”) and *McKinsey & Company, Inc. United States v. British Columbia*, 2026 BCCA 284 (“McKinsey”). At the request of the defendants, I invited the parties to provide me with supplemental submissions addressing the impact of those decisions on the question before me in this case. They both did so. Not surprisingly, each contends that those decisions support their respective positions. Of course,

they cannot both be right. I agree with the plaintiff that it is her position that has been endorsed by the Court of Appeal and is now binding on me.

[109] In *Noramco*, the Court of Appeal began its judgment with the following guidance for certification judges:

[4] The certification application and the subsequent appeals are examples of the unhelpful and disproportionate overcomplication of what should be a relatively straightforward inquiry brought early in a proceeding. That inquiry is to determine, as a procedural matter, whether there is some basis in fact to conclude that claims raise issues that can be decided commonly so as to avoid duplication of fact finding or legal analysis and whether it is preferable to resolve those issues in a common issues trial. The screening of cases through this lens should be functional and pragmatic, designed, not as a concealed merits test, but as a means of ensuring that a case will not founder at the merits stage for lack of commonality or preferability.

[5] In our view, it is time to return to basics. We encourage parties as well as chambers judges to focus on the procedural issues engaged by commonality and the other certification criteria.

[110] On the question argued at length before me, the Court of Appeal resolved the debate as follows:

[85] The certification judge analyzed whether he was required to apply a two-part test to establish, first, the existence of a common issue and, second, commonality.

[86] Much ink has been spilled about this issue. In our view, the question of whether there is a one- or two-part test is a distraction and there is no utility in chambers judges in this province continuing to evaluate whether a two-part test is the test or is satisfied.

[87] The real issue is the practical application of the evidentiary standard in light of the issues raised in a claim and whether those issues can be usefully resolved on a common basis in a way that moves the litigation towards resolution. This is the approach the judge took. He concluded an analytical two-part test had not gained much traction in British Columbia, but in any event, and from a practical and functional perspective, not much turned on whether one or two steps were involved: RFJ at paras. 584–593. We agree. No legal error lies in his conclusion.

[88] The judge relied on this Court's treatment of the approach to some basis in fact found in *Nissan*, *Trotman*, and *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127, as well as trial court decisions in *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371, and *Bowman v. Kimberly-Clark Corporation*, 2023 BCSC 1495. *Pro-Sys* (para. 110) also supports this analysis on commonality:

The multitude of variables involved in indirect purchaser actions may well present a significant challenge at the merits stage. However, there would appear to be a number of common issues that are identifiable. In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether these questions are common to all the class members.

[Emphasis added.]

[89] We agree with the judge's reasoning. The judge accurately described the development of the law in British Columbia. We reject the appellants' proposition that in doing so, he departed from well-settled jurisprudence requiring the satisfaction of a two-part test.

[111] The legal principles to be applied at this stage of the analysis were set out as follows:

[37] "Common issues" is defined in the *CPA* as meaning either "(a) common but not necessarily identical issues of fact, or (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts": s. 1.

[38] An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. An issue will not be "common" unless the issue is a "substantial ingredient" of each of the class members' claims: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18. In other words, a question posed by a common issue will be answered for each class member. The answer may be positive or negative. It may spell success or failure in respect of that issue, and it does so for each class member.

[39] The Court in *Pro-Sys* summarized the key principles about commonality:

[108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:

(1) The commonality question should be approached purposively.

(2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It not necessary that common issues predominate over non-common issues. However, the class members' claims

must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[40] However, there is a nuance. In *Vivendi Canada Inc. v. Dell’Aniello*, 2014 SCC 1 at paras. 45–46 [*Vivendi*], the Court clarified commonality is not a requirement that the resolution of a common issue means success for all class members. The answer to a common issue can also vary between class members: “It is enough that the answer to the question does not give rise to conflicting interests among the members”: *Vivendi* at para. 46. In other words, “success for one member must not result in failure for another”: *Vivendi* at para. 45.

[41] There must be an evidentiary foundation to satisfy each of the certification criteria. Simply put, it is not sufficient merely to plead a common issue. More is required. There is no dispute s. 4(1)(c) of the CPA requires “some basis in fact” to support a common issue: *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 27; *Pro-Sys* at paras. 99–100; *Hollick* at para. 25. This means there must be some basis in the evidence showing the issues are common to the class members. The certification stage is not meant to test the merits of the action: *Pro-Sys* at para. 99, citing *Hollick* at para. 16. The focus instead is on “whether there is a rational connection between the class as defined and the asserted common issues”: *Hollick* at para. 19. The class representative must show some basis in fact to support the certification order. The evidence on the application should be confined to the certification criteria: *Hollick* at para. 25. The focus, then, is on the certification criteria rather than the factual basis for the claim.

