IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Mayer v. Merchant Law Group LLP,* 2025 BCSC 1106

Date: 20250616
Docket: S229449
Registry: Vancouver

Between:

James Mayer

Plaintiff

And:

Merchant Law Group LLP

Defendant

Before: The Honourable Justice Branch

Reasons for Judgment on Class Certification

Counsel for the Plaintiff:	M. Waddell N.J. Kovak R. Laskin
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Place and Dates of Hearing:	Vancouver, B.C. April 23-24, 2025
Place and Date of Judgment:	Vancouver, B.C. June 16, 2025

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I. INTRODUCTION

[1] This is a proposed class action about a failed class action. For the reasons expressed below, I find that the case should be certified, provided that certain amendments are made to the claim.

II. BACKGROUND

A. Generally

[2] My earlier ruling on jurisdiction reported at *Mayer v. Merchant Law Group LLP*, 2023 BCSC 1797, provides an overview of the factual context underlying this claim:

> [5] This case arises out of a failed charitable donation tax program. In 2015, the Tax Court of Canada found that the persons who participated in the program did not have the donative intent necessary to support their desired tax treatment: *Mariano v. The Queen*, 2015 TCC 244 at paras. 48-50.
>
> [6] On March 16, 2016, Lorne Piett, a Saskatchewan-resident client of the defendant Merchant Law Group LLP ("Merchant Law") commenced a proposed class action against the parties who designed and promoted the program, along with the Canada Revenue Agency. The action was brought in the Court of King's Bench for Saskatchewan under the style of cause *Piett v. Global Leaming Group Inc*., KBG 590/16 (the "*Piett* Action"). The *Piett* Action sought to become a national class action. Within the proposed class, it is estimated that 34% lived in Ontario, 17.1% in Saskatchewan, 17% in Manitoba, 10.5% in Alberta, 6.1% in BC, and 4.9% elsewhere in Canada.
>
> [7] The *Piett* Action was never certified as a class proceeding and never reached a determination on the merits. Rather, the action was stayed as an abuse of process: *Piett v. Global Learning Group Inc*., 2021 SKQB 232. This finding was upheld on appeal: 2022 SKCA 141. Regarding the nature of the abuse, the Court of Appeal for Saskatchewan quoted the lower court with approval at para.10: “Mr. Piett, Mr. Shoeman, and others have undermined the integrity of the class actions adjudicative process by advancing this litigation to the certification stage for an improper purpose: to profit from the class members that they purport to represent.” The Court of Appeal also raised specific concerns regarding the retainer arrangements, stating:
>
> > [16]…The designated judge found the fee arrangements and funding structure to be objectionable for many reasons other than a lack of court approval pursuant to s. 22(2). Her conclusion on that point did not depend on her view of s. 22. Similarly, even if, as Mr. Piett contends, the designated judge committed a palpable and overriding error of fact in relation to the proportion of fees collected from putative class members that were used to pay finders and consulting fees, the *substance* of the concerns identified by the designated judge as to the fee solicitation and expenditure of funds would remain. Further, the

> other factors she took into account when finding there had been abuse would remain. In the result, the decision that the *Piett* action has been struck would stand regardless of the outcome in relation to these and any of the other issues identified as proposed grounds of appeal.
>
> [8] In the present action, the plaintiff alleges that Merchant Law induced the putative class members in the *Piett* Action to pay a fee to Merchant Law to join the class action through misrepresentations, then misused the trust funds collected…

[3] I adopt these findings for the purposes of this application for class certification, as supplemented by the additional information below.

B. Mr. Piett

[4] The proposed representative plaintiff in the original failed class proceeding, Mr. Piett, was a sales agent for the Global Learning Gift Initiative (the "Program") operated by Global Learning Group Inc. ("GLGI"). He also participated in the Program personally. Notably, despite his own 2007 reassessment by the Canada Revenue Agency ("CRA"), he continued to sell entry into the Program to others until 2013, the last year that the Program operated: *Piett v. Global Learning Group Inc.*, 2021 SKQB 232, at paras. 15, 19 [*Piett SC*].

[5] Certain Program participants challenged CRA's denial of the hoped-for charitable tax credits in a Tax Court proceeding. The Court dismissed the proceeding, finding that the Program was a "sham" and that participants lacked the necessary donative intent: *Mariano v. The Queen*, 2015 TCC 244 at paras. 50, 84-89 [*Mariano Tax Appeal*].

