IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hay v. Mundi 910 Victoria Enterprises Ltd.,* 2022 BCSC 2127

Date: 20221206
Docket: S2058198
Registry: Prince George

Between:

Leonard Hay

Plaintiff

And

Mundi 910 Victoria Enterprises Ltd., Choice Hotels Canada Inc., City of Prince George, All Points Fire Protection Ltd., and Aztech Fire Safety Planning & Consulting (2015) Ltd.

Defendants

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

Before: The Honourable Madam Justice Church

Reasons for Judgment

Counsel for the Plaintiff:	J.L. Thornback K. Duke D. Byl
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Counsel for the Defendant, City of Prince George:	T.R. Darby
Counsel for the Defendant, All Points Fire Protection Ltd.:	D.H. Liu N.L. Trevethan
Place and Date of Hearing:	Prince George, B.C. May 16 & 17 & June 9, 2022
Place and Date of Judgment:	Prince George, B.C. December 6, 2022

INTRODUCTION

[1] On July 8, 2020 at approximately 8:40 am, fire broke out at the Econo Lodge Hotel (the "Fire"). The Econo Lodge is located at 910 Victoria Street in the City of Prince George (the "Motel"). The Fire caused severe damage to the southeast end of the Motel. As a result of the Fire, three people died and at least two persons were injured. Other persons occupying the Motel lost personal possessions and/or were left without accommodation.

[2] On August 29, 2020, Leonard Hay filed a Notice of Civil Claim on behalf of all individuals who were registered guests or on site at the hotel or adjoining restaurant at the time of the Fire and on behalf of the personal representatives of the three individuals who died in the Fire. He seeks certification of this action as a class proceeding and seeks damages for the members of the class he represents for severe physical and emotional injuries, and the loss and damage suffered as a result of the negligence of the defendants.

[3] The defendants Mundi 910 Victoria Enterprises Ltd. ("Mundi Enterprises") and Choice Hotels Canada Inc. ("Choice Hotels") are the registered owner and franchisor for the Motel. The defendant, City of Prince George ("CPG") regulates building construction and maintenance, and is responsible for fire inspections and enforcing compliance with the BC Fire Code and the BC Building Code. The defendant, All Points Fire Protection Ltd. ("All Points") is a business that reviewed, tested, repaired and inspected the Fire safety systems of the Motel prior to the Fire.

[4] The plaintiff alleges that the defendants were negligent in creating or failing to ameliorate unsafe conditions that pre-dated the Fire, with respect to installation, monitoring, maintenance, inspection, and testing of the Motel's fire safety system, and failing to prepare an adequate fire safety plan. The plaintiff also alleges that the defendant Mundi Enterprises breached the terms of its contract with Motel guests and breached it duties as an occupier under the *Occupier's Liability Act*, R.S.B.C. 1996, c. 337. On behalf of the class, the plaintiff seeks damages for negligence, breach of contract and breach of the *Occupier's Liability Act.*

[5] The defendants deny the allegations of negligence, breach of contract or breach of the *Occupier's Liability Act.*

[6] On this application, the plaintiff seeks an order certifying this action as a class proceeding under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. All of the defendants oppose certification.

[7] For the reasons below, I am granting the order sought in the plaintiff's application and certifying the class action.

BACKGROUND

a) The Motel

[8] The Motel was constructed in the 1960s and the property, including the Motel, was purchased by Mundi Enterprises in December 2018. Mundi Enterprises began operating the Motel under the name Econo Lodge Prince George.

[9] The Motel was equipped with a fire alarm system comprised of a fire alarm panel, detection devices, pull stations, and alarm bells. Each of the Motel's rooms had a hardwired smoke detector with battery backup. Each guestroom had an individualized fire safety plan which provided instructions on what to do upon discovery of a fire, including information as to the nearest safe exit, nearest stairwells, pull stations, fire extinguishers, and the location of the predesignated assembly area.

[10] On February 21, 2020, less than five months before the Fire, the Prince George Fire Department attended the Motel and identified certain deficiencies to be remedied in relation to the Motel's fire suppression devices, fire alarm system, and the emergency lighting system. The fire department issued an inspection order with respect to those deficiencies and noted the need for a fire safety plan.

[11] Mundi Enterprises arranged for employees of All Points to attend the Motel on February 24 and March 18, 2020, at which time the existing fire extinguishers were inspected and two units were replaced. The Motel's fire alarm system was also

inspected and tested. The inspection conducted by All Points noted seven fire extinguishers, and seven manual pull stations and alarm bells located in the walkways in front of the guestrooms, as well as other fire safety equipment in the basement electrical room and the staff room. After the completion of inspection and testing of the Motel's fire alarm systems on March 18, 2020, All Points certified them to be fully functional and free from deficiencies.

[12] The Prince George Fire Department inspected the Motel again on July 6, 2020, and found all of the deficiencies identified on the inspection order had been remedied.

b) The Fire

[13] The Motel was occupied on the morning of July 8, 2020 when the Fire started at approximately 8:40 a.m.

[14] The plaintiff Leonard Hay was in room 243 on the second floor on the southeast side of the Motel when he heard screams from the room next door, went to the window and saw flames outside his room. The window of the room then exploded, throwing him backwards. Mr. Hay ran to the bathroom at the rear of the room, put a wet towel over his head and then exited the room. When he opened the door, he burned his hand on the door handle and then ran through the flames and smoke. He was unable to make his way down the walkway or stairway due to the thick smoke and flames. When his clothing caught fire, he threw himself over the balcony to the courtyard below. He did not hear any fire alarms or see Motel staff assisting people to evacuate the Motel.

[15] Mr. Hay suffered second and third degree burns to his hands, legs and face and was hospitalized for over a week due to his injuries. He deposes that he continues to experience pain from his injuries, has been diagnosed with post-traumatic stress disorder and lost all of his possessions that were in the room.

[16] Another Motel guest at the time of the Fire was David Klein. He was staying in a room on the ground floor near the southeastern stairs and woke up when he heard

a loud bang at approximately 8:45 am. When he did not hear any alarms or other indications of a problem, he went back to sleep. At around 9:00 am he woke again to the sound of his dog barking. When he looked outside, Mr. Klein saw a “wall of fire” and fled his room, grabbing only his crutches. Mr. Klein deposes that the heat knocked him down as he fled. When he yelled for help, someone he believed to be another Motel guest came to his aid and dragged him away from the Fire. He did not hear any fire alarms or see Motel staff evacuating people.

[17] Mr. Klein suffered second and third degree burns to the top of his head, right shoulder and arm, left hand, and right foot and leg. He was hospitalized for approximately a day and a half for his injuries and required outpatient burn care after his discharge from the hospital.

[18] Debra Brophy and her husband were staying at the Motel at the time of the Fire. Their room was on the second floor at the southeast end. They were alerted to the Fire when they heard a woman shouting “fire”. They saw thick smoke out of the window, grabbed their belongings and ran out of their room. They were able to make their way down the stairs to escape, went to their car and left the Motel.

[19] Ms. Brophy deposes that she and her husband inhaled smoke during their escape and she suffered from nightmares and difficulty sleeping following the Fire.

[20] Marc Lapointe and his wife checked into the Motel in April 2020, and had a shelter agreement with the Motel. They were occupying a suite in the corner of the Motel near the Yolks All Day Family Restaurant when they were awoken on the morning of July 8, 2020 by a woman screaming “fire!”. Mr. Lapointe deposed that he saw smoke coming towards them, but he and his wife were able to exit their room safely. Mr. Lapointe alleges that he suffered financial losses as a result of room fees that were not refunded, and loss of the food that was in his fridge at the Motel.