[42] In *Trotman v. WestJet Airlines Ltd.*, 2022 BCCA 22, Chief Justice Bauman reaffirmed the commonality inquiry is not a test of the merits of the claim:

[57] The certification judge is not to conduct an adjudication on the merits. There need only be some basis in fact for the proposition that the issue can be determined on a class-wide basis: see *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 99 [*Pro-Sys*], citing *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25. The evidence at this stage “goes only to establishing whether these questions are common to all the class members”: *Pro-Sys* at para. 110. Said another way: “is there some evidence of class-wide commonality, that is some evidence that the proposed common issue can be answered on a class-wide basis”: *Grossman v. Nissan Canada*, 2019 ONSC 6180.

[Emphasis added.]

[43] Some basis in fact is a low threshold. The standard does not contemplate a detailed assessment of contested facts; it asks only whether

there is some basis in the evidence to support certification: *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 42–43. A defendant is allowed to respond to the plaintiff with its own evidence, but the court cannot engage in a detailed weighing of conflicting evidence: *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58 at para. 68; *AIC Limited* at para. 40. This is because certification occurs at an early stage of proceedings when the court is “ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight”: *Pro-Sys* at para. 102.

[44] As described in *Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, leave to appeal to SCC ref’d, [2019] S.C.C.A. No. 311, the evidentiary threshold for establishing some basis in fact can be helpfully contrasted with there being no basis in fact:

[104] I take from this that some basis in fact is to be contrasted with no basis in fact (as in *Chadha*). It is required that a plaintiff lead some evidence that there is a plausible and realistic methodology to establish loss on a class-wide basis, but where the methodology consists of an econometric model, it is not necessary to build the model or identify with precision what information will be used to populate the model, as long as there is some evidence that information will be available to do so.

[45] It has been said that a plaintiff need only show there is a triable factual or legal issue that, once determined, will advance the litigation: *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 at para. 103, leave to appeal to SCC ref’d, [2021] S.C.C.A. No. 374, citing *Service v. University of Victoria*, 2019 BCCA 474 at para. 59.

[46] While this language is helpful in indicating the threshold for showing an issue is common, it is important not to import into the analysis a test functionally equivalent to the test for summary judgment. The point in a certification application is to ensure there is some basis in the evidence to support certification viewed as a matter of form, not as a kind of concealed preliminary merits test. In other words, there should be some minimal factual basis that the claims are common to the class.

[47] Whether a common issue “advances the litigation” should be considered from the perspective of *the litigation*, not the plaintiff: *Pioneer Corp.* at para. 109. A common issues trial “has the potential to *either* determine liability *or* terminate the litigation”: *Pioneer Corp.* at para. 109. In other words, the litigation is “advanced” in that it is moved towards resolution, not that it is “advanced” in the plaintiff’s favour.

[48] In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the proposed common issue, and whether there is some evidence that supports the argument it is a common issue across members of the class: *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 133 [*Nissan*], leave to appeal to SCC ref’d, [2022] S.C.C.A. No. 446.

[112] In *McKinsey*, Fisher J.A., writing for the Court, summarized those principles as follows, at para. 42:

- The commonality requirement should be a relatively straightforward inquiry to determine as a procedural matter whether there is some basis in fact to conclude the claims raise issues that can be decided commonly so as to avoid duplication of fact finding or legal analysis;
- The screening of cases through this lens should be functional and pragmatic, designed not as a concealed merits test, but as a means of ensuring that a case will not founder at the merits stage due to a lack of commonality; and
- It is time to return to basics, and to encourage parties as well as certification judges to focus on the procedural issues engaged in assessing the commonality requirement.

[113] With those principles in mind, I turn to the proposed common issues (“PCIs”) identified by the plaintiff.

2. Vehicle Defects (PCIs 1–3)

[114] PCI #1 asks whether the Affected Vehicles contain one or more of the three alleged defects in design, development or manufacturing.

[115] The principal defect alleged is the Oil Consumption Defect. It is not disputed that at least some of the Affected Vehicles were, prior to the repair campaign, prone to consuming oil excessively. Nevertheless, the defendants maintain that the question of whether such a defect is or was present in the Affected Vehicles generally is not a proper common issue for certification, for a number of reasons.

[116] First, they say, adjudicating the question of whether some vehicles were prone to that problem prior to the repair campaign would not significantly advance the litigation for anyone, inasmuch as the question is not disputed. In addition, they say, the evidence before the Court shows that only a small number of the Affected Vehicles had that problem, as demonstrated by the fact that fewer than 10% of the Affected Vehicles subject to CSN W80 failed the prescribed consumption test and thereby qualified for a long block replacement. Moreover, they rely on Mr. Smith’s opinion that it will be impossible to determine whether any particular vehicle had that problem without an individualised inspection of the vehicle.

