

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Dang v. Canada (Attorney General)*,
2026 BCCA 216

Date: 20260520
Docket: CA50840

Between:

Arvin Singh Dang and Kristy Morgan

Appellants
(Plaintiffs)

And

**The Attorney General of Canada and Minister of Public Safety and
Solicitor General of the Province of British Columbia**

Respondents
(Defendants)

And

British Columbia Civil Liberties Association

(Intervener)

Before: The Honourable Mr. Justice Abrioux
The Honourable Justice Gomery
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated
June 20, 2025 (*Dang v. Canada (Attorney General)*, 2025 BCSC 1143,
Vancouver Docket S231631).

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Place and Date of Hearing:

Vancouver, British Columbia
April 21, 2026

Place and Date of Judgment:

Vancouver, British Columbia
May 20, 2026

Written Reasons by:

The Honourable Justice Gomery

Concurred in by:

The Honourable Mr. Justice Abrioux

The Honourable Justice MacNaughton

Summary:

The appellants' certification application was dismissed by a judge in chambers; the judge held that the appellants failed to satisfy the identifiable class, common issues, and preferable procedure requirements of s. 4(1) of the Class Proceedings Act. The appellants say the chambers judge erred by excluding admissible evidence, and in his approach to the test for certification.

Held: Appeal allowed. The judge erred in declining to admit affidavits sworn for the purpose of another application and in failing to appreciate the evidentiary significance of findings made in the context of other applications. The judge's conclusion that the class is overbroad because of the presence of persons who may have no claim due to individual circumstances was an error. The presence of individual issues should not factor into the class identification analysis. The judge also erred by concluding that the Charter issues addressing the Exclusion Zone Policy lack commonality; a determination on the merits would move the appellants' claims forward. Finally, the judge erred in determining that a class proceeding is not the preferable procedure for the fair and efficient resolution of the common issues. On balance, a class proceeding is the preferable procedure as compared with the alternatives—individual civil actions or complaints to the RCMP Civilian Review and Complaints Commission. The question of whether Mr. Dang and Ms. Morgan are appropriate representative plaintiffs is remitted to the court below.

Reasons for Judgment of the Honourable Justice Gomery:**Introduction**

[1] In 2021 through 2023, Teal Cedar Products Ltd. was engaged in logging of old growth forest in the Fairy Creek watershed on southern Vancouver Island. It held a tree farm licence issued by the Province that permitted the logging. The logging was controversial and attracted protesters who disrupted and sought to stop the logging.

[2] Teal sought and obtained an injunction from the Supreme Court of British Columbia. The injunction authorized the RCMP to arrest persons contravening the order, and granted the RCMP discretion as to the timing and manner of enforcement. It covered the area encompassed by Teal's tree farm licence (the "Injunction area"). It expressly preserved public access to the Injunction area.

[3] Many protesters were not deterred by the injunction and the RCMP made substantial efforts to enforce it. Much litigation ensued. There were more than a

thousand arrests and hundreds of convictions for contempt of court. Hundreds of people, not all of them protesters, were arrested and not subsequently charged.

[4] The injunction was in effect from April 1, 2021 until September 26, 2023. The logging and the protests are now over. The litigation continues. The appellants, Arvin Singh Dang and Kristy Morgan, brought an action in the Supreme Court of British Columbia alleging that the RCMP wrongfully barred them from the Injunction area, in violation of their rights under the *Canadian Charter of Rights and Freedoms*. Mr. Dang also maintains that he was arrested without lawful cause and later released, in further violation of his *Charter* rights. The appellants seek certification of their action as a class proceeding on behalf of persons whose *Charter* rights were infringed by the RCMP in its efforts to enforce the injunction in the Injunction area.

[5] The appellants' application for class certification was dismissed by a judge in chambers. He held that it fails to satisfy three of the requirements for certification under s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA]: stating an identifiable class, identifying common issues, and establishing that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

[6] The appellants submit that the chambers judge erred in coming to these conclusions. They argue that his errors include an evidentiary ruling that excluded admissible evidence from consideration and analytical errors in his assessment of the certification requirements.

[7] The Attorney General of Canada ("AG"), representing the RCMP, denies that the judge erred in any way.

Related litigation

[8] The injunction and the litigation in which it was pronounced and modified are critical to an understanding of the issues presented in this appeal.

[9] The injunction was pronounced by Justice Verhoeven on Teal's application brought on notice to three named defendants described as members of the "Rainforest Flying Squad". Justice Verhoeven gave reasons that are indexed at 2021 BCSC 605. He found that protesters were interfering with Teal's lawful logging activities and that the actions of the protesters were unlawful. Teal was suffering irreparable injury to its rights, and the balance of convenience favoured injunctive relief. He stated:

[67] Police enforcement terms are required in this case. There appears to be little or no likelihood that the injunction order will be respected, otherwise.

[68] Through communications from counsel for the RCMP to Teal's counsel, the RCMP have indicated a preference for police enforcement terms in circumstances such as this, where the blockades are numerous and persistent. There are a large number of persons involved. Some of the locations are remote. For the most part, the protesters have refused to identify themselves.

[69] The protestors are a very militant group. As noted, they claim to have hundreds of active participants. In their social media posts, supporters of the "Rainforest Flying Squad" have expressly threatened a "protracted civil disobedience struggle". They make public appeals for others to join their campaign. They refer to a "war" and "battles". They have stated that Teal's actions in seeking an injunction "will be met with resistance". These are words that may incite violence. A Facebook posting of February 20, 2021, the day after the injunction application was served, seeks involvement of "people prepared to take Bold Action in a last stand for the Ancient forest campaign". Some blockaders have already stated publicly that they will defy the Court's order and go to jail if necessary.

[10] The injunction pronounced by Verhoeven J. included the following terms:

1. An interlocutory injunction lasting until midnight on September 26, 2021 is granted requiring that the Defendants ... and anyone having knowledge of the Court's order, are restrained, enjoined and prohibited from:
 - (a) impeding, physically obstructing, or in any way interfering with any person, including any member of the public, from gaining access to or egress from, or otherwise making use of any road ... situate[d] within the [Injunction area]; . . .

. . .
2. An order lasting until midnight on September 26, 2021 is granted:
 - (a) authorizing any police officer with the Royal Canadian Mounted Police ... to arrest and remove any person who has knowledge of this Order and who the Police have reasonable and probable

grounds to believe is contravening or has contravened any provision of this Order;

- (b) that the Police retain discretion as to the timing and manner of enforcement of this Order, and specifically retain discretion as to the timing and manner of arrest and removal of any person pursuant to this Order;

. . .

3. Provided the terms of this Order are complied with, the Defendants and any other persons are free to participate in a peaceful, lawful and safe protest.
4. Any person affected by the court's order, including the Plaintiff, is at liberty to apply to the Court to set aside or vary this Order on two business days' notice.