[21] Three individuals died as a result of the Fire. Amos Miller, Curtis Fraser and Maryann Sanders were staying in Rooms 240 and 242 which were closest to the southeast stairwell. They were unable to escape and died of smoke inhalation.

[22] The Yolks All Day Family Restaurant was located on the ground floor at the northwest end of the Motel property at the time of the Fire. It sustained no fire damage and had little to no evidence of smoke damage in its interior. The patrons of the Yolks All Day Family Restaurant who were present at the time of the Fire were safely evacuated from the restaurant. There were no reports of physical injuries to those individuals.

[23] The Fire was largely contained to one side of the Motel and affected a limited number of rooms. According to fire investigator Kevin Bureau, who was retained by Mundi Enterprises and inspected the Motel on July 13, 2020, the southeast section of the structure exhibited significant fire damage to the roof structure and there was also some damage to the roof on the south and west sides, but not the north side. There was minimal smoke and little or no fire damage in the office and lobby area. Most of the ground floor rooms sustained minor to moderate smoke damage and there was no fire damage to rooms on the ground floor, northwest of Room 128. The most significant area of fire damage on the ground floor was to the exterior stairway in the southeast end of the courtyard. Mr. Bureau opined that the Fire originated on or near old flooring material that had been placed on the concrete floor to the east of the south east stairway on the ground floor. The Motel had been undergoing renovation at the time of the Fire and carpet and underlay had been removed from one of the ground floor rooms the day prior to the Fire. Mr. Bureau's preliminary opinion is that the "fire was intentionally ignited by unknown person(s) who used an open and direct flame to ignite gasoline which was applied to other receptive and available combustibles."

[24] The Fire was investigated by the Prince George RCMP and was determined to have been deliberately set. Evidence of gasoline was found in several areas near the southeast stairway. The B.C. Prosecution Service has approved charges, including arson in relation to inhabited property, against one individual.

[25] The nature of the claims against the defendants asserted by the plaintiff on behalf of the class are negligence, liability under the *Occupier's Liability Act*, breach

of contract, and wrongful death pursuant to the *Family Compensation Act*, R.S.B.C. 1996, c. 126. The plaintiff asserts that the arson which damaged the Motel was only possible due to the negligence of the defendants, including inadequate security, lack of control of third parties on the premises, and unsafe conditions at the Motel. The plaintiff also asserts that the defendants' acts or omissions led to a lack of response from any fire alarm, fire suppression system, or fire safety plan. The plaintiff submits that the ability of the Fire to spread quickly and cause damage was exacerbated due to unsafe operations, and inadequate fire safety or warning systems. In consequence, the impact of the Fire on proposed class members was supposedly greater than it should have been.

[26] The defendants submit that the plaintiff's application for certification does not meet the criteria set out in s. 4(1) of the *CPA* and should be dismissed. They submit that:

> (1) the proposed class definition is overly broad and inclusive and may capture persons who have no interest in the common issues;
>
> (2) the proposed class definition is insufficiently objective as it creates an obvious conflict between class members which cannot be resolved without a determination on the merits;
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> (3) the individual issues that remain to be determined predominate over the common issues;
>
> (4) many of the common issues proposed by the plaintiff are non-substantive and resolution of those issues will not materially advance the proceeding for all proposed class members, but rather will inevitably result in the action devolving into a series of individual trials reliant on the evidence of each proposed class member; and
>
> (5) the potential class size is very small and certification is not in accordance with the principal goals of class actions: access to justice, judicial economy, and behaviour modification.

STATUTORY PROVISIONS

[27] Section 4(1) of the *CPA* provides that the court must certify a class proceeding if each of five requirements are met:

> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of two 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 standard of proof required for the certification requirements, other than the requirement that the pleadings disclose a cause of action, has been described as "some evidentiary basis" or "some basis in fact". The Supreme Court of Canada in its decision in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*] noted at paras. 99 and 100:

> [99] The starting point in determining the standard of proof to be applied to the remaining certification requirements [other than the existence of a cause of action] is the standard articulated in this Court's seminal decision in *Hollick*. In that case, McLachlin C.J. succinctly set out the standard: ". . . the class representative must show <u>some basis in fact</u> for each of the certification requirements set out in . . . the Act, other than the requirement that the pleadings disclose a cause of action" (para. 25 (emphasis added)). She noted, however, that "the certification stage is decidedly not meant to be a test of the merits of the action" (para. 16). Rather, this stage is concerned with form and with whether the action can properly proceed as a class action (see *Hollick*, at para. 16; *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, 98 B.C.L.R. (4th) 272 ("*Infineon*"), at para. 65; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), at para. 50).
>
> [100] The *Hollick* standard of proof asks not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements. McLachlin C.J. did, however, note in *Hollick* that evidence has a role to play in the

> certification process. She observed that "the *Report of the Attorney General's Advisory Committee on Class Action Reform* clearly contemplates that the class representative will have to establish an evidentiary basis for certification" (para. 25).
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> [Emphasis in original.]

[29] The court plays an important gatekeeper function to ensure that a proposed class proceeding is suitable for certification. The court must consider all of the admissible evidence to determine if the plaintiff has adduced "some basis in fact" to establish each of the requirements for certification set out in s. 4(1)(b)–(e) of the *CPA* and the claims advanced on behalf of the class: *Miller v. Merck Frosst Canada Ltd.*, 2015 BCCA 353 at para. 22.

[30] Thus, I must be satisfied that there is a sufficient evidentiary basis to allow the matter to proceed on a class basis "without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met": *Microsoft*, at para. 104.

[31] There are some general principles regarding certification applications which are settled:

> (1) Section 4(1) provides that the court "must" certify a proceeding as a class proceeding if the enumerated requirements are met. Thus, a judge on a certification application is not exercising a discretionary power to grant or refuse certification: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 28 [*Pro-Sys*].
>
> (2) The provisions of the *CPA* should be construed generously in order to achieve its objects of judicial economy, access to justice, and behaviour modification: *Pro-Sys* at para. 64.
>
> (3) A certification application does not involve a test or assessment of the merits of the action, but focuses on the form of the action: *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16 [*Hollick*].

(4) At the certification stage, the court does not engage in any detailed weighing of the evidence or resolve any conflicting facts. Instead, the court confines itself to determining whether there is some basis in the evidence to support each of the certification requirements: *AIC Limited v. Fischer*, 2013 SCC 69 at para. 43 [*AIC Limited*]; *Hollick* at para. 25.

(5) The common issues do not have to be determinative of liability in order for the action to be certified, but resolution of the common issues should move the litigation forward. The class should be bound together by a substantial ingredient necessary for the resolution of each class member's claims: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 39 [*Dutton*].

ANALYSIS

a) Cause of Action – *CPA* s. 4(1)(a)

[32] Section 4(1)(a) of the *CPA,* requires the plaintiff to plead a case that is not bound to fail.