[117] What is really in issue in this action, according to the defendants, is whether the problem was effectively resolved by the repair campaign. They submit that there is no evidence suggesting it was not, leaving no evidentiary basis to certify this PCI, and hence this action generally. They cite *Maginnis and Magnaye v. FCA Canada*, 2020 ONSC 5462 [*Maginnis*] and *Tress v. FCA US LLC*, 2023 SKKB 186, leave to appeal to ref'd 2024 SKCA 31 [*Tress*], as examples of cases, said to be similar to this one, in which certification was refused on such grounds.

[118] The plaintiff responds that, because the defendants are unable to tell whether or when any particular vehicle will consume excess oil as a result of the Oil Consumption Defect, they have effectively treated all of the Affected Vehicles as being prone to the problem. This is apparent, according to the plaintiff, from the instructions provided to dealerships in relation to CSNs W20 and W84 to implement the software update eliminating the iDFSO calibration in all of the Affected Vehicles subject to those CSNs.

[119] The plaintiff argues further that the repair campaign failed to make the class members whole because:

- a) it was rolled out years after the Affected Vehicles were allowed on the road, leaving the class members who experienced the problem before receiving a repair without compensation for the added cost of additional maintenance, including the cost of having to top up the oil more often than ought to have been necessary;
- b) for vehicles in the CSN W20 and W84 groups, the essence of the repair was to eliminate the iDFSO calibration, which created a new problem, namely, a reduction in fuel economy; and
- c) CSN W80 recognises on its face that those vehicles that did not demonstrate overconsumption at the time of the testing might still encounter the problem in the future, leaving the 90% of class members in that group who were denied a long block replacement on that basis in the

invidious position of having to continue to monitor the rate of consumption on their own in the hope that they will identify a problem before a dangerous stall occurs.

[120] I agree with the plaintiff that the record discloses a basis in fact supporting the conclusion that the question of whether the Oil Consumption Defect can be adjudicated on a class-wide basis. The pervasiveness of the problem among the Affected Vehicles, and the extent to which it may have been resolved by the repair campaign without impacting fuel economy, are more properly seen as issues for trial. The parties devoted considerable attention to arguments directed at whether the record also discloses a basis in fact supporting the conclusion that the software reprogramming out under CSNs W20 and W84 led to a reduction in fuel economy, but that is not a question raised in this or any of the other PCIs.

[121] Suffice it to say that there is evidentiary support in Mr. Hall's report and the affidavit of Ms. Langlois for the plaintiff's allegation that the Oil Consumption Defect can be attributed to insufficient sealing of the piston rings. If so, the problem may be common to all of the Affected Vehicles, regardless of whether it manifested itself in a manner that gave rise to a compensable loss in any particular case.

[122] With respect to the other alleged defects, the defendants submit that the only evidence supporting their existence is to be found in the report of Mr. Hall, which I have now found inadmissible on this point. Although the Oil Indicator Defect may also be attested in the affidavit of Ms. McGregor, the defendants are correct in pointing out that Mr. Hall provides the only evidence that such a defect affects any of the Affected Vehicles other than hers. I therefore agree with the defendants that there is no basis in fact to justify certifying this common issue in relation to the alleged defects other than the Oil Consumption Defect.

[123] PCI #2 asks whether the defect(s) pose unreasonable safety risks to the class members. The defendants object to this PCI on the basis that the plaintiff has failed to adduce some basis in fact to show that the alleged defect is a dangerous one or that the alleged danger is common across the class. In support of that submission,

they note that there have been no reports of anyone being injured and no remedial action taken by regulatory authorities.

[124] I disagree with the defendants that the requisite factual basis for this PCI is lacking. Ms. Langlois herself recognises that allowing the oil level to get too low without addressing the problem may cause the engine to stall. Although Ms. Langlois disputes that such a scenario can be dangerous, her reasoning is that low oil levels are “possibly” detectable by the driver with adequate time to prevent or mitigate a vehicle stall, and stalls are relatively rare and will occur only when the vehicle is moving slowly. I agree with the plaintiff that none of those assertions, alone or in combination, suffice to negate the basis in fact supporting the conclusion that the Oil Consumption Defect may render the Affected Vehicles prone to dangerous stalling, like that experienced by Ms. McGregor. In any event, I am bound by *Nissan BCCA*, in which it was held that resolving a factual dispute as to whether or not a defect is dangerous is a matter for trial, not certification.

[125] PC #3 asks if the defects(s) cause or contribute to, or increase the risk of, engine damage. The defendants object to this PCI on two grounds. First, they say that there is no evidence that such damage has occurred in any of the Affected Vehicles. Second, they say that mere exposure to risk is not a compensable harm in a negligence action, citing *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19; *Palmer v. Teva Canada Limited*, 2024 ONCA 220; *Mann-Campbell v. JUUL Labs Canada, Ltd.*, 2025 BCSC 771; and *Dussiaume v. Sandoz Canada Inc.*, 2023 BCSC 795.