[11] It is important that:

- para. 1(a) of the order prohibits anyone (which would include the RCMP) from impeding access to the roads in the Injunction area;
- para. 2(a) authorizes the RCMP to arrest and remove persons on two conditions: they have knowledge of the order; and the RCMP have reasonable and probable grounds to believe they are contravening or have contravened the order;
- para. 2(b) expressly confirms that the RCMP have discretion as to the timing and manner of arrest and removal of persons pursuant to the order and as to the timing and manner of enforcement of the order generally;
- the order expressly confirms the rights of persons to participate in peaceful, lawful, and safe protest, "[p]rovided the terms of this Order are complied with"; and
- the order is time-limited and set to expire at midnight on September 26, 2021.

[12] In July 2021, Justice Thompson heard applications brought by two affected individuals and media organizations to vary the terms of the injunction. The AG participated in this hearing by submitting affidavit evidence and opposing the

applications. The issue was whether policies adopted by the RCMP that impeded access to the Injunction area, were unjustified and unlawful. Justice Thompson held that they were and varied the injunction. In written reasons issued in August and indexed at 2021 BCSC 1554 (the “Media Access decision”), he explained:

[1] In April 2021, this Court issued an injunction. It prohibits interference with the use — use by anyone including any member of the public — of any road in the “injunction area.” The “injunction area” is a large tract of public land with defined boundaries in the interior of southern Vancouver Island. This injunction order authorizes the RCMP to arrest and remove persons contravening the order. These reasons for judgment address an application by two individuals, Saul Arbess and Susan Gage, and an application by a consortium of media organizations. All applicants are aggrieved by the RCMP’s policy of restricting access to the injunction area by means of expansive exclusion zones and checkpoints. The media applicants also complain about the RCMP policy of shepherding journalists in the exclusion zones. These two applications present common issues and were heard together.

[2] I ruled on these applications on 20 July 2021. A principal purpose of the injunction is to maintain public access to roads in the injunction area. The RCMP are blocking vehicle access to roads that serve as the main entry points to the injunction area. I concluded that the RCMP has not shown that their exclusion zones and associated checkpoints are reasonably necessary to carry out their enforcement duties. In short, these RCMP blockades are unlawful. I granted the media consortium’s application for a variation to the injunction to add a direction that the police will not interfere with access to any part of the injunction area by members of the media who are trying to gather information and evidence for their publications, except where there is a *bona fide* operational rationale requiring interference, in which case the interference is to be as minimal as possible. ...

[Emphasis added.]

[13] In his reasons, Thompson J. found that the RCMP had adopted what he described as a policy or strategy of exclusion zones and checkpoints. He stated:

[16] Whatever the intention might have been at the beginning of the RCMP operation, I find that there is nothing temporary about the policy of exclusion zones and checkpoints — the RCMP enforcement operation has been ongoing, essentially on an everyday basis, since mid-May and the exclusion zones and checkpoints continue to be a central component of their enforcement policy. I conclude that the checkpoints have not been placed so as to minimally restrict access to the injunction area outside of the exclusion zones. On the contrary, it is evident that the police are doing whatever they perceive can be done within legal bounds to prevent vehicles, persons suspected of intending to block roads, and road-blocking objects and material from entering the injunction area.

[17] The exclusion zones and checkpoints are intended to put an end to vehicle access by the public to the exclusion zones and the record is clear that they have done so. ...

[Emphasis added.]

[14] Justice Thompson found that police actions were interfering with important liberties of members of the public and the media and termed the interference “substantial and serious”: at para. 60. He concluded that the RCMP’s approach “has the practical effect of altering the injunction without court approval”: para. 65. Turning to remedy, he decided that there was no need to amend the injunction to confirm the public’s right of access to the Injunction area, because that right was already clearly stated and “police discretion as to the manner of enforcement does not extend to taking steps to minimize the opportunity of persons to contravene the injunction”: para. 73. However, he incorporated a fresh term into the injunction to confirm the rights of access of members of the news media: at para. 82(9).

[15] In September 2021, Teal applied to extend the term of the injunction. On this application, the AG appeared and took no position on behalf of the RCMP. In reasons indexed at 2021 BCSC 1903 (the “SC Extension Decision”), Thompson J. refused the application, expressing concern that its continuation in the context of ongoing protests and civil disobedience threatened the reputation of the Court. He stated:

[78] ... It goes without saying that unlawful measures imposed by those given authority to enforce the Court’s order does no credit to the rule of law or the Court’s reputation, especially when those measures trench on civil liberties in a substantial way. The evidence before me indicates that the RCMP have now stopped searching pedestrians, but they continue to enforce exclusion zones that are more expansive than the law permits. Moreover, the media’s right of access continues to be improperly constrained. One prominent example of the difficulties journalists continue to face is the CBC camera crew that was made to hike seven kilometres in and seven kilometres out, with their heavy equipment, to an area where RCMP enforcement activity was occurring on 26 August 2021.

[Emphasis added.]

[16] Teal appealed the SC Extension Decision. A justice of this Court stayed Thompson J.’s order, effectively reinstating the injunction after it had lapsed

(indexed at 2021 BCCA 387). This Court subsequently allowed the appeal and extended the injunction until September 26, 2022. In reasons indexed at 2022 BCCA 26 (the “CA Extension Decision”), this Court held that Thompson J. erred in considering that the reputation of the court would be damaged by police actions taken to enforce its order, in particular by police misconduct. The Court added:

[72] The concerns legitimately raised by the judge about police conduct are not without remedy. Misconduct affecting the rights of protesters can be addressed both in the prosecution of contempt proceedings and in sentencing. Individuals arrested under an injunction may raise RCMP conduct in their trial and seek *Charter* remedies.

[73] In addition, there are forums for the court to perform judicial oversight of RCMP enforcement of an injunction order. Members of the public who take issue with RCMP conduct and are harmed by it can bring civil claims against the RCMP. ...

[Emphasis added.]

[17] In February 2022, Thompson J. held a screening hearing to determine whether persons charged with criminal contempt of court should be permitted to pursue applications to stay the contempt proceedings on the basis of police misconduct. More than 400 individuals were facing contempt charges. He allowed the stay application to proceed (at 2022 BCSC 429). Justice Baird subsequently determined that the stay applications must be heard individually, but could be based, in part, on allegations of systemic misconduct (at 2022 BCSC 1912).

[18] In September 2022, on Teal’s application, Thompson J. extended the injunction for a further 12 months until September 26, 2023, when it lapsed: 2022 BCSC 1661.

Overview of the claim

[19] In an amended notice of civil claim (the “ANOCC”), the appellants plead the injunction and steps taken by the RCMP to enforce the injunction. They plead that the adoption by the RCMP of two policies: the “Exclusion Zone Policy”; and the “Catch-and-Release Policy” breached their *Charter* and other rights.

