

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Cleaver v. The Cadillac Fairview Corporation Limited*,
2026 BCCA 353

Date: 20260821
Docket: CA50727

Between:

Joshua Cleaver and Curtis Kieres

Appellants
(Plaintiffs)

And

**The Cadillac Fairview Corporation Limited, Pacific Centre Limited Inc.,
Les Galleries D'Anjou Limitee., Polo Park Holdings, L.P., FVM Property Inc,
CF/Realty Holdings, Inc., Ontrea Inc., CF Sherway Holdings I Rec. Inc.,
CF Sherway Holdings II Rec. Inc., 7904185 Canada Inc., RC (South) Inc.,
Locations Galleries D'Anjou Inc., Le Carrefour Laval (2013) Inc.**

Respondents
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Justice Iyer
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated
May 15, 2025 (*Cleaver v. The Cadillac Fairview Corporation Limited*,
2025 BCSC 910, Vancouver Docket S2012347).

Counsel for the Appellants: T.P. Charney
C. Edwards

Counsel for the Respondents: K. Thompson
M.G. Evans
E. Irving

Place and Date of Hearing: Vancouver, British Columbia
June 12, 2026

Place and Date of Judgment: Vancouver, British Columbia
August 21, 2026

Written Reasons by:

The Honourable Justice Mayer

Concurred in by:

The Honourable Mr. Justice Groberman

The Honourable Justice Iyer

Summary:

The appellants appeal a decision of a certification judge declining to certify their proposed multi-jurisdictional class action. The judge concluded the appellants had not established any basis in fact for the central allegation underpinning their action: that the respondents recorded their facial images at wayfinding directories located in a number of shopping malls and then created biometric or personal information from those images. As a result, the judge found the identifiable class, common issues and preferable procedure criteria set out at s. 4(1) of the Class Proceedings Act were not satisfied. On appeal, the appellants contend the judge erred by failing to admit findings within a report prepared by the Office of the Privacy Commissioner, by incorrectly weighing expert evidence, by misinterpreting the test for class definition, and by finding that “compensable damage” was necessary to certify the claims arising in Québec. Held: Appeal dismissed. The appellants’ failure to appeal the judge’s determination that a class proceeding is not the preferable procedure for resolving their disputes is fatal to this appeal.

Reasons for Judgment of the Honourable Justice Mayer:

[1] The appellants challenge the dismissal of their application to certify a multi-jurisdictional class proceeding. In the underlying action, they claim their privacy rights, and those of other potential class members, were breached when cameras captured their images and converted them into biometric data when they used store location directories at the respondents’ shopping malls in BC, Alberta, Manitoba, Ontario, and Québec.

[2] The certification judge was not satisfied that three of the five mandatory requirements to certify a class proceeding, set out at s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA], were met. In particular, she concluded the appellants had not provided some basis in fact that there was an identifiable class of two or more persons (s. 4(1)(b)), that the claims of the proposed class members raised common issues (s. 4(1)(c)), and that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues (s. 4(1)(d)). At the heart of the judge’s decision was her conclusion that the appellants had not established any basis in fact for the central allegation underpinning their action: that the respondents recorded facial images and then created biometric or personal information from those images.

[3] The appellants contend, in summary, that the judge made a number of errors of law or palpable and overriding errors in fact in deciding not to certify their action as a class proceeding. The respondents contend the judge did not make the alleged errors of law or fact and her decision that the certification requirements had not been met is owed deference.

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] The following background facts are largely taken from the judge's comprehensive reasons for judgment released May 15, 2025, indexed as *Cleaver v. The Cadillac Fairview Corporation Limited*, 2025 BCSC 910 (the "RFJ").

[6] On May 30, 2018, Cadillac Fairview Corporation Limited ("Cadillac Fairview") undertook a pilot project to obtain an estimate of the number, age, and gender of visitors to certain shopping malls. The pilot project used cameras installed in mall directories, equipped with video analytics software supplied by MappedIn Inc. (the "Software"). The project lasted for eight weeks, ending on July 24, 2018, after information and media circulated online suggesting that "facial recognition" technology was being used.

[7] The Software worked by detecting any human faces in a camera's field of view and converting each image of a face into a string of 128 numbers. Five million records were created, each of which was populated by fields for time, location, camera ID, estimated age, gender probabilities, and an embedding number (collectively, the "Data"). The processing of each image occurred in a matter of milliseconds, and no images of faces were retained. None of the respondents received or made use of the Data.

[8] Some time between July 2018 and October 2020, privacy commissioners from Canada, Alberta, and BC (the "Privacy Commissioners") launched a joint investigation to determine whether Cadillac Fairview was collecting and using personal information of mall visitors. Their report was released on October 28, 2020

(the “OPC Report”). They found that the Software took digital images of the faces of individuals within a directory camera’s field of view and used facial recognition software to convert those images into biometric numerical representations of individual faces, which were used to assess age range and gender.

