IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20240119
Docket: S2010566
Registry: Vancouver

Between:

Linda Bowman

Plaintiff

And:

Kimberly-Clark Corporation, Kimberly-Clark Inc., and Kimberly-Clark Canada Inc.

Defendants

Before: The Honourable Justice Matthews

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	S. Turner J. Giovannetti
Counsel for the Defendants:	J.S. Yates A. Cocks
Place and Date of Hearing:	Vancouver, B.C. January 19, 2024
Place and Date of Judgment:	Vancouver, B.C. January 19, 2024

Overview

[1] These are reasons for judgment on the post-certification matters to be addressed pursuant to my reasons on the certification application indexed at 2023 BCSC 1495. I delivered these reasons orally. I have edited them without changing the substance.

[2] This is a class proceeding pertaining to flushable wipes manufactured and distributed by the defendants Kimberly-Clark Corporation and Kimberly-Clark Inc. Kimberly-Clark Canada Inc. is also a named defendant. Counsel for Kimberly-Clark Canada Inc. has advised me that Kimberly-Clark Canada Inc. is no longer in business. I will return to that. At this stage, I simply refer to all of the defendants as "Kimberly-Clark."

[3] Some of the wipes manufactured and distributed by Kimberly-Clark during the period February 7, 2020, and September 14, 2020, were contaminated with a bacteria called *Pluralibacter gergoviae* (“P. gergoviae”). I will refer to them as the "contaminated wipes." All of the wipes manufactured on a particular line were recalled by Kimberly-Clark, although Kimberly-Clark asserts that they were not all contaminated. The proposed class definition and common issues referred to recalled lots which were all of the wipes that were recalled by Kimberly-Clark, and as I have already stated, Kimberly-Clark asserts that not all recalled lots were contaminated.

[4] In the certification reasons for judgment, I certified the claims of a proposed subclass called the Personal Injury Subclass.

[5] Other proposed subclasses overlapped with the Personal Injury Subclass, including subclasses whose members had claims under the British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, and consumer protection legislation of other provinces. That class was called the Personal Use Purchaser Subclass. A third subclass called the Purchaser Subclass was proposed to assert claims under the *Competition Act*, R.S.C. 1985, c. C-34. The Personal Use Purchaser Subclass and the Purchaser Subclass were collectively referred to as the "Economic Subclass." The difference between the Economic Subclass and the

Personal Injury Subclass was that all members of the Economic Subclass were purchasers, whereas not all members of the Personal Injury Subclass were purchasers. The Personal Injury Subclass could include persons who had not purchased but had used recalled lots as referred to in my reasons for judgment.

[6] I determined that the claims of the Economic Subclass members who were not also members of the Personal Injury Subclass should not be certified because a class action was not the preferable procedure for Economic Subclass members who did not also have personal-injury claims. I concluded a class action was the preferable procedure for Personal Injury Subclass members, including their claims as Economic Subclass members: reasons for judgment at paras. 255–285.

[7] Before I addressed preferable procedure and reached those conclusions, I addressed the cause of action, identifiable class, and common-issues elements of the test for certification provided for in s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. I determined that there were causes of action adequately pleaded, appropriate common issues stated, and appropriate class defined. I certified the claims of the Personal Injury Subclass, including their claims as Economic Subclass members.

[8] I also identified a problem with the claim for unjust enrichment in the then proposed further amended notice of civil claim. In the proposed further amended notice of civil claim, Ms. Bowman pleaded unjust enrichment on behalf of all class members, which included those members of the Personal Injury Subclass who did not purchase recalled lots. That was a problem because the deprivation element of unjust enrichment could not be met by persons who had not purchased recalled lots. I referred to that problem as the “unjust enrichment Class Member / Economic Subclass Member problem”.

[9] In my reasons for judgment, I stated that I needed further submissions on that problem but proceeded to analyze the claims as though they were brought by persons who purchased the recalled lots, i.e., Economic Subclass Members.

[10] At the conclusion of my reasons for judgment, I directed the parties to return to me with submissions on matters that needed to be addressed, including the unjust enrichment Class Member / Economic Subclass Member problem, given the certification order I made. This hearing is to address those matters.

[11] In addition, Ms. Bowman brings an application for documentary discovery from the defendant, which Ms. Bowman seeks in relation to notice.