[20] The following paragraphs of the ANOCC address the Exclusion Zone Policy:

31. The use of expansive exclusion zones and checkpoints was a primary component of the RCMP operational planning and strategy of its enforcement operations. An exclusion zone is akin to a police “buffer zone,” and is an area that police block or restrict from public access in order to carry out police duties.
32. On May 6, 2021, Chief Superintendent of the RCMP, and then Gold Commander of [the RCMP’s Community-Industry Response Group], David Attfield approved a Record of Decision concerning the use of a “Temporary Exclusion Zone” in relation to the enforcement of the Injunction Order in Fairy Creek (the “Record of Decision”).
33. The Record of Decision stated that the “Temporary Exclusion Zone” would be established upon the commencement of enforcement operations and would remain “only for such minimal a period as is required for the clearing of the roadways for Teal Cedar to commence their operations.”
34. The stated purposes of the Exclusion Zone Policy were to prevent efforts to block Teal Cedar’s access to cut blocks in [Tree Farm Licence] 46 to conduct its logging activity, and to provide a safe space for the police to conduct enforcement action pursuant to the Injunction Order.
35. Details of the RCMP’s exclusion zone policy included the following:
 - a) the exclusion zones would begin at certain checkpoints and operate throughout the Injunction Area, focusing on areas where Teal Cedar was engaging in its logging activity;
 - b) the RCMP retained full discretion as to which individuals would be able to enter the exclusion zones;
 - c) vehicles attempting to enter an exclusion zone would be stopped and searched;
 - d) occupants in vehicles attempting to enter an exclusion zone would be required to state their purpose, provide identification, and would only be allowed entry by the Silver Commander or his/her delegate;
 - e) journalists, lawyers, doctors, elected and/or government officials, and all hereditary and elected chiefs of the Pacheedaht and/or Dididaht Nations would generally be permitted to enter an exclusion zone; and
 - f) all persons granted permission to enter an exclusion zone would be required to have a police escort accompany them to a designated protest area.

Collectively, the **“Exclusion Zone Policy.”**

36. Starting in May 2021, the RCMP established “Access Control Points,” also known as checkpoints, in the Injunction Area. These checkpoints were located within or outside the exclusion zones established by the RCMP in the Injunction Area and were used by the RCMP to control the movement of people, equipment, and vehicles into the exclusion zones

and Injunction Area, regardless of the purpose for which they sought to gain access to the Injunction Area.

37. Despite the name, the “Temporary Exclusion Zone” and checkpoints established by the RCMP in the Injunction Area during enforcement operations were not temporary. Rather, the Exclusion Zone Policy was crafted in a manner that provided the RCMP wide discretion to establish exclusion zones and checkpoints as broadly—both temporally and geographically—as RCMP officers perceived was required to enforce the Injunction Order.
38. Pursuant to the Exclusion Zone Policy, the RCMP established designated exclusion zones to which access was restricted by checkpoints on various roads within the Injunction Area to aid in crowd control. Access to these exclusion zones was severely restricted.
39. Further, numerous detentions and arrests were made pursuant to the Exclusion Zone Policy. The RCMP engaged in the practice of arbitrarily detaining and arresting persons found within an exclusion zone or attempting to enter an exclusion zone, without regard as to whether the individual was engaged in any breach of the Injunction Order. Rather, these arrests and detentions were conducted in furtherance of the Exclusion Zone Policy and in order to control the movement of persons in and around the Injunction Area.
40. The result of the RCMP’s Exclusion Zone Policy has been to severely restrict public access to roads in Fairy Creek and the Injunction Area in a manner contrary to the Injunction Order. As a consequence of this policy, members of the public have been constrained in their ability to engage in lawful activities not prohibited by the Injunction Order, including activities protected by the *Charter*, such as participating in peaceful protests; journalistic reporting on the events occurring at Fairy Creek and in the Injunction Area; and free access to public roads and areas to hike, camp, and study wildlife in Fairy Creek.
41. The RCMP consistently used exclusion zones in the Injunction Area from the very beginning of RCMP enforcement operations in [Tree Farm Licence] 46. Moreover, the use of exclusion zones and checkpoints was a central aspect of the RCMP’s Exclusion Zone Policy and enforcement operations.

[21] Concerning the Catch-and-Release Policy, the ANOCC pleads:

45. To control the gathering of people at Fairy Creek, the RCMP issued command orders authorizing general and indiscriminate detention and arrests of persons within or near the vicinity of the Injunction Area with the aim of deterring lawful protest and as a means of achieving crowd control. In this regard, RCMP engaged in a systematic practice and policy of detaining putative class members only to then release them without laying any charges (the “Catch-and-Release Policy”).

[22] The ANOCC pleads that approximately 1,100 people were arrested, many hundreds of whom were arrested pursuant to the Catch-and-Release policy, and against whom charges were never laid.

[23] The ANOCC pleads that Mr. Dang attended the Injunction area to film the events occurring at Fairy Creek. It pleads that his access was impeded by the RCMP pursuant to the Exclusion Zone Policy on several occasions. Once he was arrested pursuant to the Catch-and-Release Policy.

[24] The ANOCC pleads that Ms. Morgan came into the Injunction area to document and report on events at Fairy Creek and that her access was impeded by the RCMP pursuant to the Exclusion Zone Policy on many occasions.

[25] The ANOCC defines a class of persons the appellants seek to represent. In concept, it is the class of persons who had their movements impeded or were otherwise subjected to police action during the Class Period pursuant to the Exclusion Zone or Catch-and-Release Policies. The Class Period runs from April 1, 2021 to the date of certification. The class definition is addressed in detail below.

[26] In Part 3 (Legal Basis), the ANOCC pleads that the RCMP's conduct pursuant to the Exclusion Zone Policy and Catch-and-Release Policy unjustifiably infringed on the rights of the appellants and class members under ss. 2, 7, 8, and 9 of the *Charter*. It also pleads the torts of false imprisonment, assault, battery, conversion, and trespass. In Part 2 (Relief Sought), the appellants seek damages pursuant to s. 24(1) of the *Charter* and general, special, and punitive damages at common law.

Legal framework

[27] Class proceedings require certification by the court. Certification is a procedural step whose five essential requirements are fixed by s. 4(1) of the *CPA*:

- 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 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.

[28] The judge found that the requirement in sub-s. 4(1)(a) is satisfied, and that the requirements in sub-ss. (b) (identifiable class), (c) (common issues), and (d) (preferable procedure) are not. He did not address the requirement in sub-s. (e) (representative plaintiff).

[29] The requirements of sub-ss. 4(1)(b) to (e) require consideration of evidence. There must be sufficient evidence to satisfy the court that these requirements have “some basis in fact”: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99–105. The applicant for certification bears the burden of proof. The issue is not whether the claim is likely to succeed. The court should not attempt to resolve conflicts in the evidence on a balance of probabilities: *Pro-Sys* at para. 102. As Justice Horsman put it, speaking for the Court in *Mentor Worldwide LLC v. Bosco*, 2023 BCCA 127 at para. 34, “the court cannot engage in any detailed weighing of conflicting evidence”.