[9] The Privacy Commissioners concluded the operation of the Software constituted the collection of “personal information” within the meaning of their privacy statutes. In their view, the combination of all the information collected — including biometric information, location, and timestamps meant an individual could be identified in the Data. No further steps were taken by the Privacy Commissioners because Cadillac Fairview had disabled the Software and deleted the Data.

[10] The appellants commenced the underlying action on November 19, 2020. Their amended notice of civil claim filed on November 2, 2022, set out a number of causes of action including the following: intrusion upon seclusion; statutory actions for breach of privacy; unjust enrichment (which was abandoned at the certification hearing); negligence; and various breaches of Québec law. The certification hearing was heard by the judge over three days in September 2024.

[11] In the certification hearing, in addition to the OPC Report, the appellants relied on expert reports prepared by Jason Frankovitz, a computer programmer and software litigation expert, and John Wunderlich, an information privacy and security expert. The respondents tendered an initial report from Professor Richard Zhang, a professor at the School of Computing Science at Simon Fraser University, and his follow-up report, replying to the first report of Mr. Frankovitz. The respondents challenged the admissibility of the appellants’ expert reports.

[12] In his first report, Mr. Frankovitz, relying on the findings in the OPC Report, said the Software “converted and encoded” images captured by the respondents’ cameras. He did not examine the Software source code or any live running system or computer logs of any MappedIn or Cadillac Fairview servers in coming to this conclusion. He opined that the Software stored facial images for brief periods, from a few milliseconds up to a few minutes and it was theoretically possible for a class

member to share a photo that would allow the Software to match the person with their biometric imaging. In his second report, replying to the report of Dr. Zhang, Mr. Frankovitz set out his opinion that if a person made a claim they were at a particular mall directory on a certain date, it would be possible to examine a small number of records retained by the Software to determine whether this was the case.

[13] Mr. Wunderlich provided an opinion that the Software captured a facial image, temporarily stored it, and then converted it into a numerical representation. In his view, the respondents failed to obtain consent to collect sensitive personal information, lacked transparency in their collection of such information, and failed to ensure adequate safeguards over the information collected.

[14] Dr. Zhang examined and tested the Software and the Data. His opinion was that the embedding numbers produced from facial images captured by the cameras did not contain biometric information. Further, he concluded it was not possible to recover the original facial image from which the embedding numbers were generated, such that it was not possible to accurately identify specific individuals from the Data. With respect to the appellants, he concluded that it was not possible to identify either of them from the over five million records in the Data.

The Judge's RFJ

[15] In the RFJ at para. 62, the judge framed the issues arising in the certification application as follows:

1. What use can be made of the OPC Report?
2. Are the expert reports admissible?
3. Does the proposed class action meet all the statutory requirements for certification set out in s. 4(1) of the *CPA*?

[16] The judge ruled the OPC Report was admissible, but not for the truth of its contents. That is, she could not rely on the conclusion in the OPC Report that

Cadillac Fairview collected personal information without consent, contrary to privacy laws.

[17] The judge admitted Mr. Frankovitz's reports concluding they met the test for admissibility set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at paras. 19, 23–24. She disregarded portions of the first report in which Mr. Frankovitz speculated on, in summary, the following:

- a) whether a class member could share a photo which would allow the Software to match the person with its biometric imaging; and
- b) that video images could have been preserved in another system the Privacy Commissioners did not review and that some form of speech, eye tracking or gait recognition may have been carried out.

[18] The judge also admitted the report of Mr. Wunderlich, excluding his opinions concerning the mechanism and function of the Software, on the basis that he lacked proper qualifications to opine on those issues.

[19] The judge correctly summarized relevant law concerning the test for certification of a class proceeding. She set out the statutory criteria for certification of a class proceeding in ss. 4(1)(a) to (d) of the *CPA*. She set out that the onus was on the appellants to show some basis in fact for each of the criteria, other than for the requirement that the pleadings disclose a cause of action. She recognized the “some basis in fact” threshold is low, requiring an evidentiary basis to show that a plaintiff has met the certification requirements on more than a superficial scrutiny of the sufficiency of evidence, referring to *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338 at paras. 37–38.

[20] The judge concluded the criteria at ss. 4(1)(b), (c), and (d) of the *CPA* had not been met, because:

- a) the appellants failed to provide some basis in fact that at least two persons could self-identify as class members and there was no rational relationship

- between the proposed class definition (all persons who viewed a wayfinding directory at one or more of the shopping malls during the relevant periods and any person including minors who accompanied them) and what she considered to be the fundamental common issue, whether a facial image of an individual was recorded and used to create biometric and personal information about that individual (RFJ at para. 186);
- b) the appellants failed to provide some basis in fact that any facial images were recorded by cameras located at mall directories or biometric and personal information about potential class members was created (RFJ at para. 199); and
- c) the appellants had not established that a class proceeding was the preferable procedure for the fair and efficient resolution of the proposed common issues in light of the lack of common issues, and the absence of demonstrable harm or a need for behavioural modification (RFJ at para. 215).