[126] The plaintiff responds that evidence of the risk to the health of the engine posed by low oil levels can be found in Mr. Hall’s report, the TSBs and the CSNs. In her submission, the ANOCC does not seek compensation for mere exposure to risk *per se*, but rather for the costs incurred in averting a risk of imminent property damage, which is potentially compensable (citing *Nissan BCCA*, in which a similar common issue was certified).

[127] I agree with the plaintiff, for the reasons she has given, that PCI #3 is a proper common issue. It is not necessary, in this context, to deal with the plaintiff's alternative argument seeking to justify PCI #3 based on the availability of damages for "accelerated scrappage".

3. Negligent Design and Manufacture (PCIs 4–6)

[128] PCI #4 asks if the defendants owed a duty of care to ensure that the Affected Vehicles were safe and fit for their intended use. PCI #5 asks what, if such a duty was owed, the applicable standard of care was. PCI #6 asks if the defendants breached that standard of care.

[129] The defendants object to PCI #4 on the basis that it is unnecessary and will not advance the litigation. In particular, they say that it is settled law that "vehicle manufacturers owe a duty to ensure that their products are reasonably safe" but not "to ensure that their products will perform as expected other than in matters of safety". In objecting to PCIs #5 and 6, they repeat the same arguments that they raised in arguing that the ANOCC fails to plead a viable claim in negligence. They also say that the plaintiff has failed to adduce sufficient evidence to establish the requisite factual basis to show that the defects were dangerous, so as to justify these PCIs.

[130] I have already rejected the defendants' substantive arguments in relation to the viability of the claim in negligence and the sufficiency of the evidence adduced as to the potential dangerousness of the Oil Consumption Defect. I therefore accept that it is appropriate for a common issue to be certified in respect of the claim in negligence. However, I agree that the plaintiff's proposed formulation of PCIs #4–6 is unwieldy and potentially confusing. I prefer instead the single question covering the cause of action in negligence that was certified by Ross J. in *Nissan BCSC* and affirmed by the Court of Appeal in *Nissan BCCA*, which was as follows: "Did the defendants breach a duty of care owed to class members and, if so, when and how?"

4. Failure to Warn (PCIs 7–8)

[131] PCIs #7 and 8 ask:

- a) if the defendants knew or ought to have known of the defects and the potential danger they posed to class members; and
- b) if so, did the defendants breach the standard of care by failing to warn class members at all, or in an inadequate and/or timely manner, of that danger.

[132] The defendants' objection to these PCIs repeats their argument that the underlying cause of action is inadequately pleaded, an argument that I have already rejected. I see no reason not to certify these PCIs as proposed by the plaintiff.

5. Negligent Misrepresentation (PCIs 9–12)

[133] PCI #9 asks if the defendants misrepresented the safety, performance, reliability and/or quality of the Affected Vehicles, including by omitting to disclose knowledge of the alleged defects. PCI #10 asks whether, if so, those misrepresentations were made negligently. Here too, the defendants object to those PCIs, relying on arguments grounded in alleged deficiencies in the plaintiff's pleading of this cause of action that I have already rejected.

[134] PCI #11 asks if the reliance of the class members can be inferred on a class-wide basis, and if so, whether that reliance was reasonable. PCI #12 asks whether, if the answer to PCI #11 is "no", causation can otherwise be determined on a class-wide basis.

[135] The defendants argue that PCIs #11 and 12 cannot be answered affirmatively, citing *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050, aff'd 2015 BCCA 252, leave to appeal to SCC ref'd [2015] S.C.C.A. No. 326. In that case, Fisher J., as she then was, accepted that class-wide reliance may be inferred in some cases, but the facts of that case did not lend themselves to such an inference, having regard to the variety of misrepresentations

alleged (paras. 198, 227). The defendants also cite *MacKinnon v. Volkswagen Group Canada Inc.*, 2024 ONSC 4988, in which it was held that reliance may be inferred only in relation to a core representation.

[136] The plaintiff responds that where, as here, the alleged omission relates to a dangerous defect, it can reasonably be inferred that the class members would not have purchased the product had they been advised of it. She adds that reliance can also be inferred where the representations are calculated or would naturally tend to induce reliance, citing *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471; *Valeant Canada LP/Valeant Canada S.E.C. v. British Columbia*, 2022 BCCA 366, leave to appeal to SCC ref'd [2023] S.C.C.A. No. 13; *Bowman*; and *Kalra*.

[137] In support of PCI #12, the plaintiff cites *Collette v. Great Pacific Management Co. Ltd.*, 2004 BCCA 110 and *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361. In those cases, it was held that proof of reliance need not always be required to establish liability in a negligent misrepresentation case, provided causation can be established by other means.