[30] The issue is whether there is enough evidence to justify invocation of the procedural machinery of a class proceeding. Is there evidence of an identifiable class consisting of two or more persons? Is there evidence of common issues that will move the matter forward? Is there evidence to support a finding that a class proceeding is the preferable procedure? Is there evidence of a representative plaintiff who satisfies the requirements of the statute?

Issues

[31] Having regard to the arguments advanced, there are five issues:

1. Did the judge err in refusing to admit evidence?
2. Did the judge err in determining that there is not an identifiable class?
3. Did the judge err in determining that the claims of the appellants do not raise common issues?
4. Did the judge err in determining that a class proceeding would not provide a preferable procedure for the fair and efficient resolution of the common issues?
5. If the judge erred and the requirements of an identifiable class, common issues, and preferable procedure are satisfied, what should this Court order?

Standard of review

[32] The admissibility and use that may be made of evidence other than expert evidence are questions of law. On appeal, an appellate court decides whether the judge was correct, without deference: *Sweet Productions Inc. v. Licensing LP International S.À.R.L.*, 2022 FCA 111 at para. 22. An admissibility ruling is owed deference in respect of fact-finding feeding into the determination and if it is informed by correct principles of law: *R. v. Pan*, 2025 SCC 12 at para. 185; *Sweet Productions* at para. 22.

[33] On an appeal from a judge's assessment of the issues of identifiable class, common issues, and preferability, the standard of review is deferential because the assessment is factually grounded and discretionary: *L'Oratoire St. Joseph du Mont-Royal v. J.J.*, 2019 SCC 35 [*L'Oratoire*] at para. 10. Deference has its limits. An appellate court may intervene where the judge imposes an excessive evidentiary threshold or descends into consideration of the merits of the claim (*L'Oratoire* at para. 12), or makes an error in principle or a palpable and overriding error of fact:

Jiang v. Peoples Trust Company, 2017 BCCA 119 at para. 38; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at para. 36.

First issue: Did the judge err in refusing to admit evidence?

[34] The appellants submit that the judge erred in two ways. First, he held that affidavits tendered by the appellants could not be considered as direct evidence of the assertions of the affiants because the affidavits were sworn and admitted for the Media Access and Extension applications in the action brought by Teal. While they were evidence in that proceeding, in this proceeding, the judge held that they are inadmissible hearsay: reasons at paras. 64–87. The appellants maintain that the affidavits are admissible for the purpose of addressing the existence of an identifiable class and whether the common questions they have proposed have some basis in fact.

[35] Second, and more subtly, the appellants submit that the judge evidently erred in refusing to accord any weight to Thompson J.’s findings in the Media Access and Extension decisions. They submit that, in the context of a search for “some basis in fact”, these findings should have been considered as evidence.

[36] The respondents submit that the judge did not err. On the second point, they submit that the judge’s factual findings could not in law be considered as probative because they were merely interlocutory findings in another proceeding, and not evidence.

Admissibility of the affidavits

[37] The affidavits in question were before the court as exhibits to an affidavit made by a legal assistant.

[38] In holding that the affidavits are inadmissible hearsay, the judge cited considerable authority: *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at para. 25; *Carter v. Canada (Attorney General)*, 2011 BCSC 1371 at para. 28; *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 810 at paras. 23, 28–29; and *Leifso v. BevCanna Enterprises Inc.*, 2023

BCSC 579 at paras. 56, 58–59. He took those cases as authority for the proposition “that it is generally improper to attach one affidavit as an exhibit to another affidavit”: at para. 81. He held that the appellants could not rely on the affidavits as statements given on information and belief, as contemplated by *Supreme Court Civil Rule* 22-2(13), because the legal assistant who attached them to his own affidavit had not asserted his belief in the truth of what was stated in the affidavits.

[39] In my view, insofar as the affidavits sworn for the Media Access decision are concerned, the judge erred in failing to have regard to the particular and unusual circumstances of this case.

[40] An affidavit is sworn (or affirmed) evidence in written form. Affidavits made in one proceeding are not automatically admissible in another, unrelated proceeding because the mere fact that the statements in them were sworn or affirmed is not sufficient. Ours is an adversarial system and the opposing party may not have had an opportunity to address the affidavits by applying for leave to cross-examine or one of the other orders contemplated by R. 22-1(4). This may lead to prejudice to the opposing party.

[41] The objection to the admissibility of previous sworn affidavits does not extend to affidavits sworn earlier in the same proceeding and is not usually raised in respect of affidavits sworn in related proceedings between the same parties. In these cases, there is no real risk of prejudice to the opposing party.

[42] In this case, there was no real risk of prejudice. The AG fully participated in the Media Access application on behalf of the RCMP. He called evidence and took the lead in opposing the application: Media Access decision at paras. 43, 64, 66. While the AG could have applied to cross-examine on the affidavits submitted by the applicants, so far as the record discloses, he did not. The issue on the application concerned the propriety of the RCMP’s strategies adopted to enforce the injunction. Substantially the same issue is presented in this case.

[43] The AG objects that he was not a party in the proceeding before Thompson J. and could not have appealed his order. This is unduly technical. He had the same opportunity to address the affidavits in evidence on the application as any party would ever have in a proceeding in chambers. As a person affected by the injunction order, he had standing to participate in the proceedings before Thompson J., and he did so. The point is unaffected by the existence of a right of appeal, although it may be noted that, had the AG wished to appeal the Media Access order, he might have applied for formal party status pursuant to R. 6-2(7)(b)(ii), granting him standing to appeal: *Court of Appeal Act*, S.B.C. 2021, c. 6, s. 1(1) (“appellant”).

[44] I conclude that the judge erred in refusing to admit affidavits made for the Media Access application.

[45] The affidavits made for the Extension application are different, because the AG took no position on that application. He had no reason to challenge the evidence tendered in opposition to the application, and there is a real possibility of prejudice. In my view, the judge did not err in ruling these affidavits inadmissible.

Admissibility of reasons for judgment to establish “some basis in fact”

[46] The parties referred the judge to reasons for judgment in various applications, including the Media Access and Extension applications, and the judge quoted at length from them. The issue is not whether these materials were before the court, but rather what use the court might properly make of them.

[47] Ordinarily, findings in one case have no evidentiary value in another, later case. There are exceptions.

[48] In *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 [*Malik*], the Court held that findings in an earlier proceeding could serve as evidence in a later proceeding between the same parties: at para. 7. The earlier application was a *Rowbotham* application in which the defendant, Mr. Malik, sought Provincial government funding for his criminal defence on the basis that he was without

financial resources. Mr. Malik had already obtained some government funding of his defence. His *Rowbotham* application was dismissed by Justice Stromberg-Stein (as she then was) who found that Mr. Malik was a millionaire who controlled substantial businesses held in the names of family members. In the later proceeding, the Province sued Mr. Malik and members of his family for the return of funds paid for the criminal defence and obtained an *Anton Piller* order authorizing searches of various premises occupied by them. The fate of the *Anton Piller* order on appeal turned on whether it was open to the judge who issued it to rely on Stromberg-Stein J.'s findings.