[12] Ms. Bowman has proposed:

a) a class definition to address the narrower class certified and the unjust enrichment Class Member / Economic Subclass Member problem;

b) amendments to the common issues to align them with the claims I certified;

c) amendments to the notice plan to align with the claims certified and the status of the case;

d) and a further amended notice of civil claim, again to address amendments that Ms. Bowman thought were necessary at the time of certification as well as amendments Ms. Bowman says are necessary given my certification order.

[13] Kimberly-Clark's position is that Ms. Bowman's new class definition is overbroad, the changes to the class that I certified means many of the common issues that I addressed in my reasons are no longer appropriate, and the claim as a whole should not be certified because it does not meet the preferable procedure criteria of s.4 of the *Class Proceedings Act*.

[14] In essence, Kimberly-Clark seeks to reargue certification on the basis that since I did not certify the claim sought to be certified, s. 10 of the *Class Proceedings Act* requires that for the class I did certify, and the revisions that Ms. Bowman proposes, I re-analyze of the matter pursuant to the certification requirements. Kimberly-Clark seeks to lead evidence that it says the Court must consider when re-analyzing preferable procedure.

[15] Kimberly-Clark says Ms. Bowman's application for discovery pertaining to Ms. Bowman's proposed notice should not be addressed at this time and is more appropriately addressed when notice will be addressed in the future.

Nature of the Matters to be Addressed at This Hearing

[16] In my certification reasons for judgment, I said as follows under the heading "Disposition":

> [296] The claims of the Personal Injury Subclass are certified, including claims they have as members of the Economic Subclass. The claims of the Economic Subclass Members who are not also Personal Injury Subclass Members are not certified.
>
> [297] The parties should make arrangements to appear before me to address the Class Member / Economic Subclass Member problem, taking into account what I have said about that problem in these reasons, and that I am only prepared to certify the claims of Economic Subclass Members who are also Personal Injury Subclass Members.
>
> [298] The class definition and common issues should be amended to align with my disposition of which claims are certifiable, these reasons, and with the resolution of the unjust enrichment Class Member / Economic Subclass Member problem. If the parties cannot agree on the appropriate amendments to the class definition and the common issues, they may arrange for an appearance before me to speak to the issues.
>
> [299] If the parties agree on how the outstanding issues should be addressed, they should seek an appearance to apprise me of their agreement and to finalize the certification order in accordance with s. 8 of the *Class Proceedings Act*.

[17] Kimberly-Clark asserts that this hearing must be conducted in accordance with s. 10 of the *Class Proceedings Act*, which provides as follows:

> **If conditions for certification not satisfied**
>
> 10 (1) Without limiting Section 8(3), at any time after a certification order is made under this Part, the court may amend the certification order, decertify the proceeding or make any other order it considers appropriate if it appears to the court that the conditions mentioned in section 4 or 6(1) are not satisfied with respect to a class proceeding.

[18] Section 8(3), which is referred to in s. 10(1), provides as follows:

> **Contents of certification order**

> (3) The court, on the application of a party or class member, may at any time amend a certification order.

[19] This is not an application to amend the certification order. This is not an application to decertify the proceedings. This is an application to settle the certification order I have made and to align the proposed common issues and the class definition proposed with the certification order as part of that settlement of the certification order.

[20] Kimberly-Clark relies on cases of this court, in particular the decision of Justice Myers in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2014 BCSC 1280, which considered s. 10(1). Kimberly-Clark also relies on *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, for the proposition, which is stated in many cases, that certification is a fluid and flexible process. In particular, Kimberly-Clark relies on *Halvorson* for the proposition that as part of that fluid and flexible process, the court must be constantly testing the status of the case and in particular its certification status against the requirements of certification set out in the *Class Proceedings Act*.

[21] There is no doubt that certification is a flexible and fluid process. There is no doubt that certification must always be considered mindful of the requirements of s. 4 of the *Class Proceedings Act*. However, this is not a case where certification is being reconsidered after events have intervened between the court's original order and the present time and which events require the court to reconsider whether the circumstances still justify certification pursuant to s. 4 of the *Class Proceedings Act*.

[22] The Court's last order, made a few months ago, was that the circumstances did justify certification under s. 4, and certain elements of the case should be brought into alignment with the court’s determination. That was not an invitation to reargue certification or to argue that the manner in which the court ordered certification was such that certification ought not to have been ordered. The latter point is essentially Kimberly-Clark's submission, particularly with regard to preferable procedure.