[138] I am satisfied, based on the authorities cited by the plaintiff, that the question of whether causation, in the form of reliance or otherwise, can be inferred on a class-wide basis is an open one that falls to be answered in light of the facts of the particular case before the court. It is a question for trial. I therefore find that these PCIs are appropriately certified.

6. Implied Warranty (PCIs 13–14)

[139] PCI #13 asks whether the defendants have an implied contract with the class members that the Affected Vehicles would be of merchantable quality and fit for their intended use. PCI #14 asks whether the defendants breached one or both of those covenants. Once again, the defendants object to those PCIs, relying on arguments, grounded in alleged deficiencies in the plaintiff's pleading of this cause of action, that I have already rejected. I therefore accept that these PCIs are appropriately certified.

7. Consumer Protection Legislation (PCIs 16–39 and 42)

[140] These PCIs ask whether the defendants are in breach of federal and provincial consumer protection legislation, as pleaded in the ANOCC. I have already rejected the defendants' arguments raised in relation to these PCIs. I therefore accept that they are properly certified.

8. Punitive Damages (PCI 43)

[141] PCI #43 asks whether exemplary, punitive and/or aggravated damages should be awarded against the defendants. The defendants object to this PCI on the basis that the evidence discloses no basis in fact to establish that they had knowledge of the defect at a date early enough to render such damages appropriate. They cite *MacKinnon BCCA*, *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307 [*Sharp*], and *Kirk v. Executive Flight Centre Fuel Services Ltd.*, as examples of cases in which the courts have refused to certify an issue of that kind on similar grounds. They note that in *MacKinnon BCCA*, Harris J.A., writing for the Court, held it to be an error in principle for the certification judge to have certified a common issue in respect of punitive damages on the strength of allegations in the pleadings alone, in the absence of at least some evidence showing a basis in fact to support the substance of the allegations on the merits (at para. 7).

[142] The plaintiff responds that there is evidence in the record that the defendants continued to market the Affected Vehicles after learning of the defect. Such knowledge can, she argues, be inferred from Ms. Langlois' assertion that by August 2018, the defendants had already researched, developed and mass-produced a redesigned Tigershark engine to eliminate the Oil Consumption Defect. Moreover, the defendants have not explained why the repair campaign was not launched until December 2020.

[143] I agree with the plaintiff that the record contains a basis in fact indicating that the defendants had knowledge of the Oil Consumption Defect prior to 2018, a fact which, if proven at trial, could, with other evidence of wrongdoing, support an

arguable claim for punitive damages. Accordingly, I am satisfied that the PCI #43 is appropriately certified.

9. Aggregate Damages (PCI 44)

[144] PCI #44 asks whether, if one or more of the other PCIs are answered affirmatively, the amount of damages payable by the defendants can be determined on an aggregate basis, and if so, in what amount.

[145] The defendants argue that an award of aggregate damages will not be available unless all of the following conditions are satisfied:

- a) the defendants are found liable to all of the class members;
- b) there is some determinable baseline amount of loss suffered by each class member; and
- c) that baseline amount can be determined without proof by individual class members.

[146] In support of that argument, they cite *Banman v. Ontario*, 2023 ONSC 6187, *Roberts v. Canada (Attorney General)* 2025 BCSC 995; *Cheetham v. Bank of Montreal*, 2023 BCSC 1319, aff'd 2025 BCCA 374; and *Insurance Corporation of British Columbia v. Ari*, 2023 BCCA 331. They also refer me to *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 118, in which it was held that:

... in order for individual class members to participate in the award of damages, the trial judge must be satisfied that each has actually suffered a loss where proof of loss is essential to a finding of liability (as it is for liability under s. 36 of the *Competition Act*). Therefore, ultimately, to use the aggregate damages provisions, the trial judge must be satisfied, following the common issues trial, either that all class members suffered loss, or that he or she can distinguish those who have not suffered loss from those who have.

[147] Moreover, such an issue cannot properly be certified, in the defendants' submission, unless the plaintiff has put forward a plausible methodology for calculating such damages on a class-wide basis (citing *Elizabeth Fry Society of*

Greater Vancouver v. British Columbia (Public Guardian and Trustee), 2025 BCSC 610).

[148] The defendants submit that an affirmative answer on one or more of the other PCIs will not satisfy any of these criteria. In their submission, the Ivey Report proposes a methodology for quantifying damages in a manner that depends on individual inquiries.

[149] The plaintiff responds that an aggregate damages common issue may properly be certified where there is a reasonable possibility that an aggregate assessment can be made with respect to at least part of the damages claimed (citing *Krishnan* and *Pro-Sys*). The plaintiff suggests such an aggregate assessment might be possible in this case if, for example, all of the Affected Vehicles are found to require a complete replacement of the defective engine with a non-defective one, in which case the cost of the replacement can be calculated and awarded to all of the class members.