[33] The pleadings disclose typical causes of action in negligence against all defendants and a claim for breach of contract against Mundi Enterprises. The defendants do not dispute that the first requirement for certification has been met.

b) Identifiable Class – *CPA* s. 4(1)(b)

[34] The plaintiff seeks to certify a class proceeding to obtain compensation for the dependants of those who died in the Fire and for those who suffered losses because of the Fire. The proposed class definition in the notice of application for certification does not expressly exclude anyone responsible for starting the Fire. Thus, the plaintiff seeks to modify the class definition as follows:

> All individuals who were registered guests of the Motel and all individuals on the Motel premises or the adjoining [Yolks All Day Family] Restaurant, at the time of the Fire on July 8, 2020; and

> The personal representatives and dependants of the people who died as a result of the Fire; but
>
> Excluding the defendants and their directors, officers, representatives, servants, employees or agents, or any person who intentionally started the Fire or conspired to start the Fire.
>
> ("**Class**", members of which are "**Class Members**")

[35] The plaintiff submits the change to the class definition will not prejudice the defendants: the proposed amendment is minor, was made in response to a complaint raised by the defendants, the defendants have had adequate notice, and the action is still at an early stage. None of the defendants took issue with the timing of the proposed amendment or suggested that they have suffered prejudice as a result of insufficient notice of the proposed amendment.

[36] Clear identification of a proper class at the outset of the litigation is critical to achieving the purposes of class proceedings. The requirement of a rational relationship between the proposed class and common issues was explained by Chief Justice McLachlin in *Hollick* at para. 19:

> The difficult question, however, is whether each of the putative class members does indeed have a claim — or at least what might be termed a "colourable claim" — against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues.

[37] There must be some connection between the class definition, the common issues, and the Notice of Civil Claim. The requirement of an identifiable class is not satisfied where many of the putative class members do not have a claim which raises a common issue with the cause of action asserted by the proposed representative plaintiff, or where the putative class members do not have any potential cause of action: see *Williamson v Johnson & Johnson*, 2020 BCSC 1746 at paras. 188–194, and *Mouhteros v. DeVry*, [1998] O.J. No. 2786, 1998 CanLII 14686 (S.C.) [*Mouhteros*].

[38] The burden is on the plaintiff to propose a class definition that is sufficiently narrow and certain. The plaintiff need not show that everyone in the class shares the same interest in the resolution of the asserted common issues, but he bears the

burden of showing that the class could not be defined more narrowly: *Hollick* at paras. 20 and 21.

[39] A class definition does not need to be framed such that every class member will be successful. It is clear from *Hollick* at paras. 20 and 21, and *Dutton* at para. 38, that the putative class members must:

i. be defined with reference to objective criteria that do not depend on the merits of the claim;

ii. bear a rational relationship to the common issues; and

iii. have 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.

[40] The plaintiff submits that he has discharged this burden and that the proposed class meets these criterion as follows:

1) The class definition is based on objective criteria: Class members will know if they were guests of the Motel or at the Motel or Restaurant at the time of the Fire or whether they intentionally started the Fire or conspired to start the Fire (and are therefore excluded from the Class). The plaintiff submits that class members can self-identify based on objective, factual circumstances that are within their knowledge.

2) The class definition does not depend on the answer to a legal question nor does it depend on the merits of the plaintiff's claims. The court or any adjudicators/administrators retained for the administration phase of the proceeding will know by reference to objective criteria whether a particular individual is a member of the Class or not.

3) The class definition is rationally connected to the common issues. The proposed class is intended to capture persons who were present at the time of the Fire or had property at the Motel at the time of the Fire. These are the people who may have suffered losses as a result of the Fire and should be

> given the opportunity to participate in these proceedings. The common issues ask factual and legal questions that will help determine whether the defendants are liable for those losses.

[41] The plaintiff also submits that it is too early in the proceedings to narrow the class without arbitrarily excluding people who share an interest in the resolution of the common issues and therefore the class definition is not overly broad. Counsel submitted that if the class was limited to those who were registered guests of the Motel, it would exclude other Motel occupants who might not be registered Motel guests but were occupying a room together with a registered guest. The plaintiff also argues that limiting the class based on proximity to the Fire would arbitrarily exclude people who did not receive refunds or whose property was damaged, destroyed or lost.

[42] The defendants submit that the proposed class is overbroad, is not determinable on an objective basis and gives rise to a conflict between class members that cannot be resolved without an adjudication on merits. They submit that the proposed class purports to include all individuals who were registered guests of the Motel, regardless of whether they were physically present at the Motel when the Fire occurred, or had any possessions located in the Motel. The class would, therefore, improperly include: individuals who may have been registered guests but did not check-in, or individuals who had not checked out but had already removed their belongings and left their room before the Fire broke out. In other words, the class would include individuals who were neither at the Motel, nor had any possessions there, and therefore have no conceivable claim against the defendants.

[43] The proposed class also purports to include all individuals who were at the Motel property, including at the Yolks All Day Family Restaurant, in the parking lot of the Motel or located in a portion of the Motel that was entirely unaffected by the Fire and thus would have no colourable claim against the defendants. The defendants

submit that such individuals have no rational connection to the claims that are set out in the Notice of Civil Claim or the proposed common issues.

[44] In my view, the proposed class definition meets the requisite criteria. The proposed class would capture persons who were present on the Motel property at the time of the Fire and does not depend on the merits of the claim. Those persons may have suffered loss or injury as a result of the Fire and therefore have a rational connection to the claims in this proceeding. The proposed class definition, as amended, allows persons to self-identify as class members and excludes the persons responsible for the Fire. The proposed class members will know whether they were present on the Motel property at the time of the Fire and are potentially included in the class, or whether they took steps to intentionally start the Fire and are therefore excluded from the class.

[45] The class definition in this case does not suffer from the difficulties identified by the court in *Mouhteros*. In *Mouhteros*, the plaintiff had defined the proposed class as “all persons who attended the defendant Devry's Ontario and Alberta campuses as students at any time between September, 1990 and May, 1996, inclusive”. The plaintiff was a former student of DeVry Institute of Technology who claimed that DeVry misrepresented the quality of their programs, facilities and the marketability of their graduates, and that students who enrolled at DeVry relied upon these representations to their detriment. The defendant identified 17,227 potential class members based on a computer program used to track enrolments. The Court found that although the proposed class encompassed all students of DeVry during the relevant time period, many of those students did not rely on the representations, or were satisfied with their education. These students might well have no claim let alone one that raised a common issue.

[46] Unlike *Mouhteros*, in this case there is a clearly identifiable class that captures persons who may have suffered losses as a result of the Fire and the class definition bears a rational relationship to the common issues. The class definition is not over-broad simply because it includes persons who may not ultimately be

successful. Further, simply because some class members may not have suffered *physical* injuries, does not mean that they did not suffer other losses.

[47] The defendants further submit that that the class definition is not determinable on an objective basis, even with the amendment proposed by the plaintiff. They submit that it is not possible to exclude individuals who were involved in the arson and propagation of the Fire from the class definition, by way of the proposed amendment because the identity of such person or persons is unknown. In order to exclude such individuals from the class, there would need to be a determination on the merits, which would make the class definition insufficiently objective.

[48] The plaintiff submits that the class definition is based on objective criteria. Class members will know if they were guests of the Motel or present on the Motel property at the time of the Fire and will also know if they took steps to intentionally start the Fire and are therefore excluded from the class.

[49] One individual has been criminally charged in connection with the Fire. It is unknown whether that individual person acted alone or with others, although there is no evidence before me as to the involvement of more than one person. While all parties agree that the Fire was deliberately set, there has been no finding of guilt in relation to the charges arising from the Fire and, at this stage, they are mere allegations. For the purposes of this certification application, the identity of the individual, or individuals, involved in the arson and propagation of the Fire remains uncertain.