[6] Mr. Piett was also one of the Program participants to commence the Federal Court multi-plaintiff action *Scheuer v. Canada* (the "*Scheuer Action*") against CRA in 2011: *Piett SC* at para. 19. The *Scheuer Action* alleged that the CRA owed a duty of care to the plaintiffs when it issued a tax shelter identification number to the Program's promoter, and that it owed a duty to warn the plaintiffs that it would deny any charitable tax credits claimed.

[7] In 2015, the defendant Merchant Law Group LLP (“MLG”) assumed representation of the plaintiffs in the *Scheuer Action*.

[8] On January 13, 2016, the Federal Court of Appeal struck out the *Scheuer Action*, although it granted leave to amend: *Canada v. Scheuer*, 2016 FCA 7 at paras. 45-47. There is no evidence that the *Scheuer Action* plaintiffs subsequently amended their claim. Rather, it appears that the claim was abandoned: *Piett SC* at para. 29.

[9] While the *Scheuer Action* and the *Mariano Tax Appeal* were pending, Mr. Piett also retained MLG to commence a proposed class action as a "back-up" to these other proceedings (the “*Piett Action*”). The *Piett Action* was brought against a variety of defendants alleged to have played some role in the Program. The claim alleged, among other things, that certain defendants participated in promoting the Program and advising GLGI despite knowing that the Program was a sham. The CRA was also named as a defendant based on allegations that it failed to warn taxpayers that the Program was a sham: *Piett v. Canada Revenue Agency*, 2022 SKCA 141 at para. 4 (“*Piett CA*”).

[10] Mr. Mitchell, a former senior executive of GLGI, along with Mr. Piett and plaintiffs’ counsel, established a steering committee to oversee the *Piett Action*. Through the committee, it was decided that Mr. Piett would be the proposed representative plaintiff. Mr. Piett agreed to be the representative plaintiff on the condition that he be financially compensated for doing so: *Piett SC* at para. 55.

[11] In the proceeding before me, it is alleged that Mr. Mitchell created two websites, *Merchant Law Helps* and *Donors4Donors,* to help solicit class members to pay a retainer to MLG: *Piett SC* at para. 55. There is some basis in the evidence supporting the plaintiff’s position that the content of the *Merchant Law Helps* website, at a minimum, was approved by MLG, given that the website stated that it was subject to MLG’s copyright.

C. The Plaintiff's Decision to Participate in the Class Action

[12] Between 2005 and 2007, the plaintiff in the present action, James Mayer, participated in the Program. His claim for charitable tax credits was also reassessed by the CRA.

[13] In November 2015, Mr. Mayer learned that MLG planned to act as counsel in the *Piett Action*. His investigations into the *Piett Action* included speaking to a lawyer at MLG and to a Mr. Kellett from Global SaveTax Consultants. Mr. Mayer visited Global SaveTax Consultant's website, which provided links to the *Merchant Law Helps* website.

[14] There is some evidence that *Merchant Law Helps* contained communications that stated "From the Desk of Tony Merchant", and included audio clips of Mr. Merchant, a partner with MLG.

[15] On November 24, 2015, Mr. Kellett sent Mr. Mayer a link "to enrol in the Merchant Class Action suit against CRA". On November 25, 2015, the plaintiff signed up for the *Piett Action* and paid a retainer (the "Retainer") of $500 to MLG by credit card.

[16] There is evidence that other proposed class members received similar information before deciding to forward the Retainer to MLG. For example, proposed class member Alex Kepic received an unsolicited email from an organization called "*Donors4Donors*". From reading the content on the *Donors4Donors* website, Mr. Kepic understood that he had to pay a Retainer to participate in the class action. It was not explained to him that it was unnecessary to pay money to be included as a class member in a certified class action. Mr. Kepic states that he relied on the representations on the *Donors4Donors* website when paying his Retainer to MLG on November 16, 2015.

[17] Proposed class member Valerie Luscott attended a teleseminar featuring Tony Merchant as a speaker on June 25, 2015. In that teleseminar, Mr. Merchant solicited the participating Program participants to pay the Retainer. Ms. Luscott's

notes from the teleseminar indicate that Mr. Merchant stated the Retainer was intended to "help towards fees" and that "[Gift Program participants] need to sign up straight away" using the *Merchant Law Helps* website. Ms. Luscott paid MLG the Retainer on July 20, 2015.