[49] Justice Binnie gave judgment for the Supreme Court of Canada. He upheld the *Anton Piller* order and held that the judge hearing the *Anton Piller* application “was *not* required to proceed as if the *Rowbotham* judgment was of merely historical interest and of no probative value”: at para. 39, emphasis of Binnie J. He noted that the application for the *Anton Piller* order was interlocutory, and hearsay is admissible on an interlocutory application pursuant to R. 22-2(13). The weight and significance to be given to prior findings depends on the circumstances and “will rest not only on the identity of the participants, the similarity of the issues, the nature of the earlier proceedings and the opportunity given to the prejudiced party to contest it but on all ‘the varying circumstances of particular cases’”: at para. 48, quoting *Re Del Core and Ontario College of Pharmacists* (1985), 51 O.R. (2d) 1 at 22, 1985 CanLII 119 (C.A.). Admitting or treating the prior findings as evidence did not foreclose the defendants from controverting the findings by leading evidence of their own.

[50] Justice Binnie stated:

[51] Undoubtedly, a chambers judge should proceed cautiously with hearsay evidence, particularly where the *ex parte* remedies sought are as prejudicial to the absent defendants as in the case of an *Anton Piller* order or a summary judgment ..., or an injunction ... However, the need to proceed with caution does not render hearsay as such inadmissible under [R. 22-2(13)] on an interlocutory motion.

[52] More significantly in this case, for the reasons already discussed, I do not regard a prior judicial decision between the same or related parties or participants on the same or related issues as merely another controversy over hearsay or opinion evidence. The court’s earlier decision was a judicial

pronouncement after the contending parties had been heard. It had substantial effect on their legal rights. It would have been wasteful of litigation resources and potentially productive of mischief and inconsistent findings (as discussed in *Toronto (City) v. C.U.P.E., Local 79*) to have required the chambers judge to put aside Stromberg-Stein J.'s judgment and require the Province to litigate the *Rowbotham* facts *de novo* on an interlocutory motion. ...

[Emphasis added.]

[51] Applying *Malik*, I consider that Thompson J.'s findings on the Media Access decision, but not the Extension decision, have probative value and warrant consideration in addressing the question of "some basis in fact". As noted, the AG fully participated in the application where the findings were made. Certification of a class proceeding is an interlocutory or procedural step that is not determinative of substantive rights. "Some basis in fact" is a low threshold. Certification applications are often over-litigated, and applicants for certification should not be forced to proceed as though findings made against the defendant in proceedings contested by the defendant had not been made.

[52] In fairness to the judge, while he erred in law by failing to appreciate the evidentiary significance of Thompson J.'s findings, the issue was not well-identified or well-argued before him.

Second issue: Did the judge err in determining that there is not an identifiable class?

[53] The appellants define the class as follows:

- (a) [All individuals who] had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers in connection with enforcement of the Fairy Creek injunction during the Class Period, when attempting to access or travel within the injunction zone (the "Exclusion Zone Subclass"); and
- (b) [All individuals who] had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers during the Class Period, in connection with the enforcement of the Fairy Creek injunction but for whom the RCMP did not recommend to bring charges (the "Catch and Release Subclass").

[54] In *Jiang* at para. 82, following a review of the authorities, Chief Justice Bauman concisely summarized the principles governing the requirement of an identifiable class:

- the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
- the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
- the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
- the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could later prove they are members of the class.

[Emphasis removed from original.]

[55] The judge quoted these requirements and also cited *Douez v. Facebook, Inc.*, 2018 BCCA 186 at paras. 68–69, where Justice Groberman, speaking for the Court, elaborated on the requirement that the class should not be unnecessarily broad; it should not “include, within its ambit, large, identifiable groups of people who manifestly have no claim”: at para. 69. The judge cited further authority for the proposition that a class definition is not overbroad merely because some class members may ultimately be determined disentitled to relief: *MacKinnon v. Pfizer Canada Inc.*, 2021 BCSC 1093 at paras. 74, 82; *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at para. 42, aff’d 2013 BCCA 21.

[56] The judge gave several reasons for concluding that the class definition is overbroad and does not bear a rational relationship to the common issues: at paras. 147–157.

[57] One of the reasons given by the judge is sound. He stated:

[150] The class definition includes individuals who were arrested, charged and convicted of breaching the Injunction Order. Such individuals can have no claim in relation to their detention and arrest.

[58] I agree with the judge that persons convicted of contempt of court cannot complain, in a subsequent legal proceeding, that their *Charter* rights were violated by the actions of the police in the run-up to their arrest. That argument would be a collateral attack on the conviction: *R. v. Chief Dsta'hyl*, 2026 BCCA 176 at paras. 85–87.

[59] However, if the only objection to the class definition is the inclusion of a subset of convicted contemnors, the solution is not to reject the class definition outright, but to consider whether the class definition may be amended to carve out the subset: *Hollick* at para. 21.

[60] More generally, the judge viewed the class as overbroad because “virtually every individual who attended at Fairy Creek during the relevant time period would have had their movement impeded when attempting to access or travel within the injunction zone” so that “the class as proposed would include every person who attended at Fairy Creek during the class period”: at para. 148. The judge considered it a flaw in the class definition that the class would include many persons whose movements were impeded by the legitimate and lawful use of police powers in enforcing the injunction.

[61] The judge further reasoned that the Catch-and-Release subclass would include people who were legitimately and lawfully arrested by the RCMP for breaching the injunction but ultimately not charged. He commented that “[t]he circumstances of the arrest of Mr. Dang also illustrate how this class action will inevitably collapse into individual trials”: at para. 151.

[62] This reasoning reflects legal error because, in law, a class is not rendered overbroad by the presence of persons who have no claim by virtue of their individual circumstances. As noted, the judge acknowledges as much in his review of the authorities, but fails to give effect to this principle. To repeat Groberman J.A.’s caution in *Douez*, overbreadth only arises where the proposed class includes “large, identifiable groups of people who manifestly have no claim”: at para. 69, emphasis added. An otherwise identifiable class is not made overbroad by the presence of

individual issues. The presence of individual issues factors into the test for certification at other points in the analysis, but not at the stage of class identification.

[63] The judge comments that the exclusion zones and enforcement tactics were not the same for all putative class members whose interests, objectives, and level of participation in the protests were not homogeneous. None of this is pertinent to the existence of an identifiable class. These are concerns pertinent to the questions of commonality and preferability.

[64] The judge compares the proposed class definition with the classes certified in two cases put forward by the appellants: *Canada (Attorney General) v. Nasogaluak*, 2023 FCA 61; and *Good v. Toronto (Police Services Board)*, 2014 ONSC 4583 (Div. Ct.), aff'd 2016 ONCA 250. He terms the class definition certified in *Nasogaluak* “much more restrictive and objective” and the class definition certified in *Good* “much more circumscribed” because it “comprised only individuals who were arrested at specific locations on specific dates”: at paras. 155–156.