[23] The *Pro-Sys* and *Halvorson* cases are helpful in demonstrating what circumstances mandate revisiting certification requirements and why this case is not one that requires the court to revisit the certification requirements for the reasons suggested by or in the manner suggested by Kimberly-Clark.

[24] In *Pro-Sys*, the case was certified by Myers J., went to appeal to the Court of Appeal for British Columbia, and then to the Supreme Court of Canada. The Supreme Court of Canada "largely upheld the certification" but not identically to the order that Myers J. had made. In addition, as Myers J. described in para. 1 of his reasons, the court left it open to the parties to go back to the chambers judge with respect to some aspects of the certification order in addition to the outcome of the appeal based on a decision the Supreme Court of Canada anticipated releasing when it released its decision in *Pro-Sys*.

[25] The parties went back before Myers J. At that hearing, Myers J. did not preclude the parties, and particularly the defendants, from making arguments about how the certification order should be drafted that were broader than the issues left open by the Supreme Court of Canada. In permitting those submissions, Myers J. reviewed the principles pertaining to abuse of process, multiplicity of proceedings, and finality, as well as s. 10 of the *Class Proceedings Act.* Justice Myers observed that the application of s. 8(3) and s. 10(1) of the *Class Proceedings Act* had to be considered keeping the principles of finality in mind. In that particular case, given the matters that had gone on between when he issued his certification order and after the Supreme Court of Canada was through with the appeal, he held that there was scope for him to consider matters other than the ones that the Supreme Court of Canada expressly stated were open to be addressed.

[26] In *Halvorson*, the case went to certification. The certification failed on s. 4(1)(a) and s. 4(1)(d) requirements of the *Class Proceedings Act*. The Court of Appeal for British Columbia overturned that decision and remitted the decision to the chambers judge. In the ordinary course, the judge to whom the case was remitted would have taken into account the Court of Appeal's rulings on s. 4(1)(a) and 4(1)(d)

and considered the other s. 4 elements to determine whether the case ought to be certified. However, for reasons that are not explained, seven years elapsed, and when the case eventually came back before a new chambers judge, it was not clear to the parties what the Court of Appeal's order was. Not surprisingly, the Court of Appeal held that the new chambers judge was not restricted to a narrow reading of what had happened seven years ago and what had happened in the Court of Appeal. There was a lot of new law and a lot of water under the bridge, as well as the apparently unresolved uncertainty between the parties as to what the Court of Appeal had ordered.

[27] The circumstances in *Pro-Sys* and *Halvorson* were much different than the present circumstances in this case. This is the type of hearing that is often held after certification reasons are given where the court certifies a claim that is not the same as the one Ms. Bowman sought to be certified, nor did the court dismiss the certification outright as the defendant argued it ought to be. That meant there were matters that needed to be attended to align certain issues with my certification order, and I do not consider that to be a circumstance where I should be considering, for example, whether the Personal Injury Subclass ought to have been certified as a matter of preferable procedure. I addressed that in a manner that I considered to be appropriate at the time, and I do not see any reason to readdress it at this stage.

[28] I accept that s. 10 is a codification of a principle that unlike in other matters, a chambers judge on a certification application is not *functus officio* on the topic of certification by virtue of having made a certification order. The *Class Proceedings Act* in s. 8(3) and s. 10(1) expressly provides for jurisdiction to the chambers judge to reconsider a certification order as the case develops and evolves. However, that does not mean that the moment a judge makes a certification order, the parties are permitted to reargue it or assert that the judge ought not have made the order that the judge made. That is what appeals are for.

[29] In summary, the fluid and flexible process of certification does not include seeking to readdress or overturn a certification order before it has been entered on

issues that were argued at the certification hearing. Considerations of finality, judicial economy, and the administration of justice are such that it would have to be an extraordinary and unanticipated change in circumstances before the court would entertain such submissions on an application like this one.

[30] It is clearly open to Kimberly-Clark at this juncture to persuade me not to amend the class definition, common issues, or litigation plan in the way Ms. Bowman proposes on the basis that those amendments do not align with the claims I certified. Ms. Bowman has also produced a new further amended notice of civil claim, and Kimberly-Clark has issues with it, which are appropriate to address. However, I do not consider it appropriate for Kimberly-Clark to argue in the manner that it does that the certification order by the court cannot "maintained."