[150] I agree with the defendants that the record discloses no basis in fact to support the possibility of an aggregate damages award, even if one or more of the other PCIs are answered affirmatively.

[151] The common defect alleged is a susceptibility of the Affected Vehicles to consume oil at an excessive rate in certain circumstances due to insufficient sealing of the piston rings. Of the 91,898 Affected Vehicles in the class:

- a) 38,676 are and remain eligible for the CSN W20 repair (of which at least 73.4% have received it);
- b) 44,703 are and remain eligible for the CSN W84 repair (of which at least 66.7% have received it); and
- c) 8,519 were eligible for the CSN W80 repair, of which 2,238 were tested and, of that group, 206 received a long block replacement after failing the test (the remaining 91% that were tested passed it).

[152] For those who are eligible for, or received, the CSN W20 or W84 repairs (a total of 83,379 vehicles, or 91% of the class), there is no evidence that the software recalibration failed to resolve the Oil Consumption Defect as intended. The damages they are alleged to have suffered might therefore include the following:

- a) the extra cost of maintaining the vehicle, such as having to top up the oil more often than should have been necessary, from the time they acquired their vehicle until the repair is/was done;
- b) damage to the engine caused by the Oil Consumption Defect prior to the repair, along with associated “accelerated depreciation”; and
- c) the cost of extra gasoline incurred by virtue of the alleged reduction in fuel economy attributable to the repair.

[153] There is no baseline loss that could be the subject of an aggregate damages award for this 91% of the class. Individual inquiries would be required to determine:

- a) how much extra oil and other maintenance each class member had to purchase, prior to the repair, beyond the amount that would have been required had there been no defect;
- b) if the alleged defect actually caused engine damage prior to the repair and, if so, what impact it had on the lifespan of the vehicle;
- c) how much extra gasoline will be spent over the remaining lifetime of the vehicle following the repair as a result of the reduction in fuel economy caused by the repair (there is, in any event, no PCI asking if the repairs did in fact cause a reduction in fuel economy, as the ANOCC alleges but the defendants deny).

[154] The plaintiff argues that she might be in a position to seek aggregate damages based on the concept of “premature scrappage” as proposed in the Ivey Report. I agree with the defendants that the argument is problematic for two reasons.

[155] First, the authors of the Ivey Report present a sample calculation for such an award based on the assumption that the Oil Consumption Defect will have shortened the lifespan of the Affected Vehicles by a specified and uniform amount of time, an assumption which masks the need for individual inquiries to determine how much damage, if any, the engine has actually sustained in each case, and its impact on the vehicle's lifespan. There is no evidence that the Oil Consumption Defect caused all of the Affected Vehicles to depreciate at the same accelerated rate. On the contrary, the evidence suggests that the susceptibility to consume oil excessively manifests itself only in some of the Affected Vehicles and then only under certain conditions.

[156] Second, I also agree with the defendants that such damages will not be available as a remedy for the negligence-based causes of action, inasmuch as the plaintiff would be seeking damages in negligence for pure economic loss, relying on the so-called "complex structure theory" rejected by the Supreme Court of Canada in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, 1995 CanLII 146 (S.C.C.), and more recently in the automotive product liability context by the Ontario Court of Appeal in *North v. Bayerische Motoren Werke AG*, 2025 ONCA 340 at paras. 42–49, leave to appeal to SCC allowed, 41913 (2 April 2026).

[157] For the 9% of the class members who were eligible for the CSN W80 repair, 9.2% of them, or 206 class members, received a long block replacement after their vehicles failed the oil consumption test. There is no evidence that they suffered any loss (other than the same pre-repair losses I have identified for those who received the CSN W20 and W84 repairs, none of which, on the evidence currently before me, could be quantified without individual inquiries). Although Ms. McGregor appears to have continued to experience excessive oil consumption after receiving a long block replacement, there is no evidence that there is anyone else in that category, or that, even if there were, their damages could be calculated without individual input from them.

[158] The remaining category consists of the following:

- a) the owners/lessees of CSN W80-eligible vehicles that were brought to a dealership and passed the oil consumption test, but that might still be prone to excessive oil consumption in the future (2,032 vehicles); and
- b) the owners/lessees of CSN W80-eligible vehicles that have yet to be taken to a dealership for testing (8,519 – 2,238 = 6,281 vehicles).

[159] There is no evidence that anyone in either of those groups has suffered or will suffer any loss. Some of them may, depending on when the issue arises for them, be able to benefit from the extended warranty that the defendants have made available to them. For the rest, individual inquiries would be needed to determine if the vehicle has been consuming oil excessively, and if so, whether the cause of that excessive consumption was the Oil Consumption Defect or some other cause.

[160] In summary, there is no evidence to support the conclusion that there would be a baseline quantum of damages that could properly be awarded on an aggregate basis to the class, or any part of it, even assuming the plaintiff succeeds in a common issues trial on one or more of the other PCIs.