[50] The defendants referred me to the decision of the Ontario Superior Court of Justice in *Nixon v. Canada (Attorney General),* 21 C.P.C. (5th) 269, 2002 CarswellOnt 1350 (S.C.) [*Nixon*], which involved an application for certification where the proposed class members were inmates on “Range A” at the Kingston Penitentiary. In October 1999, several inmates on that range set fire to items in their individual cells and threw the flaming objects into an open area of the range. When the correctional officers entered the range to intervene, various inmates threw

"unidentified liquids" at them. There were 35 inmates on Range A at the time of this incident.

[51] The plaintiff in *Nixon* alleged that the correctional officers failed to respond to the Fires appropriately and treated the inmates in an inhumane manner. It was also alleged that the defendant failed to maintain proper fire safety equipment and failed to have proper safety inspections and procedures. The action sought damages for physical and emotional suffering, as well as punitive, exemplary, and aggravated damages.

[52] The plaintiff initially proposed a class definition that included all inmates who were on Range A at the time of the Fires. While the Court found that the class was capable of a clear definition on this basis, the defendant noted that the proposed class included inmates who started the Fires and who would be prevented from recovery due to their own wrongdoing. Those inmates would also be liable in damages to the defendant and to other inmates who were not involved in setting fires. The class definition also included those inmates who impeded the correctional officers from attempting to put out fires which might also prevent recovery and/or give rise to liability to other class members.

[53] The Court found that there was an inherent conflict within the proposed class that was not merely hypothetical. The identity of the wrongdoers was uncertain, but it was clear that they were among the members of the class proposed by the plaintiff.

[54] The plaintiff's counsel sought to redefine the class to exclude the wrongdoers, in a manner similar to the plaintiff in the case at bar. The first proposed amendment was to exclude inmates of Range A at the time in question <u>who voluntarily admitted to setting fires</u> or those found guilty by a court or prison disciplinary tribunal for having done so. The Court noted that the class definition was objective, but that it was unlikely that many or any of the wrongdoers would voluntarily admit to setting fires. The defendant argued that the class definition would amount to it taking on an onus to prosecute the potential class members in some other forum in order to exclude them from the class action. Counsel for the plaintiff then proposed that the

class should exclude those inmates who consented to be excluded or those who, on a balance of probabilities, are proven to have been involved in the Fire setting. The plaintiff suggested that there would be a series of mini-trials to determine who was entitled to be in the class. The Court found at para. 7:

> The class proposed in this case cannot be determined without a preliminary finding on the merits. Counsel for the plaintiffs proposes that upon certification a series of mini-trials would be conducted to determine the members of the class by weeding out those individuals who set the fires and identifying those who impeded the efforts of the correctional officers attempting to extinguish the fires. Such a determination would require the trier of fact to explore everything that happened on the range that night including the cause of the fires, who set the fires, how the fire progressed, which inmates obstructed the correctional officers and the effect of their conduct upon the progress and effects of the fire. While there would still be some common issues left to be determined in the action, the process of defining the class would deal with a substantial part of the subject matter of the action. This raises difficult issues of *res judicata* and the rights of the parties to pre-trial oral and documentary discovery. Would the findings on these preliminary issues be binding on the trial judge? Should these preliminary issues be decided by the trial judge rather than a different judge? To what extent would the defendant be entitled to discovery on this point and against which individuals since it would be prior to the definition of the class? These practical difficulties illustrate the rationale behind the principle that a class should not be defined in terms that require a determination on the merits of the underlying claim.

[55] The defendants submit that the class definition proposed by the plaintiff in this case faces similar problems to the one before the court in *Nixon*. There is no objective way for the person or persons responsible for the arson and spread of the Fire to be excluded from the class and a court would have to determine whether a given individual was responsible for the arson or spread of the Fire in order to determine if they are excluded from the class. In order to make that determination, the Court would need to hear evidence regarding what occurred at the Motel leading up to the Fire, how the Fire spread, why the Fire spread as it did, who set the Fire, whether anyone interfered with the Motel's fire safety systems, etc. The process of defining the class would deal with a substantial portion of the issues that the plaintiff puts forth as being common to the class members.

[56] In my view, the circumstances of this case are different than those in *Nixon*. The proposed class definition in this case is objective and excludes those who were

responsible for the fire. It enables potential class members to self-identify as class members. It is not dependant upon the outcome of litigation. That was not the case in *Nixon* where the proposed class definitions required an admission of having committed a crime or tort, consent to be excluded from the class, or proof on a balance of probabilities, of involvement in the fire setting. This latter part of the class definition would have required a preliminary finding on the merits in order to determine class membership.

[57] The proposed class definition in this case is more analogous to the class definitions that have been certified in other cases arising from fires, in that the class definition excludes potential class members who could have a conflict with other class members.

[58] For example, *Carillo v. Vinen Atlantic S.A.,* 2014 ONSC 5269, concerned a class action related to a fire in a large residential apartment building. Five units in the building were identified as housing marijuana growing operations. Fire investigators concluded that the fire may have been caused by coincidental electrical failure or intentional arson related to the persons operating the grow-ops. The Court agreed that if these residents were included in the class they would have a conflict with the other class members since the class was arguing that the defendants were negligent for failing to prevent the operation of the grow-ops. Also, since the operation of the grow-ops was the cause of the fire, the residents of the apartments with grow-ops were potential defendants. The grow-op units were identified and it was objectively possible to exclude their occupants, without the need for a determination on the merits.

[59] Similarly, in *Blair v. Toronto Community Housing Corporation*, 2011 ONSC 4395, the action arose from a fire in a 29-storey residential apartment building. The fire began in a unit where the occupant had hoarded large quantities of paper. The plaintiff, who occupied a neighboring apartment, had warned the defendants about the fire hazard before the fire occurred but they did nothing. The proposed class consisted of the residents of the apartment building on the date of the fire, but

excluded the occupant of the unit wherein the fire originated. Once again, the unit where the fire began was readily identifiable and it was objectively possible to exclude the occupant from the class without the need for a determination on the merits.

[60] While I am alert to the defendants' concern of allowing a potential arsonist to benefit from misconduct, I am also aware of the purposes of class definition. As set out by Justice Ward Branch in *Class Actions in Canada*, 2nd ed. (Loose-leaf) (Toronto: Canada Law Books, 2022) at § 4:6:

> The purpose of the class definition is threefold: (a) it identifies those persons who have a potential claim for relief against the defendant; (b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and (c) it describes who is entitled to notice.

[61] The proposed definition accomplishes these purposes, principally by allowing potential class members to self-identify based on clear criteria. Moreover, the issue raised by the defendants is a hypothetical issue that could arise when a judgment, if there is any, is granted and distributed. This case is far from that stage. The plaintiff has also conceded that there will likely need to be individualized causation and damages assessments, and the Court has ample powers to address distribution problems if they arise: *Fischer v. IG Investment*, 2010 ONSC 296 at paras. 139 and 140, rev'd on other grounds *AIC Limited*. Thus, the proviso to exclude anyone who intentionally started or conspired to start the Fire is sufficient.

[62] I accept the submission of the plaintiff that the proposed class definition, as amended, does not depend on the merits of the claim, and is not overly broad. The proposed class definition is rationally connected to the claims set out in the Notice of Civil Claim and allows persons to self-identify as class members. I am not persuaded that the proposed class definition creates a conflict between class members or that it is not objectively possible to exclude the individual or individuals responsible for the fire without an adjudication on the merits. I also agree with the plaintiff's submission that the class definition cannot be further narrowed at this time without arbitrarily excluding persons who may have claims against the defendants.

c) Common Issues – *CPA* s. 4(1)(c)

[63] The resolution of the common issues is at the heart of a class proceeding. Section 4(1)(c) requires the plaintiff to demonstrate that that his claims and the claims of the proposed class members raise common issues.