Amendments to the Notice of Civil Claim

[31] At the time of the certification hearing, the filed pleading was an amended notice of civil claim. During the certification hearing, Ms. Bowman proposed a further amended notice of civil claim. That had not been filed, but the arguments on certification proceeded on the basis of the pleadings proposed by Ms. Bowman in the then draft further amended notice of civil claim. Ms. Bowman, as a result of my reasons for judgment, now proposes a further amended notice of civil claim that has some of the amendments proposed at the time of the certification hearing and some amendments consequent to my reasons to align it with my reasons.

[32] I will address them generally instead of by reference to the paragraph number except for where it is necessary to reference the paragraph number.

[33] Generally, Ms. Bowman proposes amendments to address the claims for unjust enrichment in relation to what I have called the unjust enrichment Class Member / Economic Subclass Member problem. Those amendments are not opposed, and I consider them to be appropriate.

[34] Kimberly-Clark points out that in its view, Kimberly-Clark Canada Inc. is not an appropriate defendant because it apparently no longer exists, and it has advised

Ms. Bowman of that. Ms. Bowman's view is that because Kimberly-Clark Canada Inc. was a legal entity at the time that the claims that pertain to it arose, it remains an appropriate defendant, and Ms. Bowman wishes to keep it as a defendant, at least at this time, until Ms. Bowman has more information about that. I consider that to be an appropriate position for Ms. Bowman to take. In any event, there is no application to remove a party from the claim, which is different from amending a claim, and so I am not going to accede to any objections to the amendments to the notice of civil claim based on the continued existence of Kimberly-Clark Canada Inc. as a defendant.

[35] More substantively, Kimberly-Clark says there needs to be a substantial change to what it calls the look and feel of the claim because the court limited the certified claims to the personal-injury claims, which means that "recalled wipes" are not important anymore. All of the references should be to "contaminated recalled wipes."

[36] I make two preliminary comments on that broad submission. First of all, refusal to certify a certain aspect of the claim does not mean that portion of the claim is dismissed, it means that portion of the claim may not proceed as a class action. Therefore, it does not necessarily follow that a pleading should be struck or a portion of a pleading should be struck or cannot continue because it has not been certified.

[37] Secondly, while the certified claims only pertain to the claims of personal-injury class members, they do also include the personal-injury class members' economic claims, and the causation issues pleaded by Ms. Bowman in relation to the economic claims relate to recalled wipes and not just contaminated recalled wipes. Accordingly, on an over-arching basis, I am not persuaded that every reference to a "recalled wipe" needs to have the word "contaminated" next to "recalled wipes."

[38] However, there is now an important distinction between "contaminated recalled wipes," which pertain to the personal injury claims of class members, and "recalled wipes," which pertain to the claims in relation to their economic losses. As

a result of my decision on certification, all class members are personal-injury class members, but they have claims both for their personal injuries and their economic losses.

[39] Ms. Bowman refers to paragraph 12 of the further amended notice of civil claim, which is not sought to be amended. It is in the form, as I understand it, that it has been in all along, and the second paragraph of which reads:

> The affected wipes from the recalled lots are interchangeably referred to in this pleading as the "contaminated wipes," the "recalled wipes," or the "affected wipes."

[40] Ms. Bowman points to that language as justifying the fact that in its now proposed further amended notice of civil claim, it sometimes refers to "contaminated recalled wipes" and sometimes refers to "recalled wipes" and that because paragraph 12 explains those as the affected wipes from recalled lots, there is no changes that need to be made.

[41] I am of the view that it is not appropriate to continue with such a pleading. The claim that the defendant needs to meet should be clear, and the current status is such that the difference between "contaminated recalled lots" and "recalled lots" are important to whom can claim for what in the certified claim and ought to be clear in the filed further amended notice of civil claim. Accordingly, Ms. Bowman's application with regard to the further amended notice of civil claim is not allowed at this time and can be re-brought to address the issue that I have just described.

[42] Kimberly-Clark also submits that the theories of causation in relation to the economic claims are not adequately pleaded and need to be particularized. This issue of causation, which is referred to in the case law as an alternate theory of causation. The descriptor "alternate" is a reference to detrimental reliance, which is commonly accepted as the primary theory of causation for claims brought under consumer protection legislation and the *Competition Act*.