[18] Proposed class member Steven Laughlin received a link to a recording of a teleseminar conducted by Mr. Merchant. In the recording, Mr. Merchant was asked if people could wait and join the action later. His answer was:

> Well not really. Um, we're, we're moving forward this fall, but they're, they're really doing a disservice to themselves and others by, by waiting because, um, we need the numbers. We need them together and, uh, $500 isn't a lot of money in terms of, of, uh, joining with everybody else and, and, and, and making this work.

Mr. Laughlin received various emails from a sales agent, as well as a link to the *Merchant Law Helps* website, the contents of which were labelled as being from Tony Merchant or Merchant Law. He decided to pay the Retainer as well.

D. The Websites and Other Relevant Communications

[19] An archived version of the *Merchant Law Helps* website contains the following language on a page entitled "FAQs":

> **Will I not be represented in this action as well?**
>
> You help this action only if you decide to sign-up and get behind Merchant Law…
>
> …
>
> **Who is the Steering Committee?**
>
> The Steering Committee is made up of a handful of individuals who initiated this action. These individuals provide ongoing direction and guidance to the firm on behalf of the "class" or donors.
>
> …
>
> **What if I don't do anything?**
>
> You can choose to do that, however we wouldn't recommend that you decide to "put all your eggs in one basket" (i.e. back a single course of action). In effect, you are betting that GLGl's legal action [the *Mariano Appeal*] will proceed smoothly to a successful conclusion. That's it. You have no back-up plan. Now take a moment to consider the position you would be putting yourself in, if you decide to back-up your position by contributing to Merchant

> Law's class action. Effectively, then you would be backing both cases, two different legal approaches …
>
> …
>
> **Does the Steering Committee make decisions on behalf of all donors involved in the case? Do I have a say?**
>
> The Steering Committee and then the representative client essentially becomes "the client". They vote on behalf of the action. The reality is though that Tony Merchant is the one who will be determining the legal issues he thinks will win out in the end, including the ones that affected donors who chose to take their own lives. We will place our trust in him to fight for us. Together we are strong. (Rest assured, your issues ARE common to the donors and fundraisers who make up the steering committee. So, in a way, you do have a say.)
>
> …
>
> **Why should I pay $500?**
>
> The cost of a court action like this is prohibitive … the best way to look at the expenditure is that ***it buys you a rock-solid back-up plan.*** And considering what's on the line, this is, in our humble opinion, a smart way to proceed.
>
> …
>
> **If I don't participate in the class action, will I be included in the outcome?**
>
> Technically yes. The law is that class certification makes everyone automatically a class member who meets the class description – which will also be determined by a judge. However, you will be much less aware of the stage of progress of the class action and will be entirely dependent on the notice provided by the court to know when and how to make your claim. Court notice is good, but studies of class action have shown that many people don't get notice and subsequently don't make any claims under settlements.
>
> More importantly, your participation is crucial to allowing this action to go forward. When we go before a judge and say 2,000 people have not only signed up, but paid $500, that is impactful. That lets the judge know that people care about this, that there is a real sense among many people that a significant injustice has taken place.
>
> …
>
> **If everyone pays $500 and you fail to get the case certified, what happens?**
>
> The cost of certification itself will be more than the amounts we hope to raise through this fundraising effort … The point of the $500 payment is to provide a deposit of funds necessary to litigate certification.

[20] An archived "Sign up" page from *Merchant Law Helps* contains the following language:

> **GLGI Former Donors vs. The CRA – The Next Step**
>
> Yes, Tony. I want Merchant Law Group LLP to represent me in connection with a class action your firm will soon launch against the Government of Canada…
>
> In return for services rendered, I agree to pay Merchant Law Group LLP (as my share of the fee for work done by it in connection with a pending appeal in the Federal Court of Appeal and a potential Supreme Court of Canada appeal, plus any anticipated class action work) the sum of $500 to be paid immediately without regard to the outcome of any litigation…
>
> I further understand that an official and only then enforceable retainer agreement will be forwarded in a few weeks relevant to the jurisdiction of my residence… Furthermore, in the retainer agreement that will be forwarded to me, Merchant Law Group LLP will fulfil its duty to disclose, in detail, the rules that deal with this type of contingency agreement.
>
> **Donors**
>
> **IMPORTANT NOTICE**: Each donor must complete a separate form in order to join the class action.