[64] The principles governing the commonality question are set out in *Dutton* at paras. 39 and 40:

> 39 … The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus, an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.
>
> 40 … [S]uccess 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.

[65] In *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45, the Supreme Court of Canada confirmed that success for all class members is not a rigid standard. It is sufficient for certification that resolving the common issue does not result in failure from some class members.

[66] The plaintiff submits that the 38 proposed common issues meet these criteria. The proposed common issues are attached as Schedule "A" and include:

a) determining the factual circumstances behind the Fire, including the City's fire inspection process, why the Motel's fire warning system failed, how and why the Fire spread, the extent of the damage, and

whether there were steps that could have been taken to minimize the damage;

b) for each defendant, determining whether they owed a duty of care, the standard of care, whether the standard of care was breached, and the impact of those breaches;

c) for Mundi, determining its contractual obligations and whether Mundi breached these obligations;

d) with respect to damages:

i. determining whether Class Members are entitled to recover for certain classes of damages (to be proved at the individual issue stage), including un-refunded amounts paid for rooms, damaged or destroyed property, and out-of-pocket expenses incurred as a result of the Fire; and

ii. determining whether the conduct of any of the Defendants was sufficiently reprehensible to warrant punitive or aggravated damages.

[67] The plaintiff further submits that each of these questions would need to be answered if each of the class members were to proceed with individual actions and thus they are all common issues.

[68] The plaintiff submits that the threshold for this criterion is low and that the concession by the defendants that the duties of care and cause of the Fire itself are common issues, is sufficient to satisfy the commonality requirement under s. 4(1)(c) and also the preferability analysis under s. 4(1)(d) of the *CPA*. In this regard, the plaintiff submits that the presence of “even one worthwhile common issue” is sufficient at the certification stage, relying upon the decision of our Court of Appeal in *Finkel v. Coast capital Savings Credit Union*, 2017 BCCA 361.

[69] The defendants do concede that there are “common issues”, but they submit that those common issues are relatively simple, non-substantive, and resolution of them will not materially advance the proceeding for all proposed class. The defendants further submit that the question of causation, which is arguably the most important issue for each individual class member, cannot be resolved without the evidence of each individual involved; thus, resolution of the common issues would result in the action “devolving into a series of individual trials”.

[70] The defendants further argue that the plaintiff has deliberately framed the issue of causation in very general terms so as to minimize the significance of the individual issues, as against the less significant common ones. Causation is defined as an issue requiring consideration of whether an alleged breach of a standard of care may have had an impact on the events surrounding the fire and the evacuation of the Motel.

[71] It is clear from the defendants’ application responses that their position is that commonality of the issues of duties of care and the cause of the Fire is not in dispute. Their position is that the cause of the Fire is readily determinable and determining the cause of the Fire is not really a substantial ingredient of each class members claim. Unlike a “standard fire action”, however, this action is primarily based on whether or not the Motel’s fire safety/alarm systems were adequate, and whether injury and loss would have been avoided if the safety systems were adequate. While it may be that in these specific circumstances the issues of duties of care and the cause of the Fire are less contentious for the reasons stated by the defendants, the threshold is low and I agree with the position of the plaintiff that the concession by the defendants that there are common issues, despite their assessment of their lack of importance, is sufficient to satisfy the commonality requirement.

[72] Even if I am wrong in this assessment, on the basis of the materials before me, I have concluded that the proposed common issues are substantial ingredients of each class member’s claim and will serve to materially advance the proceeding

for all proposed class members. While the issue of causation will be central to the determination of liability with respect to each proposed class member, there are several important common issues about how the Fire began that relate to the broad issue of causation and which will advance the litigation for each class member. I agree with the submission of the plaintiff's counsel that answering various questions—such as: How did the Fire start? Would the Fire have started if the Motel had better security? Where and how quickly did the Fire spread? Would the Fire's spread have been different if the condition of the Motel was different? Was the Fire warning system functioning properly? If it was functioning properly, when would it have been activated? When did the Fire department arrive? Would it have arrived earlier if the Fire warning system was functioning properly? Would the Fire's spread be different if the Fire department had arrived earlier? - are common issues that will advance the litigation for each class member. At a later stage, the individual class members will have to answer the more specific questions related to when they became aware of the Fire, what happened to them, and how their experience would have changed had the defendants behaved differently in order to establish whether the breach of the defendants' duties caused their particular loss.

[73] While I accept that there are issues regarding the circumstances surrounding the Fire and the determination of liability may require a consideration of the individual experiences of the proposed class members, I do not agree with the submission of the defendants that the determination of liability arising from any breach of a standard of care, is "overwhelmed by individual findings of fact".

[74] The plaintiff is not required to demonstrate at a certification hearing that the proposed common issues will fully resolve all questions of liability for every class member, only that the answers to the common issues advance the ultimate determination of outcome. The degree of importance to each class member need not be the same for each common issue: *Watson v. Bank of America Corporation,* 2015 BCCA 362 at paras. 147-152; *Dutton* at para. 39.

[75] In a recent decision of this court in *Escobar v. Ocean Pacific Ltd*., 2021 BCSC 2414, the court noted at para. 219:

> The preferability analysis is not a matter of numerosity either in the numbers of common issues versus individual issues, or in the number of individual inquiries that will be required for a very large class. There are many cases where the individual issues will be many and time consuming for a very large class. In personal injury cases, for example, the individual inquires pertaining to causation and multiple heads of damages will involve individual phases that may require trials for each class member. Many cases of this nature have been certified in British Columbia including: *Rumley; Harrington v. Dow Corning Corp*. (1996), 1996 CanLII 3118 (BC SC), 22 B.C.L.R. (3d) 97 (S.C.); and *Endean v. Canadian Red Cross Society* (1997), 1997 CanLII 2079 (BC SC), 36 B.C.L.R. (3d) 350 (S.C.), rev'd on other grounds (1998), 1998 CanLII 6489 (BC CA), 48 B.C.L.R. (3d) 90 (C.A.). [Emphasis added.]

[76] The defendants argue that some of the proposed common issues are improper because they raise the issue of breach of contract and contract damages, which cannot be determined on a class-wide basis, and require individual assessments regarding contractual obligations, class members' losses, etc. However, section 7(a) of the *CPA* expressly states that the court cannot refuse to certify a class proceeding on the basis that damages are individual:

> 7. The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues…

[77] The fact that some class members may only have a claim in negligence and not in contract is also not a reason not to certify the common issues related to contract. In this case, there is a close nexus between the contract and tort claims as they both arise from the same factual issues which are common to the class. Importantly, while resolving the contract claims may not mean success for all class members, it would not mean failure for the individuals with only a tort claim.

[78] The plaintiff has established that the resolution of the proposed common issues will advance the determination of the outcome and have thus satisfied the requirement of commonality.

d) Preferable Procedure – *CPA* s. 4(1)(d)

[79] Section 4(1)(d) of the *CPA* requires the plaintiff to establish that a class proceeding is the preferable procedure for the fair and efficient resolution of the common issues. Section 4(2) of the *CPA* sets out non-exhaustive criteria for this analysis:

> i. whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> ii. whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> iii. whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> iv. whether other means of resolving the claims are less practical or less efficient; and
> v. whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[80] As stated in *AIC Limited* at para. 16, the questions that are central to the preferability analysis are:

a) whether a class proceeding would be a fair, efficient and manageable method of advancing the claims; and

b) 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.