[43] In my reasons for judgment, I reviewed the law on this issue and concluded that alternate theories of causation could be pleaded and support an adequate claim

for both types of economic losses. In my reasons for judgment at paras. 34, 37, and 40, I held that the then proposed further amended notice of civil claim contained adequate pleadings pertaining to the plaintiff's alternate theories of causation for the provincial consumer protection legislation claims. I reached the same conclusion pertaining to the *Competition Act* claims at para. 58 of my reasons for judgment. I am not persuaded on this application to change that conclusion.

[44] Kimberly-Clark also argues that paragraph 39 of the now proposed further amended notice of civil claim ought to be struck because it is no longer relevant to the current theory of the case. Paragraph 39 reads as follows:

> The plaintiff and class members have not accepted and should not be expected to accept that only the recalled lots were affected. All recalled lots manufactured during the class period are inherently suspect and therefore worthless.

[45] I confess that I do not entirely follow the defence objection to that paragraph, but I also confess that I do not entirely follow what it is intended to be pleading certainly at this juncture of the case. It seems to me it certainly suffers from the problem that I have already said is one that prevents me from making an order in favour of Ms. Bowman on this version of the further amended notice of civil claim in that it refers to recalled lots that were affected, all recalled lots.

[46] I rule that Ms. Bowman has to propose an amendments that makes it clear what that paragraph is purporting to do, including addressing the language problems I have already said need to be addressed. At the time this application comes back to me, I will hear whether Kimberly-Clark has a continuing objection to it and hopefully be in a better position to understand the role of that particular paragraph.

[47] There are, mercifully, a few matters that have been sorted out. One is that under the heading "Part 2 Relief Sought" of the proposed further amended notice of civil claim, paragraph 40(j), the parties have agreed that the words at the end of that subparagraph "or alternatively disgorgement" should come out. I agree with that. In addition, the parties have agreed that under "Part 3 Legal Basis," paragraph 70 should come out, and I also agree with that.

[48] That is my disposition of the application as it pertains to the further amended notice of civil claim. The application is not allowed, but Ms. Bowman has leave to reapply taking into account the reasons I have given.

Class Definition

[49] I turn to the class definition. At the certification hearing, Ms. Bowman proposed a series of subclasses, which I have described, the three subclasses being the Personal Injury Subclass, the Purchaser Subclass, and the Personal Use Purchaser Subclass. I certified the claims of the Personal Injury Subclass, including the claims of the members of the Personal Injury Subclass which pertain to their economic losses that would otherwise have been brought as members of the Purchaser Subclass or the Personal Use Purchaser Subclass, collectively the Economic Subclass.

[50] In order to recognize that some Economic Subclass members are now members of a single class of Personal Injury Subclasses, Ms. Bowman proposes this class definition:

> All persons in Canada who used the recalled lots* and who claim to have suffered personal injury as a result of using the recalled lots. Members of the class may also seek to be included in either of two subclasses, namely: a subclass of persons who purchased the recalled lots primarily for purposes other than personal, family, or household use, the Purchaser Subclass and the Purchaser Subclass members; or a subclass of persons who purchased the recalled lots primarily for personal, family, or household purposes, the Personal Use Purchaser Subclass and the Personal Use Purchaser Subclass members. The Purchaser Subclass and the Personal Use Purchaser Subclass are collectively the Economic Subclass and the Economic Subclass members.

[51] The asterisk provides a definition of "recalled lots" as meaning Cottonelle Flushable Wipes or Cottonelle Gentle Plus Flushable Wipes manufactured between February 7, 2020, and September 14, 2020 and which were subject to recall.

[52] Kimberly-Clark argues that this class definition is overbroad because by being in reference to recalled lots, it includes persons who used wipes that were not contaminated. In my reasons for judgment, I addressed the class-definition issues at

paras. 108–115. Those paragraphs pertain both to issues of overbreadth argued by Kimberly-Clark at the certification hearing in relation to the Personal Injury Subclass and the Economic Subclass.

[53] Kimberly-Clark says that since my certification ruling, there has been a fundamental change in the structure of the class. Kimberly-Clark submits that at the time of certification, the economic losses were the ties that bound all of the classes together and that my certification ruling that makes the Personal Injury Subclass the only subclass means that that connective tie no longer exists therefore rendering the contamination of the wipes important. Kimberly-Clark submits that the class definition is not appropriate without reference to contaminated wipes.