[161] I am therefore refusing to certify this PCI.

D. Preferable Procedure

[162] Section 4(2) of the *CPA* lists a number of non-exhaustive factors for the court to consider in deciding whether the plaintiff has met her burden to show that a class proceeding would be the preferable procedure for resolving the dispute. Those factors are as follows:

- a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
- b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

- c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
- d) whether other means of resolving the claims are less practical or less efficient; and
- e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[163] In *Reichert v. Canada (Attorney General)*, 2026 BCCA 9 at para. 12, Mayer J.A., writing for the Court, reiterated that to satisfy the s. 4(1)(d) requirement, a proposed representative plaintiff must show some basis in fact that the proposed class action would be: (a) a fair, efficient and manageable method of advancing the claim; (b) preferable to other reasonable available means of resolving the claim; and (c) facilitate the principal goals of class proceedings, being judicial economy, access to justice, and behaviour modification, citing *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22–23, 48.

[164] In *Bowman*, Matthews J. distilled the preferability test down to the following two main considerations:

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

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

[242] Generally speaking, the preferability analysis must be applied through the triple lenses of the objectives of class proceedings: access to justice, judicial efficiency, and behaviour modification: *Hollick* at para. 27. Related to this, when considering whether a class proceeding will be fair, efficient, and

manageable, the common issues must be considered in the context of the action as a whole, and their relative importance taken into account: *Hollick* at para. 30.

[165] The defendants argue, on the following grounds, that the plaintiff has failed to satisfy the preferability test:

- a) the individual issues that will remain to be determined after the common issues trial predominate and would overwhelm the common issues, which means that a class proceeding would not be a fair, efficient or manageable means of resolving the dispute (citing *Medellin v. Lucion*, 2025 BCSC 180 at paras. 251–2); and
- b) the oil consumption issue has already been adequately resolved through the repair campaign, which, even if it was less than perfect, offers a preferable alternative to the proposed class action (citing the following authorities in which certification was refused on that basis: *Richardson v. Samsung Electronics Canada Inc.*, 2018 ONSC 6130, at paras. 73–4, aff'd 2019 ONSC 6845 (Div. Ct.); *Maginnis*; *Tress* at paras. 27–28; *Coles v. FCA Canada Inc.*, 2022 ONSC 5575 at para. 168; *Bowman* at paras. 274–5; and *Larsen* at para. 83).

[166] The plaintiff disagrees that individual issues predominate over common ones, or that the repair campaign adequately addressed the class members' claims. She says that the cases cited by the defendants are distinguishable, insofar as in this case, the defendants have not shown that the repair campaign was initiated promptly, or that it adequately resolved the problem. Rather, in the plaintiff's submission, the CSNs were rolled out only after a long delay and even then, failed to address the problem adequately – on the contrary, she says, the CSN W20 and W84 repairs created a new problem, in the form of a reduction in fuel economy.

[167] I agree with the plaintiff that the evidence discloses a basis in fact supporting her submission that the repair campaign came late, after a long delay, during which many class members may have incurred losses in the form of excessive oil

consumption and associated damage to their vehicles' engines and accelerated depreciation. The repair campaign may also have led to a secondary loss to many class members in the form of reduced fuel economy for vehicles that received the CSN W20 and W84 repair. Those considerations weigh in favour of a class proceeding as the preferable procedure.

[168] On the other hand, I have also concluded that there is no basis in fact to support the inclusion of an aggregate damages question as part of the common issues trial, which means that proving the existence of a loss and quantifying it will, of necessity, devolve into individual inquiries. It has been held that s. 7(a) of the *CPA* is not applicable in these circumstances: *Sharp*, at para. 192.

[169] That being said, I accept that, with better evidence, the plaintiff might be able to present a basis in fact showing that an aggregate award could be available to compensate at least parts of the class for the following kinds of losses:

- a) extra oil and maintenance costs, if the plaintiff can present evidence that such costs were incurred across the class at a rate that can be quantified without the need for individual inquiries;
- b) premature scrappage (for claims other than those based in negligence), if the plaintiff can present evidence that the Affected Vehicles have depreciated, due to the Oil Consumption Defect, across the class at an accelerated rate that can be calculated without the need for individual inquiries; and
- c) extra gasoline costs for those who received the CSN W20 and W84 repairs, if the plaintiff proposes a new common issue asking if those repairs did indeed cause a reduction in fuel economy, and presents evidence of a viable methodology, if that question is answered affirmatively, to quantify the resulting loss to that subclass on a class-wide basis without the need for individual inquiries.

[170] Without evidence to fill those gaps, it appears to me that the proposed common issues trial, even if one or more PCIs were answered in favour of the class, would achieve relatively little for them. Their claims would be advanced to that extent, but the litigation would then be bogged down and overwhelmed by individual issues, with no realistic plan to resolve them. None of the objectives of the *CPA* would be achieved in such a scenario.