[81] The Supreme Court in *Hollick* noted at para. 27, that the preferability analysis should be conducted through the lens of the principal advantages of class proceedings; namely judicial economy, access to justice, and behaviour modification.

[82] The plaintiff submits that the proposed class action is the preferable procedure for three key reasons.

[83] Certification of this action as a class proceeding is consistent with the objective of promoting judicial economy. The plaintiff argues that the proposed common issues, which predominate over individual issues, will resolve significant factual and legal questions. The remaining individual questions will require fewer resources and less time than the proposed common issues.

[84] The plaintiff submits that the question of whether there are any individual issues will depend on the determination of the common issues. Thus, if the court found that none of the defendants owed the class a duty of care or that none of the defendants breached the standard of care, there would be no individual issues to resolve. If there are individual issues to resolve after resolution of the common issues, a class proceeding would allow for simplified procedures to resolve those individual issues. The resolution of the common issues will advance the litigation and would promote judicial economy.

[85] The plaintiff further submits that a class proceeding is preferable in this case because there is no evidence of class members having an interest in controlling separate actions. The plaintiff points to evidence of a court registry search showing that no other actions have been filed and the affidavit evidence of proposed class members with significant injuries who have chosen to participate in the class action rather than pursuing individual actions.

[86] The plaintiff also submits that requiring individual claims is not a preferable alternative and would serve to exclude people with viable claims, which is contrary to the access to justice objective of class proceedings. Some of the proposed class members likely suffered modest damages and would not file an individual claim because it is not economically feasible. Some of the potential class members who have viable claims live outside of BC, which may further impact the feasibility of bringing individual actions.

[87] The plaintiff submits that the formal notice program under the *CPA* would provide information to class members about their rights and provide them with the

opportunity to participate, if they wish to do so, which would do more to promote access to justice than several individual actions joined together.

[88] The defendants urge this Court to remember its important gate-keeping role in screening proposed class action proceedings to ensure that they are suitable and fair to both plaintiffs and defendants.

[89] They argue that in this case, the relative importance of the common issues in comparison to the class members' claims as a whole militates against certification of a class action. The defendants submit that the resolution of the claims of class members will require particularized evidence and individualized fact finding at the liability and damages stages of the litigation; thus, the class action procedure may not result in significant judicial economy and does not satisfy the preferability requirement.

[90] The defendants submit that while questions regarding duties of care and the cause of the Fire itself may be common issues, they are simple and relatively easy to determine in the action. In contrast, the issues pertaining to causation cannot be resolved without individualized inquiries from each class member asserting a claim. Detailed evidence will be required from every proposed class member in order for a court to decide whether any loss or injury suffered by any proposed class member was actually caused by the breach of any standard of care.

[91] The defendants submit that factual and legal causation is such a critical and time-consuming component of the claims of all class members that the action is bound to break down into individual inquiries, and hence, a class proceeding is not the preferable procedure. They further submit that the efficiency and savings of a class action will be lost by the necessity of litigating individual issues after conclusion of the class proceedings and therefore a class proceeding would not be the preferable procedure to resolve the common issues.

[92] With respect to the principal goals of class actions, the defendants argue that there is nothing in the evidence to suggest that it would be economically unfeasible

for those who suffered injury and loss as a result of the Fire to pursue their individual claims or that there are a large number of economically insignificant claims, as would typically be the case with class proceedings. The defendants point to the evidence set out in the affidavits filed on behalf of the plaintiff regarding the injuries and loss suffered by Mr. Hay, Mr. Klein, and Ms. Brophy, the death of three individuals in the Fire, the losses suffered by Mr. Lapointe for prepaid rent, a damage deposit, and personal belongings.

[93] The defendants argue that the potential claims relating to the individuals who died, Mr. Hay, Mr. Klein, and Ms. Brophy are not economically insignificant claims and they can be pursued individually, while the claim of Mr. Lapointe is a contractual issue, which does not require the establishment of negligence, causation, etc.

[94] The defendants acknowledged that s. 7 of the *CPA* provides that the court must not refuse to certify a proceeding as a class proceeding merely because of one or more enumerated grounds stated therein is met. They relied, however, on the decision of the Ontario Divisional Court in *Abdool v. Anaheim Management Ltd.*, 21 O.R. (3d) 453, 1995 CanLII 5597 (D.C.), where the Court found that it is entitled to consider the grounds referred to in s. 7 of the *CPA*, and where two or more of them are found to exist, the cumulative effect of these may legitimately be factored into the s. 4(1)(d) preferability analysis.

[95] The defendants submit that some of the enumerated grounds in s. 7 of the *CPA* exist in this case, namely:

a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;

b) the relief claimed relates to separate contracts involving different class members; and

c) different remedies are sought for different class members.

[96] The defendants submit that the question of judicial economy must be considered in the context of the case as a whole. They argue that, while there are common issues in the case, their determination would only be the beginning of the liability inquiry and separate examinations and trials would be required for each of the class members to determine the issues of causation and the individual assessments of damages. On that basis, the defendants submit that certification of this action as a class proceeding will not result in any judicial economy.

[97] I tend to agree with the submission of the plaintiff that a class proceeding will result in judicial economy. There are important common issues in this case about how the Fire began that will advance the litigation for each class member. Further, as noted above, the differing contracts and relief sought in this case are closely linked to the common factual issues. While each class member will still need to establish causation in terms of when they became aware of the Fire, what happened to them, etc. and any claim in damages, the mere fact that questions of causation or damages need to be determined individually does not necessarily mean that a class proceeding is not the preferable procedure: *CPA* at s. 7(a). The common issues do not have to be determinative of liability in order for the proceeding to be certified: *Dutton* at para. 39.

[98] The defendants also submit that the class size in this case is very small and certification would render the legal process “needlessly complex, cumbersome, and inefficient.”

[99] They argue that the size of a class is relevant to the preferability analysis and the advantages of a class proceeding may be outweighed by the costs of the procedure where the class is small.

[100] The defendants submit that based on the evidence of the plaintiff, it is possible that the proposed class is no larger than approximately six to ten members, and possibly smaller if the deceased individuals do not have family members eligible to claim under the *Family Compensation Act*, or choose not to pursue same.

[101] The defendants submit that the fact that there may be more than one or two injured individuals does not justify the imposition of the complexities associated with class proceedings.

[102] Section 4(1)(b) of the *CPA* requires that the class consist of "two or more persons". Section 7(d) of the *CPA* states:

> 7. The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> …
>
> (d) the number of class members or the identity of each class member is not known;

[103] The issue of class size in the context of the preferability analysis was considered by this court in *Griffiths v. Winter*, 2002 BCSC 1219 [*Griffiths SC*], aff'd 2003 BCCA 367. In that case, the defendant Province of British Columbia argued that the class size would be closer to six to eight individuals and would be better suited to joinder or multi-plaintiff litigation, while the plaintiff suggested that the potential class size could involve more than 50 individuals. The Court found on the evidence that the class would be at least 15 individuals and concluded that this small class size did not militate against certification.

[104] The chambers judge noted that the *CPA* clearly contemplated "mass tort type … litigation" but did not restrict class actions to that type of litigation. The chambers judge said at para. 33:

> I am of the view that if the Legislature intended to restrict the size of the proposed class to mass litigation, they would have structured the legislation to do so. Instead, the Legislature decided to impose a low threshold requirement of two or more persons. Here, the Province does not dispute that there are certainly more than two persons in the proposed class.