[54] I am not persuaded that it is correct that the economic claims tied all of the class members together. There were three overlapping subclasses, one of which was not defined in relation to economic claims. That is the subclass that I have certified, but I have included in their certified claims their economic claims. Accordingly, I am not persuaded that the reasons I have already given, rejecting the Kimberly-Clark's arguments that the class was defined in an overly broad manner, are no longer applicable.

[55] However, I do agree that in my reasons for judgment on that issue, my language focused on the Economic Subclass members. For example:

> [108] In addition, Kimberly-Clark led evidence and submitted that the contamination was intermittent on one of two production lines. All of the lots produced on that line were recalled. Accordingly, some of the recalled lots were not contaminated with P. Gergoviae and so some of the Economic Subclass Members do not have claims.
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> [109] I am not persuaded by these submissions. It is permissible to have a class definition that includes people who may not ultimately establish a claim. At the certification stage, it is inappropriate to require that the class be restricted to all persons who suffered damage so long as the class is not irrationally overly broad: *Jones v. Zimmer GMBH*, 2011 BCSC 1198 at paras. 41–42, aff'd 2013 BCCA 21; *MacKinnon* at para. 82.

[56] While my summary of Kimberly-Clark's submission on overbreadth pertaining to a class definition that included uncontaminated wipes pertains to Economic

Subclass members, my assessment of that submission at para. 109 does not depend on those being claims of Economic Subclass members. My statement that it is permissible to have a class definition that includes people who may not ultimately establish a claim applies equally to a Personal Injury class member who may not ultimately establish that he or she used a contaminated wipes as to an Economic Subclass member who may not ultimately establish that he or she bought a contaminated wipe. In fact, my reasoning applies more to Personal Injury Subclass members given the difference between the economic claims and the personal injury claims. Accordingly, I am not persuaded that the proposed class definition is overbroad by referring to "recalled lots" as opposed to "contaminated recalls lots."

[57] Kimberly-Clark also argues that the current proposed class definition inappropriately allows for any kind of personal injury from any use of the wipes, and some injuries, for example minor skin irritation, are not legally compensable or are not the subject of an evidentiary foundation that such harm could result from exposure to contaminated wipes. This argument was not advanced in this exact form at certification, although it is certainly related to arguments Kimberly-Clark made at certification. There is nothing about the narrow class that I certified that makes the argument germane if it was not before. It is not an argument I would have acceded to in any event.

[58] At certification, this argument was made more forcefully in relation to Ms. Bowman as an appropriate representative plaintiff. I rejected it as follows:

> [292] On certification, Ms. Bowman does not have to prove that she was exposed to P. Gergoviae because that finding of fact is not necessary to support any of the certification elements. Ms. Bowman has withdrawn her proposed common issue pertaining to causation for the Personal Injury Subclass. Accordingly, there is no requirement for her to show that causation is a common issue and so Dr. Robert's scepticism about the cause of her symptoms is not relevant to certification except that it demonstrates that individual causation may not be straightforward in some cases, a factor that I have taken into account in assessing preferability.

[59] That reasoning is applicable to this argument that Kimberly-Clark makes about the class definition, and I do not accept the argument for the reasons I have

already given. Ms. Bowman's proposed revised class definition aligns with my reasons for judgment, and I approve it.

Common Issues

[60] Ms. Bowman has revised some of the common issues to take into account the class certified and the unjust enrichment economic class, Economic Subclass problem I identified in my reasons, and which has also been addressed in the amendments to the amended notice of civil claim or the proposed amendments.

[61] In addressing the common issues, Ms. Bowman has abandoned what was proposed common issue 5:

> How many recalled lots were sold to class members during the class period, and what was the value of those sales to the defendants?

[62] Ms. Bowman concedes that because the certified claims do not cover all persons who purchased recalled lots during the class period, the calculation of the value of the sale of all recalled lots to the defendants is not relevant and does not advance the certified claims.

[63] Kimberly-Clark agrees that proposed common issue 5 is no longer appropriate but also submits that the reasoning that Ms. Bowman employed to come to the conclusion that it ought to be abandoned applies to other common issues. Kimberly-Clark argues that because of the narrow class I certified, any common issues that depend on all recalled wipes being the subject of the certified claims cannot continue in the same form, and if they cannot be reconstituted to apply to the narrower class, they should not be certified.