Summary of the Appellants' and Respondents' Arguments

[21] On appeal, the appellants contend the judge erred in law in determining the admissibility of and weight to be given to certain evidence. First, they argue the judge erred by not admitting the OPC Report under either the public documents exception to the hearsay rule or for the purpose of showing the evidence that could be adduced at trial. They say this error resulted in a further error, by the judge, in failing to give any weight to the first Frankovitz report. In addition, they say the judge impermissibly weighed the opinions set out by Mr. Frankovitz in his second report against the opinions of Dr. Zhang.

[22] The appellants also contend the judge erred by misinterpreting the test for determining class definition, or alternatively, made palpable and overriding errors of fact in deciding: (a) there was no rational relationship between the appellants' proposed class definition and the common issues and (b) there was no factual basis on which class members could self-identify.

[23] Finally, the appellants contend the judge erred in law in finding that it was necessary for the appellants to plead that a Québec plaintiff suffered “compensable damage” as opposed to suffering an injury, to certify the claims under the *Civil Code of Québec*, C.Q.L.R., c. C.C.Q.-1991 [CCQ]. In addition, they contend the judge misstated the law regarding the claim advanced under the Québec *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12 [Québec Charter], for punitive damages and in finding the appellants were required to plead that Cadillac Fairview intentionally caused or knew of the consequences (humiliation, anxiety, loss of trust, and fear) resulting from its alleged wrongful conduct.

[24] The respondents’ position is, save for the causes of action in Québec, each of the appellants’ arguments concern the certification judge’s exercise of discretion in assessing the factual record put before the court or her application of those facts to the identifiable class criterion. They say the standard of review in respect of those determinations is palpable and overriding error and no such errors were made. They deny the judge made the alleged errors concerning the claims advanced under the CCQ and Québec Charter.

[25] Of note, the appellants do not appeal the judge’s determination that a class proceeding was not the preferable procedure. In their reply factum, the appellants submit “[p]referable procedure has not been appealed here. Instead, the appellants request that this Court remit the question if the appeal is granted. The civil claim and the common issues advance privacy torts which satisfy the three goals of class proceedings”.

[26] The respondents say the appellants’ failure to appeal the judge’s conclusion on preferable procedure is a full answer to the appeal, although they do not rely on this as their main argument why the appeal should be dismissed.

Discussion

[27] The appellants’ decision not to appeal the judge’s determination with respect to preferable procedure is significant because the test for certification under the CPA

is conjunctive, meaning that all five criteria at s. 4(1) of the *CPA* must be satisfied before the court will certify an action as a class proceeding.

[28] There is overlap in an analysis whether the identifiable class criteria under s. 4(1)(b) and preferable procedure criteria under s. 4(1)(d) have been met. In analysing preferable procedure, s. 4(2)(a) of the *CPA* makes it mandatory for a certification judge to consider “whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members”. Thus, the judge’s conclusion with respect to whether facial images or biometric and personal information was recorded by the respondents is relevant to her decision concerning both the identifiable class and preferable procedure criteria.

[29] In my view, the material before the court provided no basis in fact for the proposition that facial images or biometric and personal information was recorded by the respondents. As that proposition is essential to the claim, the judge was right to deny certification.

[30] Even if the appellants had succeeded on that issue, the appeal could not properly be allowed. As I have said, the appellants did not include, in their grounds of appeal, any challenge to the judge’s determination that a class proceeding is not the preferable procedure for the fair and efficient resolution of the common issues. The judge’s finding that s. 4(1)(d) of the *CPA* was not satisfied precludes certification of the class proceeding.

[31] I wish to emphasize, in saying this, that the problem is not merely a technical one. It is apparent that the appellants’ failure to challenge the determination on preferability was not inadvertent.

[32] The judge gave cogent reasons, starting at para. 210 of her judgment, for finding that a class proceeding would not be efficient from a judicial economy perspective. She further considered whether there would be social benefits from allowing the matter to be certified. On their face, the judge’s reasons are unassailable. It is not apparent that any damage has been occasioned by the

respondents' conduct, or that there will be any systemic or social benefit to pursuing a class proceeding. Her reasons provide a sound basis for the conclusion that a class proceeding is not proportional to the matters in issue.

Conclusion

[33] For the reasons set out above, I would conclude the judge did not err in determining the requirements for certification under s. 4(1) were not satisfied.

[34] I would dismiss the appeal.

“The Honourable Justice Mayer”

I AGREE:

“The Honourable Mr. Justice Groberman”

I AGREE:

“The Honourable Justice Iyer”