[105] In this case, I am unable to determine the class size on the basis of the materials before me. I accept the plaintiff's submission that this is in part due to the failure of the defendants, Mundi Enterprises and the CPG to provide information required by s. 5(5)(c) of the *CPA*. As the plaintiffs noted in their submissions, the defendant, Mundi Enterprises did not provide information about the Motel's capacity

limits or occupancy the night before the Fire, the number of occupied rooms at the southeast end of the Motel, or even the number of reimbursement requests made for accommodation charges that were accepted by Mundi Enterprises. There was no information provided by the CPG as to the number of individuals assisted or evacuated during the Fire. Leonard Hay deposed in his affidavit that the Motel was "full or nearly full" on the date of the Fire. Various media reports referred to in Affidavit #1 of Amy Mileusnic reference several other Motel guests who were present during the Fire and, together with family members who were staying with them, were impacted by the Fire. It is reasonable to infer from this evidence that there are more potential class members than the estimate of six to ten provided by the defendants. In my view, this is not a case where the class size militates against certification.

[106] The defendants submit that there are other preferable means of achieving justice for individuals impacted by the Fire, including separate actions, consolidation of separate actions, or multiple actions being heard together. They argue that the individuals' particular circumstances are crucial to establishing their causes of action and therefore "they ought to have the ability to individually control the prosecution of their action". The defendants submit that proceeding by way of a class proceeding would erode individuals' access to justice rather than uphold it.

[107] With respect, I cannot accept this submission. The defendants acknowledge that the claims of Mr. Hay, Mr. Klein, and Ms. Brophy are "not economically insignificant claims" and can therefore be pursued individually. However, there is evidence from both Mr. Hay and Mr. Klein that they wish their claims to be part of a class proceeding. As of August 10, 2021, no other action has been started against the defendants relating to the Fire. There is no evidence that any of the class members have any interest in individually controlling separate actions. As the court noted in *Rumley v. British Columbia,* 2001 SCC 69 at para. 37:

> The second factor is "whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions", and the third is "whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 4(2)(b), (c). On these factors I would note again that no class member will be able to prevail without making an individual showing of injury and causation.

> Thus, it cannot be said that allowing this suit to proceed as a class action will force complainants into a passive role. Each class member will retain control over his or her individual action, and his or her ultimate recovery will be determined by the outcome of the individual proceedings on injury and causation (assuming, again, that the common issue is resolved in favour of the class). Further there is little evidence here to suggest that any significant number of class members would prefer to proceed individually.

[108] In this case, determination of the common issues would advance the litigation of each class member. It is likely that resolution of those common issues in a class proceeding would permit more efficient resolution of the individual issues and may encourage settlement. Certification of this action as a class proceeding would limit the necessary fact finding and legal argument on the common issues to one proceeding rather than multiple individual proceedings, which would save judicial resources and minimize delay. As the court noted in *Griffiths SC* at para. 41:

> [T]o require each individual to separately address the common issues when a class action can resolve the issues for all class members in one proceeding would be a waste of resources and would unnecessarily prolong this matter. This would especially be true if the ultimate conclusion is that the Province is not liable.

[109] I have therefore concluded that the class proceeding would be a fair, efficient and manageable method of advancing the claim and would advance the objectives of class proceedings of access to justice and judicial economy.

e) Suitable Representative – *CPA* s. 4(1)(e)

[110] Section 4(1)(e) of the *CPA* sets out the requirements for a representative plaintiff. It must be someone who would:

> (i) 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 and notifying class members, and
>
> (iii) does not have, on the common issues, an interest in conflict with the interests of other class members.

[111] Counsel for the plaintiff submits that Leonard Hay meets these requirements. He submits that Mr. Hay has engaged with the issues, assisted counsel with the

preparation of materials for the action and has no conflicts with other class members.

[112] Mr. Hay has also put forward a litigation plan that he submits provides a workable framework within which the case may proceed.

[113] The defendants submit that Mr. Hay is unable to fairly and adequately represent the interests of the class for a number of reasons.

[114] They submit that his own experience, and the causation of his injuries/losses, is unique to him and therefore his own interests may not align with other class members who had different experiences, leaving him unable to adequately and fairly instruct counsel and advocate on behalf of other class members.

[115] The defendants further submit that Mr. Hay's interest requires him to establish that the spread of the Fire was such that it disproportionately impacted him in his ability to escape without injury, an interest that may conflict with those of the other class members.

[116] The defendants also assert that Mr. Hay has failed to propose a workable litigation plan and argue that the proposed litigation plan does not adequately address a method for resolution of individual issues, notably, the issues pertaining to causation.

[117] I am not persuaded by the defendants' claim that Mr. Hay is not an appropriate representative plaintiff because his experience with the Fire was different from other class members. It is not a requirement of the *CPA* that the representative plaintiff share the same experience as other class members, only that he would fairly and adequately represent the interests of the class and not have, on the common issues, a conflict of interest with the other class members. A representative need not be "typical" of the class so long as he can "vigorously and capably prosecute the interests of the class": *Dutton* at para. 41.

[118] I agree with the submission of plaintiff's counsel that Mr. Hay is well-suited to act as a representative plaintiff. In his Affidavit #1, Mr. Hay deposes that he understands his responsibilities in agreeing to seek and accept an appointment as representative counsel, the steps he has already undertaken to represent the interests of potential class members and his commitment to fairly and adequately represent the interest of the class. He is not aware of any personal interest that is in conflict with the interests of other class members. His own experience with the Fire and the extent of his injuries may differ from that of other class members, but that does not mean that he has a conflict on the common issues.

[119] With respect to the litigation plan, the defendants have argued that the proposed litigation plan does not adequately address a method for resolution of individual issues, notably causation, and they submit that case management cannot be relied upon to address this deficiency, relying on *McCracken v. Canadian National Railway Co.,* 2012 ONCA 445 [*McCracken*].

[120] In my view, the defendants' submission does not reflect the standard of scrutiny of a litigation plan that is required at the certification stage in British Columbia. As set out in the decision of this Court in *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 77 [*Fakhri SC*], aff'd 2004 BCCA 549, a litigation plan is to be assessed as follows:

> [77] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through trial and resolution of the common issues without amendment. It is anticipated that plans will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

[121] The British Columbia Court of Appeal, in the recent decision of *Jiang v. Alfalfa's Canada Inc*., 2019 BCCA 149, considered the decision in *McCracken* and concluded that it did not propose closer scrutiny of the litigation plan than suggested

in *Fakhri SC.* Hunter J.A. noted at para. 60, that he preferred the standard set out in an earlier decision of the Ontario Court of Appeal in *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, 2004 CanLII 45444 (C.A.) at para. 95, which provided that:

> [95] … The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings can be addressed under the supervision of the case management judge once the pleadings are complete.

[122] When assessed on this standard, the proposed litigation plan sets out a workable method of advancing the proceeding and notifying class members, including a clear notice plan, a plan for the litigation steps leading to the common issues trial, and procedures to deal with individual issues at various stages of the proceeding. The individual procedures can be amended as the case progresses and once counsel has more information about the size of the class and the nature of harm to all class members.

[123] In my view, the requirements of section 4(1)(e) of the *CPA* have been met. I am satisfied that Leonard Hay is a suitable representative plaintiff.