[64] I will return to that in a moment. At first I address a few of the other common issues that are not related to that over-arching argument.

[65] First, common issue 4, which is:

> When did the defendants or some of them initiate the recall, and what were the steps taken by the defendants to publicize the recall?

[66] Kimberly-Clark argues that that issue does not advance the negligence cause of action. I considered that common issue and the arguments at certification and decided the issue would advance the negligence claims. I acknowledge that when I considered that argument, I had not yet narrowed the class, but the Personal Injury Subclass members have negligence claims, and so I see no reason why that common issue is no longer appropriate.

[67] Kimberly-Clark also challenged common issues 8 and 9. They will be revised common issues 7 and 8, if the common issues as revised by Ms. Bowman are certified. They are the health care costs of recovery common issues. Kimberly-Clark argues that these issues are only relevant if a determination of liability is made in favour of the class members. It is not unusual in class actions for issues to be certified that depend on what are referred to as "antecedent liability findings." That is often a phrase used for the appropriateness of certifying aggregate damages, which depend on a finding of liability before damages become relevant. It also applies to, for example, punitive damages, which depend both on findings of liability and on conduct that justify punitive damages.

[68] Kimberly-Clark asserts that it is not a matter of whether they can be common issues but a matter of timing and says that these issues cannot be appropriately tried at what one might refer to as a first common-issues trial because of the requirement or the need for an antecedent finding of liability. In my view, the timing of trial of common issues should be addressed in the litigation plan, which I will come to, but it does not mean that these issues should not be certified at this time. I certify them and direct that the timing of the trial be addressed in a litigation plan.

[69] I return to Kimberly-Clark's overarching submission that any common issues that depend on all recalled wipes being the subject of the certified claims cannot continue in the same form and cannot be reconstituted to apply to the narrower class. The common issues that Kimberly-Clark says are related to the narrower class certified and cannot continue in the form they are in are unjust enrichment issues. I understand those to be issues 14(b) and (c), 15(a) and (b), and issues 22 to

25. It is not clear to me whether counsel considers issue 28 to be an unjust enrichment issue.

[70] Kimberly-Clark submits that because the class is not now all purchasers and so not all recalled lots will be the subject of these claims, these common issues require a different lens than was brought to them at the certification hearing. Kimberly-Clark submits that at the certification hearing, the economic evidence was proffered on the assumption that all recalled lots were the subject of the claim, and the economic evidence focused on that as being an element of the opinions that were given and the question about whether or not harm could be determined, for example, on a class-wide basis.

[71] I do not agree with this submission as broadly as it is made on this application. The starting point is that the class I was previously considering and to which the evidence of certification applied had different subclasses, one of which, the Personal Injury Subclass, did not consist entirely of purchasers.

[72] Kimberly-Clark makes the point that the composition of this class compared to what was before certification is different because although the Personal Injury Subclass had some non-purchasers, it was one of three classes, and the other two subclasses were all purchasers. Kimberly-Clark, as I take it, says that the proportion of purchasers to non-purchasers in the current certified class is much different, and the economic evidence no longer applies to the common issues because the nature of the class is different.

[73] I do not have any evidence before me about the magnitude or the proportions of persons who used wipes but did not purchase them. There is no evidence about how a change in that proportion affects the evidence that I heard at certification. I do not recall that the evidence depended on that, and I have not been taken today to any of that evidence that would persuade me that those changing ratios should result in different common issues or rewording to common issues. In addition, there was no evidence at certification that a significant portion of persons who used recalled wipes were non-purchasers or that what any proportion of persons who

used wipes were non-purchasers. For all of those reasons, I am not persuaded that a change to the common issues must follow the fact that the class has been narrowed.

[74] Kimberly-Clark says the same arguments apply to unjust enrichment because the portion of sales revenue that Kimberly-Clark received from the various classes has changed. I am of the view that no change to the common issues is mandated for the same reasons I have already given.

[75] As with the amendments to the notice of civil claim, there are some changes to the currently proposed common issues that the parties agreed to. I am going to refer to the renumbered issues.