[171] For those reasons, I am not persuaded that the plaintiff has satisfied the preferability element of the test on the record currently before me.

E. The Representative Plaintiff

[172] Section 4(1)(e) of the *CPA* requires the court to consider whether there is a representative plaintiff who:

- i. would fairly and adequately represent the interests of the class,
- ii. has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- iii. does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[173] The defendants argue that the plaintiff has failed to satisfy the first two of those criteria. In particular, they say that:

- a) she cannot fairly and adequately represent the interests of the class because she has not pleaded a viable claim on her own behalf; and
- b) she has not produced a workable litigation plan.

[174] The plaintiff responds that her own personal claim is adequately pleaded and that her litigation plan is adequate. She submits that a litigation plan need not be perfect, and that, in assessing its adequacy, the court must be mindful of the flexible and dynamic nature of class proceedings (citing *Godfrey v. Sony Corporation*, 2017

BCCA 302; *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401 (C.A.), 2004 CanLII 45444; *Fakhri v. Alfalfa's Canada Inc.*, 2003 BCSC 1717, aff'd 2004 BCCA 549; and *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at para. 62, leave to appeal to SCC ref'd [2019] S.C.C.A. No. 264).

[175] I have already rejected the defendants' arguments about the viability of the plaintiff's claims, including her own. However, I have also found the litigation plan to be inadequate, for want of a realistic plan to address the individual issues that will be left for determination at the damages stage.

[176] The litigation plan includes provisions dealing with the adjudication of any remaining individual issues following the common issues trial. Among those terms are the following:

If the Court does not order an award under s. 29 of the Class Proceedings Act and/or determines that individual issue determinations are necessary, then the Plaintiff will attempt to come to an agreement with the Defendants to reach a mutually acceptable method for determining individual issues (which may include liability and damages).

Alternatively, the Court will be asked to provide directions to determine any individual issues which are not resolved at the trial of the common issues pursuant to s. 27 of the Class Proceedings Act.

Given the information the Defendants possess relating to each class member, including their names, contact information, and the make and model of their vehicles, there is a limited number of individual issues that might be required to be determined on an individual basis.

Given the nature of individual issues that may need to be addressed and the quantum of each class member's claim, a simplified process for individual issues determinations is proposed pursuant to s. 27 of the Class Proceedings Act.

[177] Assuming the parties are unable to reach agreement on a process for resolving the common issues, the litigation plan proposes that the defendants would be required to provide the claims administrator basic information about each class member. Class members would be required to provide the following information about themselves:

- a) their name and contact information;

- b) make and model of the Affected Vehicle; and
- c) if the Affected Vehicle was leased, the terms of the lease.

[178] Class members would be invited to submit claims. The defendants would have 60 days to advise the administrator which claims they intend to dispute, and the basis for the dispute. For those not disputed, the administrator would assess the claims summarily, “based on a pre-determined formula”. For those claims that are disputed, the claimants would be required, within 60 days, to adduce an affidavit in support of their claims. Finally, a referee would, where necessary conduct hearings, each lasting no more than two hours.

[179] Such a process would clearly be inadequate to address the damages issues that would remain to be determined following the common issues trial contemplated here. The individual inquiries that will be needed for a fair assessment of damages would be numerous and complicated. A class comprised of 91,898 class members would be invited to submit individual claims for damages, complete with sufficient information to allow for damages to be assessed fairly and comprehensively in each case.

[180] To that end, each individual claim form would have to address the following questions, among others:

- a) has the class member’s vehicle consumed oil excessively in the past;
- b) if so, is the condition attributable to the Oil Consumption Defect or some other cause;
- c) how much did the claimant spend on extra oil and other maintenance attributable to the Oil Consumption Defect;
- d) did the Oil Consumption Defect cause damage to the engine, and if so, did it accelerate the rate of depreciation, and if so, to what extent; and

- e) for those who have had the CSN W20 and W84 repairs, how much extra gasoline will have to be purchased over the remaining lifetime of the vehicle due to the reduction in fuel economy caused by the repair.

[181] The task of assessing so many claim forms containing so much information would be overwhelming and likely unmanageable. I have therefore concluded that the plaintiff has failed to satisfy this element of the certification test.

V. SUMMARY AND CONCLUSION

[182] I have found that the plaintiff has satisfied the *CPA* requirements for certification under ss. 4(1)(a), (b) and (c), but not (d) and (e). I am therefore dismissing the application. However, I have also found that the action may be amenable to certification if she can fix the various shortcomings in the application that I have identified in these reasons for judgment. I am therefore granting the plaintiff leave to renew the application on different terms, so that she can have that opportunity.

“Milman J.”