CONCLUSION

[124] I find that the plaintiff has established that the pleadings disclose a cause of action, there is an objectively identifiable class, the claims of the class members raise common issues, a class proceeding is the preferable procedure, and that he is a suitable representative plaintiff. Thus, Mr. Hay has met the requirements for certification imposed by s. 4(1) of the *CPA*.

[125] I therefore order that the proceedings be certified on the basis of the common issues which are attached as Schedule “A”. The form of the notice proposed by the plaintiff will require amendment to reflect the modification to the class definition to exclude “any person who intentionally started the Fire or conspired to start the Fire.”

COSTS

[126] The plaintiff acknowledges that British Columbia is a “no costs” jurisdiction, but urges this court to exercise its discretion to award costs pursuant to s. 37 of the *CPA*.

[127] Section 37(2) states:

> (2) A court referred to in subsection (1) may only award costs to a party in respect of an application for certification or in respect of all or any part of a class proceeding or an appeal from a class proceeding
>
> (a) at any time that the court considers that there has been vexatious, frivolous or abusive conduct on the part of any party,
>
> (b) at any time that the court considers that an improper or unnecessary application or other step has been made or taken for the purpose of delay or increasing costs or for any other improper purpose, or
>
> (c) at any time that the court considers that there are exceptional circumstances that make it unjust to deprive the successful party of costs.

[128] The plaintiff submits that costs are appropriate in these circumstances because the defendants opposed certification without asserting a viable, legal basis for their opposition. The plaintiff submits that defendants put forward frivolous arguments and withheld evidence with respect to the size of the class in attempt to bolster their position.

[129] The plaintiff further submits that the defendants’ decision to oppose certification has caused significant delay for the class, increased costs for all parties, and was undertaken in an attempt to prevent access to justice for class members. The plaintiff submits that such conduct is worthy of rebuke and the defendants should be required to pay costs of the certification hearing in any event of the cause.

[130] I am not prepared to exercise my discretion to award costs pursuant to s. 37 of the *CPA.* I am unable to find that the defendants have engaged in vexatious, frivolous or abusive conduct or that their opposition to certification was improper or unnecessary. I agree with the defendants’ submission that they raised genuine legal issues in their opposition to the certification application.

[131] While the plaintiff submitted that the defendants ought to have consented to certification and, in failing to do so, their conduct is worthy of rebuke by way of an award for costs, I have considered the decision of the Court of Appeal in *Stanway v. Wyeth Canada Inc*., 2012 BCCA 499 [*Stanway*], where a similar argument was rejected by the court. In that case, the plaintiff brought a successful application to certify an action for negligence and breach of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2. In *Stanway*, the defendants' appeal of the certification order was dismissed. The plaintiff sought an order for costs for several reasons, including that the appeal was doomed to fail, the appeal was an "unnecessary step", the appeal caused delay, and it added costs to the respondent and class members.

[132] The court declined to make an order for costs, noting that the appeal raised genuine legal issues, the appeal was entirely proper, and the defendant did not engage in any improper or unnecessary conduct by appealing.

[133] In the circumstances of this proceeding, the defendants' opposition to the certification application was based on genuine issues arising from the requirements imposed by the certification test. The mere fact that the defendants have been unsuccessful in their opposition to certification does not mean that they did not have a viable legal basis for their opposition.

"The Honourable Madam Justice Church"

Schedule "A"

Proposed Common Issues

Facts

1) What renovations or repairs have been performed at the Motel since the building's original construction and what building inspections has the City undertaken with respect to those renovations or repairs?

2) What upgrades, repairs or modifications, if any, has the City required or recommended with respect to the Motel?

3) What fire safety training or practices did Mundi have in place with respect to the Motel?

4) What steps did the City take when conducting the Fire inspections of the Motel on or around February 21, 2020, and July 6, 2020? What were the City's findings, recommendations or orders with respect to those inspections?

5) What services did All Points perform for the Motel between February 21, 2020, and July 6, 2020? What were All Points' findings and recommendations with respect to the tests and inspections it carried out?

6) What were the Fire suppression system(s) and fire warning system(s) in place at the Motel on July 8, 2020?

7) Were the Motel's fire suppression system(s) and/or fire warning system(s) functioning properly on July 8, 2020?

8) Did the Motel have a fire safety plan in place on July 8, 2020 and, if so, what was it?

9) What were the circumstances surrounding the Fire?

10) What steps did Mundi take to evacuate the Motel or combat the Fire?

11) What steps did the City take to evacuate the Motel or combat the Fire?

Causes of Action

Mundi

1) Was Mundi an occupier of the Motel?

2) Did Mundi owe Class Members a duty of care to operate and maintain the Motel so that Class Members and their property were reasonably safe?

3) What was the standard of care required of Mundi?

4) Did Mundi breach the standard of care required of it?

5) What impact did each breach of the standard of care by Mundi have on the events surrounding the Fire and the evacuation of the Motel?

6) Did Mundi have contractual obligations, express or implied, to:

    a. Have an adequate fire safety system, including a fire safety plan?

    b. Ensure the condition of the Motel, activities taking place at the Motel, and the conduct of third parties at the Motel did not pose a risk of harm to the Class?

    c. Provide adequate staff and security to make the Class reasonably safe at the Motel?

7) Did Mundi breach its contractual obligations with respect to the Fire on July 8, 2020?

8) What impact did each breach of contract by Mundi have on the events surrounding the Fire and the evacuation of the Motel?

Choice Hotels

1) Was Choice Hotels an occupier of the Motel?

2) Did Choice Hotels owe Class Members a duty of care to oversee the operation and maintenance of the Motel so that Class Members and their property were reasonably safe?

3) What was the standard of care required of Choice Hotels?

4) Did Choice Hotels breach the standard of care required of it?

5) What impact did each breach of the standard of care by Choice Hotels have on the events surrounding the Fire and the evacuation of the Motel?

The City

1) Did the City owe a duty of care to Class Members to:

    a. Conduct fire and building inspections of the Motel with reasonable care?

    b. Warn Class Members of unsafe or hazardous conditions in the Motel?

    c. Require Mundi to eliminate unsafe conditions in the Motel?

    d. Fight the Fire and evacuate Class Members from the Motel?

2) What was the standard of care required of the City?

3) Did the City breach the standard of care required of it?

4) What impact did each breach of the standard of care by the City have on the events surrounding the Fire and the evacuation of the Motel?

All Points

1) Did All Points owe a duty of care to Class Members to conduct inspections and perform fire services at the Motel with reasonable care?

2) What was the standard of care required of All Points?

3) Did All Points breach the standard of care required of it?

4) What impact did each breach of the standard of care by All Points have on the events surrounding the Fire and the evacuation of the Motel?

Apportionment

1) If one or more of the Defendants are at fault, what degree of fault should be assigned to each of them?

Damages and Administrative Costs

1) Are Class Members entitled to refunds of amounts paid to the Motel for accommodation that was not provided due to the Fire?

2) Are Class Members entitled to compensation for damaged or destroyed property due to the Fire?

3) Are Class Members entitled to compensation for out-of-pocket expenses incurred as a result of the Fire, including transport, food, and replacement lodging?

4) Was the conduct of any of the Defendants with respect to the Fire sufficiently reprehensible to warrant punishment by an award of punitive or aggravated damages?

5) Should the Defendants pay the costs of administering and distributing any monetary judgment and/or costs of determining eligibility and/or the individual issues and if so, who should pay what costs and in what amount?