[76] For common issue 25, the parties agree that the words "an accounting and/or disgorgement" and "charged to them" shall be deleted. They agree that the words "charged to them" are to be replaced by "received by." So that common issue will read:

> If the defendants or some of them were unjustly enriched, are the plaintiff and Economic Subclass members entitled to restitution of the amounts received by the defendants during the class period for the recalled lots in violation of the *Competition Act* or the *Food and Drugs Act*?

Preferable Procedure

[77] The focus of Kimberly-Clark's current position is that this case is now more individual than it was given the narrow class and that the narrowing pertains to the Personal Injury Subclass. Kimberly-Clark has led further evidence on its recall plan and its compensation of Personal Injury Subclass members.

[78] My certification reasons addressed the individual nature of the Personal Injury Subclass claims under the analysis of preferable procedure. I did so specifically in the section of the reasons where I determined that the Personal Injury Subclass claims met the preferable procedure element of the certification test. I do not consider it appropriate to revisit that decision.

[79] While I agree with Kimberly-Clark that what evidence it can submit is more flexible than in a normal case where the court has issued reasons and made an order but not yet entered it, I still do not consider it appropriate in this case at this time to receive further evidence on that issue. In any event, the evidence does not change my views on preferability.

Litigation Plan

[80] At the certification hearing, I held that Ms. Bowman's litigation plan was adequate but that it would need to be revised to accord with the order I made. Kimberly-Clark takes the position that it is not detailed enough and that the detail it does have is inappropriate in terms of timing and what will happen given the status of this case now and the timing that is set out in the litigation plan.

[81] I provide as context for my reasons on this issue that there is currently an application scheduled that pertains to notice. I will not go into detail about that, but it is common ground that at this time, the form of notice and the means of delivering notice are not yet determined and will be subject to further court appearances. It follows that the litigation plan and the certification order will not provide for the means of notice or the date for opting out.

[82] Ms. Bowman has suggested that perhaps the litigation plan should simply be shelved, and the certification order should be made with a reference that the litigation plan is to be developed at a future date. I am not persuaded that is appropriate. I am of the view there should be a litigation plan that is appropriate to the time at which the certification order is made. That may mean that the litigation plan says that certain issues are to be addressed in the future, and it may be that for certain things like discovery and trial dates, the litigation plan outlines some basic steps but leaves some dates and details to be determined. I am of the view that a plan that sets out what detail is appropriate at the time and what matters are to be addressed is preferable to not having a litigation plan at all.

[83] I understand that the parties have had a lot to deal with since my certification order. I have heard submissions that after almost every set of reasons making a

certification order, the parties have work to do to translate those reasons into a certification order that meets the requirements of s. 8. Sometimes, as in this case, the court is involved in that. I have heard submissions that this process is more complicated than in other cases. I accept that the parties have been focused on things other than the details of the litigation plan up to this point. It is my view that the parties should continue to work together on it.

[84] In any event, in the absence of a finalized further amended notice of civil claim, the certification order should not yet be entered. Accordingly, the parties should work on the litigation plan. I direct that within one week of today, Ms. Bowman shall send a revised litigation plan to the Kimberly-Clark that addresses the matters that have been discussed in terms of what form the litigation plan should take at this stage. Kimberly-Clark shall reply within a week. The parties shall schedule a case planning conference for sometime in February at 9:00 a.m. to address the litigation plan and the further amended notice of civil claim. I am hopeful that the parties will be in a position to agree on those at that time, but if not, we will determine what needs to be addressed and either address it at case planning conference or set a time to address it if it needs more time than that. I am directing you to do that in February because we have another application set for March, and I think it is appropriate that these issues be addressed before then.

The Certification Order

[85] Returning to the certification order, the only contest in the order is the common issues and the class definition, which I have addressed. There are also agreed-upon changes to the order, which is paragraph 9(b) should read "restitution for unjust enrichment" instead of just "unjust enrichment." Once the further amended notice of civil claim and the litigation plan have been addressed, then the order can be entered.

(DISCUSSION)

[86] THE COURT: There will be a direction that Kimberly-Clark will deliver its materials for the hearing to take place on March 15 by four weeks from today. Ms.

Bowman will deliver a further proposed revised further notice of civil claim and a revised litigation plan within one week. The defendant will respond within one week, and the parties will hopefully be able to narrow any issues on those matters before a case planning conference that will be arranged for in February.

[87] Anyone who wishes to attend the case planning conference by MS Teams may do so by MS Teams.

"Matthews, J."