[65] In my view, the class definition proposed by the appellants features both objectivity and specificity. It permits the identification of class members in advance of a common issues trial without reference to the trial's outcome. Potential class members can know whether their movements were impeded by RCMP actions in the Injunction area during the class period. They can know whether they were arrested or detained, were searched, or had their property seized.

[66] The class certified in *Nasogaluak* was not, in my respectful view, more objectively or specifically defined. It included all Aboriginal persons who alleged they were assaulted while held in custody or detained by RCMP officers in any of the Northwest Territories, Yukon, and Nunavut, at any time, so long as they were alive as of December 18, 2016. It covered actions over many decades and an enormous territory, and membership was triggered by allegations rather than findings of assault.

[67] Assuming, for the moment, the existence of common issues in connection with the RCMP's actions (a point addressed below), the proposed class definition is rationally related to the common issues.

[68] I conclude that the judge erred and the requirement of an identifiable class is satisfied in this case, provided that the proposed class definition is modified to eliminate persons convicted of contempt of court for breaching the injunction.

Third issue: Did the judge err in determining that the claims of the appellants do not raise common issues?

[69] Common issues are issues whose resolution is necessary to the resolution of the claims of each individual class member. All members of the class must benefit from success in the resolution of a common issue, although not necessarily all to the same extent: *Pro-Sys* at para. 108. In *Pioneer Corp. v. Godfrey*, 2019 SCC 42 at para. 105, Justice Brown, speaking for a majority, explained that:

... "Common success" denotes not that success for one class member must mean success for all, but rather that success for one class member must not mean *failure* for another (para. 45). A question is considered "common", then, "if it can serve to advance the resolution of every class member's claim", even if the answer to the question, while positive, will vary among those members (para. 46).

[Quoting from *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1.]

[70] Before the chambers judge, the appellants proposed the following common issues in relation to the class members' *Charter* claims:

A. Charter Breaches

1. Do any searches and seizures, arrests, detentions, and/or restrictions of movement pursuant to the Exclusion Zone Policy constitute a violation of Class members' rights under sections 2, 7, 8 and/or 9 of the *Charter*?
2. Do any searches and seizures[,] arrests, detentions, and/or restrictions of movement pursuant to the Catch and Release Policy constitute a violation of Class members' rights under sections 2, 7, 8 and/or 9 of the *Charter*?

B. Section 1 of the Charter

3. Were any infringements of the *Charter* justified pursuant to section 1 of the *Charter*?

...

D. Damages

7. Are the Class members entitled to damages pursuant to section 24(1) of the *Charter* for breaches of sections 2, 7, 8 and or 9 of the *Charter*?

a. To the extent the Court concludes that Class members are entitled to damages pursuant to section 24(1) of the *Charter*, can an aggregate award of damages be made pursuant to section 29(1) of the *Class Proceedings Act*?

[Reasons at para. 164.]

[71] The appellants also proposed common issues in relation to their common law tort claims for false imprisonment, assault, battery, conversion of goods, and trespass. The judge found that these claims lack commonality, and the appellants have not argued otherwise on appeal. They focus their case on the *Charter* claims.

[72] Issues 1 and 2 are identically worded except for the subject policies: issue 1 engages conduct of the RCMP pursuant to the Exclusion Zone Policy, and issue 2 engages conduct pursuant to the Catch-and-Release Policy. The policies are central to the question of commonality. They tie together what would otherwise be disparate actions at various locations within the Injunction area over the extended period while the injunction was in force.

[73] The RCMP deny the existence of the Exclusion Zone Policy and Catch-and-Release Policy defined by the appellants in their pleading. Issues 1 and 2 assume the existence of these policies. In oral argument, counsel for the appellants accepted that it would contribute to clarity of analysis to separate out the existence of the Exclusion Zone Policy and Catch-and-Release Policy as issues in their own right, and I will address the appeal on that basis.

[74] On their face, common issues are presented by the appellants' allegations that the RCMP pursued as a policy or strategy the alleged Exclusion Zone Policy and Catch-and-Release Policy, and that actions undertaken pursuant to those policies systemically violated the rights of persons affected. Allegations of systemic violations of rights by government policy have been certified as common issues warranting a class proceeding in other cases: claims of systemic negligence in *Rumley v. British Columbia*, 2001 SCC 69, and *Nasogaluak*; claims of *Charter*

breaches in *Brazeau v. Attorney General of Canada*, 2016 ONSC 7836; *Good; Reddock v. Canada (Attorney General)*, 2018 ONSC 3914; *Araya v. Canada (Attorney General)*, 2023 FC 1688; and *Canada (Attorney General) v. B.W.*, 2025 FCA 199.

The judge's reasons

[75] The judge considered that issues 1 and 2 lack commonality because of the manner in which they are framed. He stated:

[168] First, the use of the word “any” is problematic. The word “any” means one or more. The proposed common questions are therefore asking if one or more of the searches, seizures, arrests, detentions, and/or restrictions of movement were in breach of *Charter* rights. The answers to these questions do not advance each class member’s claim. A single arrest could be in breach of a particular class members *Charter* rights but a single wrongful arrest does not advance the other class members claims. ...

[76] With respect, this objection is grounded in a misreading of issues 1 and 2. They are more restrictively framed than is assumed by the judge. They do not capture any of the searches, seizures, detentions, or restrictions of movement that class members may have suffered. They only capture those searches, seizures, detentions or restrictions of movement pursuant to one of the named policies. This point underscores the centrality of the policies to an analysis of commonality.

[77] The judge goes on to address the policies. He reasons: first, that the definitions of the policies in the pleading are deficient to the point that they do not give rise to commonality (at paras. 171–172, 176); second, that the existence of the policies is unsupported by evidence (at para. 175); and third, that *Charter* rights are inherently individual and require individual assessments (at paras. 177–180).

The objection to the definitions of the policies

[78] The judge reasons that the Exclusion Zone Policy, as defined, “is not in any real sense a policy” because it simply identifies a practice of establishing exclusion zones in which the police would exercise discretion as to who might enter or pass through. He notes that many different zones were implemented over time, in

different locations, and for different reasons: at para. 171. Similarly, he says that the Catch-and-Release Policy, as defined, is “not a definition of a discernible policy but a conclusory allegation of wrongdoing”: at para. 172. He notes that the exercise of discretion is expressly pleaded suggesting “the absence of an umbrella command order or policy”: at para. 176.

[79] I do not agree with the judge’s characterization of the pleaded claim. The appellants’ case alleges systemic misconduct. The alleged policies are what make the misconduct systemic. Both alleged policies do more than simply allege that the RCMP violated the rights of class members individually and in varied circumstances. They allege a coordinated and deliberate effort resulting in rights violations as a matter of course.

The objection that the existence of the policies is unsupported by evidence

[80] The question is whether the allegations have some basis in fact. In addressing this question, the judge focuses on the Catch-and-Release policy.

[81] There is considerable evidence supporting the existence of an Exclusion Zone Policy. Justice Thompson described such a policy in the Media Access decision: at para. 45. An RCMP officer, Assistant Commissioner Brewer, addressed the RCMP’s use of exclusion zones at length in an affidavit made for this proceeding.

[82] The existence of an exclusion zone policy, at some level of generality, is not in doubt. Its terms—in particular, the extent to which it shaped or constrained the discretion of individual officers—are contentious. Having regard to the findings of Thompson J. and the terms of the injunction, it is arguable that the policy was sufficiently enduring and certain to result in a systemic violation of the *Charter* rights of class members during the Class Period. This is a question for trial, not to be resolved on a certification application.

[83] The position in relation to the alleged Catch-and-Release Policy is murkier. In relation to this policy, the judge stated:

[175] The evidence proffered in *Good* stands in marked contrast to the evidence before me. In particular, before me there is no evidence of a command order or policy to arbitrarily search, detain or arrest. The evidence before me presented by the plaintiffs does little more than establish that there were searches, seizures, arrests and detentions at different dates and locations and under different circumstances. The plaintiffs offer no evidence of a command order, systematic practice or policy applying throughout the relevant time period and at all locations within [Fairy] Creek to arbitrarily search, arrest or detain. In contrast, the evidence of the defendants is that there were no umbrella command orders or policies to arbitrarily search, arrest or detain and that such decisions were left to the discretion of watch commanders or the officers present at the disparate locations.

[Emphasis added.]

[84] The judge's reasoning is problematic. The test of some basis in fact eschews a weighing of defence evidence against the plaintiff's evidence. At this early stage in the lawsuit, prior to discovery, the appellants could not be expected to produce a command order expressly authorizing plainly abusive conduct.

[85] Having said that, the evidence of a Catch-and-Release policy is thin. The allegation is unsupported by Thompson J.'s findings or by affidavit evidence tendered by the appellants. In his affidavit, Assistant Commission Brewer acknowledges that the RCMP made at least 473 arrests without further processing of the individuals arrested. He states that he became aware of an RCMP member who was alleging that some members were intentionally arresting individuals and releasing them. He spoke to the member who could provide no or very little details or evidence of his allegations, and much of the member's evidence was double or triple hearsay or clearly incorrect. Assistant Commissioner Brewer denies the existence of a Catch-and-Release policy, and the evidence described above falls short of substantiating the existence of such a policy even to the low threshold of some basis in fact.

[86] Taking into account the deference owed to the judge, I cannot say that he erred in finding that the allegation of a Catch-and-Release Policy lacks a basis in fact.

The objection that Charter rights are inherently individual and require individual assessments

[87] On a point taken up and stressed by the AG, the judge holds that *Thorburn v. British Columbia (Public Safety and Solicitor General)*, 2013 BCCA 480 at paras. 41–42, and *Cirillo v. Ontario*, 2019 ONSC 3066, aff'd 2021 ONCA 353, leave to appeal ref'd 39811 (17 February 2022), establish that commonality is lacking because “*Charter* rights are individual in nature and require individual assessments”: reasons, paras. 177–180. In oral submissions, counsel for the AG argued that hard boundaries on police powers cannot be set in the abstract. Even if the police had adopted a policy of excluding everyone except Teal from the Injunction area for the duration of the injunction, he submitted that the lawfulness of the policy could not be litigated in a class proceeding because the exclusion would stem from the exercise of police powers whose extent depends entirely on the particular circumstances of the case.

[88] I reject this legal argument. If the police adopt and implement an unlawful policy and apply it to a broad range of people in a broad range of circumstances, there is no reason the court cannot tackle the unlawfulness of the policy as a common issue. That the exercise of police powers might justify the actions of the police in any individual case would be an individual issue, but the existence of individual issues does not negate the common issue. Common issues and individual issues of varying significance almost always coexist.

[89] *Thorburn* does not say differently. In *Thorburn*, an attempt to certify an action on behalf of persons who had been strip searched on arrest, contrary to their *Charter* right to be free from unreasonable search and seizure, failed because the answers to the proposed common issues would not advance the litigation in any meaningful way. In every case, even if the strip searches were the product of an unconstitutional policy, it would be necessary to determine whether a particular strip search was justified.

[90] In *Cirillo*, a proposed class action on behalf of persons whose bail hearings had been delayed similarly failed at certification. The plaintiff alleged a policy of delayed bail hearings following arrest that violated the *Charter* rights of people who had been arrested. Justice Benotto, speaking for the Ontario Court of Appeal, agreed with the certification judge that commonality was lacking. At para. 65, she distinguished cases where *Charter* questions arise from a single course of conduct, saying that there was no single course of conduct giving rise to the alleged breaches.

[91] *Thorburn* and *Cirillo* do not establish a legal proposition as to the unavailability or limited availability of class proceedings as a vehicle for the prosecution of *Charter* claims based on the inherently individual nature of *Charter* rights.

Conclusion as to commonality

[92] I conclude that the judge erred in determining that the *Charter* issues addressing the Exclusion Zone Policy (though not the Catch-and-Release Policy) lack commonality.

[93] The class in this case would include people who were no more than bystanders to the protests, but whose liberty of movement was nonetheless impeded by the RCMP. A determination that the RCMP was applying an Exclusion Zone Policy, that violated their *Charter* rights, would move their claims forward. The class would include other persons whose claims would not benefit as much from the determination, but no one whose claim would be prejudiced by the determination.

[94] Accordingly, subject to considerations of preferability, in my opinion, the following are common issues that would advance the claims of class members, satisfying the test under s. 4(1)(c) of the *CPA*:

1. Did the RCMP implement an Exclusion Zone Policy as alleged in the amended notice of civil claim?

2. If so, do any searches and seizures, arrests, detentions, and/or restrictions of movement pursuant to the Exclusion Zone Policy constitute a violation of Class members' rights under ss. 2, 7, 8 and/or 9 of the *Charter*?
3. Were any infringements of the *Charter* justified pursuant to s. 1 of the *Charter*?

[95] The appellants did not address the commonality of their claim for *Charter* damages on appeal, and this is a question warranting further consideration in the trial court. I venture to observe that it might make most sense to postpone its consideration until after the common issues listed above are resolved, if a common issues trial is preferable, a question to which I now turn.

Fourth issue Did the judge err in determining that a class proceeding would not provide a preferable procedure for the fair and efficient resolution of the common issues?

[96] As noted, sub-s. 4(1)(d) of the *CPA* requires a finding that “a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues”. In addressing the question of preferability, it is necessary to have regard to s. 4(2) which states:

- (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
 - (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;
 - (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.

[97] Preferability is the fundamental question on a certification application. As noted, some of the judge's reasoning founding his conclusions as to the existence of an identifiable class and common issues focused on concerns best understood as bearing on preferability. Analytically, the concern that individual issues predominate and cannot be avoided is really a preferability concern expressly recognized in sub-s. 4(2)(a).

[98] When the judge finally comes to address preferability, he deals with it very briefly:

[184] I have determined that the plaintiffs have not met the ss. 4(1)(b) and (c) requirements of the CPA and, therefore, do not need to consider the ss.4(1)(d) and (e) requirements. However, I am firmly of the view that a class action is not the preferable procedure, due to the lack of commonality. Any class action will be unmanageable and will inevitably collapse into multiple sub-classes or individual issues trials. Alternative preferable procedures include individual actions and complaints to the Independent Civilian Review and Complaints Commission and the Independent Investigations Office.

[99] Section 4(2)(a) requires the court to consider the relative importance of individual and common issues. Unfortunately, the judge was not in a position to make that comparison, having mistakenly concluded that there are no common issues. His reasoning attracts no deference.

[100] Preferability engages a comparison of possible avenues for the vindication of the claims of class members. The comparison is to be carried out having regard to the three principal goals of class proceedings: judicial economy, behaviour modification, and access to justice: *AIC Limited v. Fischer*, 2013 SCC 69 at paras. 22–23. Access to justice requires consideration of both fairness of process and the prospects of achieving a just and effective remedy: *AIC Limited* at para. 24.

[101] There are three possible avenues for the vindication of class members' claims in this case: (1) individual civil actions; (2) complaints to the RCMP's Civilian Review and Complaints Commission; and (3) a class proceeding.

(1) Individual civil actions

[102] The primary obstacles to vindication through individual civil claims are economic. The claims present complicated and subtle legal issues. Legal representation would be required to have a reasonable chance of success. Such cases would not be simple to develop and present. They would require the mustering of substantial volumes of evidence from various sources, including through discovery of the RCMP. The trial of a civil claim brought by a protestor in Small Claims Court lasted nine days and ended with a verdict for the defendant: *Ostapchuk v. Minister of Public Safety and Solicitor General*, unreported, February 20, 2025, Provincial Court of British Columbia, Robson Square Registry, File 2374508. The individual damages awarded to successful claimants may not be large. The leading case on *Charter* damages is *Vancouver (City) v. Ward*, 2010 SCC 27. In that case, the successful plaintiff recovered an award of \$5,000 to compensate him for a strip search that violated his *Charter* right to be free from unreasonable search and seizure.

[103] All in all, it is unrealistic to think that the *Charter* claims of individual class members could be fully and properly addressed through individual civil actions. Access to justice for class members will not be achieved in this way. Nor will behaviour modification, as the RCMP are unlikely to adjust their behaviour against the distant prospect of adverse findings in cases that will never proceed to trial. In the circumstances, judicial economy is a neutral consideration.

(2) Complaints to the RCMP Civilian Review and Complaints Commission

[104] Parts VI and VII of the *Royal Canadian Mounted Police Act*, R.S.C. 1985, c. R-10, establish a Civilian Review and Complaints Commission. The mandate of the Commission is to review and report on RCMP operations and receive complaints concerning the conduct of members of the RCMP. The Commission is an administrative body possessing substantial discretion: s. 45.53(2). It may conduct a hearing with witnesses. Ultimately, its only power is to make recommendations to the Minister responsible for the RCMP: s. 45.76.

[105] As a matter of policy, the Commission classifies the recommendations it may make into 14 categories. Category F is the only category contemplating financial compensation:

F – Reimbursement	The RCMP should provide appropriate monetary compensation to the complainant
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[106] Considering access to justice, complaints to the Commission present both advantages and disadvantages by comparison to civil legal proceedings. They will be much less expensive, because complainants will not require counsel. Complainants will have much less control over the process than is offered by a civil proceeding. The extent to which the complaint will be investigated and pursued is a matter within the Commission's discretion. The prospects for substantial compensation are dim because it seems clear that, to the extent that the Commission is prepared to recommend compensation, it thinks in terms of reimbursement rather than damages. On balance, complaints to the Commission offer reduced access to justice compared to a civil proceeding, if a civil proceeding can be devised that is likely to lead to judgment or a substantive settlement.

[107] From the perspective of behavior modification, findings of a *Charter* breach in reasons for judgment of a superior court are likely to carry greater weight than findings in a report of the Commission to the Minister.

[108] Judicial economy benefits from administrative procedures that keep disputes out of court.

(3) A class proceeding

[109] If common issues 1–3 outlined above are tried and determined in the defendant's favour, the objective of access to justice will be achieved because complainants will have had their claims decided by a court on the merits. If the issues are determined in the appellants' favour, the question is what happens next.

[110] Individual issues of substance would remain. Individual class members would have to establish that the RCMP's actions that qualified them as members of the class (their movement was impeded, they were detained or arrested, or their person or property were seized within the Injunction area during the Class Period) were actions made pursuant to the Exclusion Zone Policy (found to exist as contemplated by common issue 1) as a violation of Class members' rights (found to have occurred by common issue 2) without justification pursuant to s. 1 of the *Charter* (by common issue 3). Depending on the findings at the common issues trial, this determination might be quite straightforward for some class members. Undoubtedly, it would require disputed factual determinations for others, such as persons actively involved in protest activities.

[111] In my view, for some class members a class proceeding would offer a reasonable prospect of access to justice and ultimately compensation in the event of success at a common issues trial. As noted, success at a common issues trial would encourage the RCMP to modify its policies and strategies in the difficult circumstances presented in cases of mass civil disobedience of a court order.

Conclusion as to preferability

[112] Weighing together the considerations canvassed above, in my view, a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

Fifth issue: If the judge erred and the requirements of an identifiable class, common issues, and preferable procedure are satisfied, what should this Court order?

[113] The judge did not make findings necessary for a determination as to whether Mr. Dang and Ms. Morgan are appropriate representative plaintiffs, as contemplated by sub-s. 4(1)(e) of the *CPA*, and the parties did not address this question in their factums and oral submissions. I would remit this question to the court below.

Disposition

[114] For these reasons, I would allow the appeal and order that the application for certification be remitted to the Supreme Court of British Columbia for determination on the following basis:

a) The pleadings disclose a cause of action;

b) There is an identifiable class of 2 or more persons, namely;

All individuals who had their movement impeded, were detained or arrested, or had their person or property searched or seized by RCMP officers in connection with enforcement of the Fairy Creek injunction during the Class Period, when attempting to access or travel within the injunction zone, excluding persons who were convicted of contempt of court arising from their actions on the same occasion.

c) The claims of the class members raise the following common issues:

1. Did the RCMP implement an Exclusion Zone Policy as alleged in the amended notice of civil claim?

2. If so, do any searches and seizures, arrests, detentions, and/or restrictions of movement pursuant to the Exclusion Zone Policy constitute a violation of Class members' rights under ss. 2, 7, 8 and/or 9 of the *Charter*?

3. Were any infringements of the *Charter* justified pursuant to s. 1 of the *Charter*?

d) The court may consider the certification of additional common issues pertaining to damages; and

e) A class proceeding is the preferable procedure for the fair and efficient resolution of the common issues.

[115] Having regard to s. 37(1) of the *CPA*, the appeal should be allowed without costs.

“The Honourable Justice Gomery”

I AGREE:

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Justice MacNaughton”