[21] There is evidence that the *Donors4Donors* website stated as follows as of November 6, 2018:

> Dear Donor:
>
> First, just to be clear, we are NOT affiliated in any way with GLGI. We are simply GLGI donors like you…
>
> To date, over 3,500 donors have signed up and contributed $500 each to support our new lawsuit, a class action which has already been filed and is awaiting certification to go forward…
>
> Of course, if you are skeptical about all this, we understand. After all we've been through, trust–for all of us–can be tough to come by…
>
> Then make the decision to stand up for your rights and the rights of your fellow donors by committing your support here…
>
> Frequently Asked Questions…
>
> **What if I don't do anything?**
>
> You can choose to do that, however, we wouldn't recommend that you decide to "put all your eggs in one basket" (i.e. back a single course of action). In effect you are betting that GLGI's legal action will proceed smoothly to a successful conclusion. That's it. You have no back-up plan. Now take a moment to consider the position you would be putting yourself in, if you decide to back-up your position by contributing to Merchant Law's class action. Effectively then you would be backing both cases, two different legal approaches (i.e. two different statement of claims – one refusing CRA's contention that GLGI's tax shelter program was a sham (the case put forward by GLGI's lawyers) and one case (Merchant Law's case) hinging on CRA's alleged failed "duty of care"… All things considered think having a sound

> back-up plan is the best way to go. Merchant Law can win even if GLGI loses! ...
>
> **Will I not be represented in this action as well?**
>
> You help this action only if you decide to sign-up and get behind Merchant Law.
>
> …
>
> **… will this lawsuit only cover donations already done?**
>
> The class action lawsuit will cover every signed-up donor who participated in the GLGI tax shelter…

[22] Mr. Kepic received a "Month End Report" from *Donors4Donors* on December 1, 2015, purporting to be "from Tony Merchant himself". It states:

> Many former donors of GLGI who <u>are now registered class members of a pending class action</u> on which we are currently working to prepare the case, were unaware of another case that has been working its way through the judicial system, namely, [the *Scheuer Action*] …
>
> [Emphasis added.]

E. The Retainer Agreement

[23] <u>After</u> paying the Retainer, MLG asked the plaintiff to complete and execute a written agreement (the "Retainer Agreement"). The Retainer Agreement was identified as being between MLG, as the "Lawyer", and the plaintiff, as the "Client". The Retainer Agreement included the following material provisions:

> 1. The Client retains the Lawyer and the Lawyer agrees to represent the Client with respect to the following matter **("the Legal Proceedings")**:
>
> > The action relates to assertions of negligence committed by Canada Revenue Agency **("CRA")** and its employees in their handling of Global Learning Group Initiative **("GLGI")** tax credits, as well as negligence in failing to adequately warn participants as promised in CRA's Taxpayer's Bill of Rights.
> >
> > The Lawyer will defend, up to the Supreme Court of Canada if necessary, against the application made by Canada to strike the Statement of Claim in the action already commenced in the Federal Court of Canada by Lothar Scheurer and others (Court File No: T-1352-11).
> >
> > The Lawyer will also pursue a class action either in the Federal Court or in one or more Superior Courts of a Canadian province, on behalf of all persons who participated in GLGI, who claimed and were granted charitable tax credits by CRA relating to this participation and

> who subsequently were reassessed and had GLGI tax credits cancelled by CRA.

…

4. The Lawyer will keep the representative plaintiff[s] in the class action[s] informed of the status of the Legal Proceedings…

5(1) In consideration of the legal services to be performed by the Lawyer for the Client under this Agreement, the Client agrees to pay to the Lawyer as a share of the fee to be earned for the work done by it in connection with a coming Federal Court of Appeal and a potential Supreme Court of Canada appeal, and in connection with the class action work as anticipated

> (a) the sum of $500, already paid and without regard to the outcome of any litigation.
>
> …

5(2) The Client agrees that the Lawyer may use the $500 cash component of the consideration for the legal services, for fees, for taxes, for disbursements, or as the Lawyer may deem appropriate. The Client agrees that part of the use of the cash component of the consideration will be to pay for class contact which will probably include a payment to the company or agency making contact with the Client and informing the Client of the nature of the proposed class action. The Client, by this term, is hereby informed that in some instances the payment for the client contact is by way of a set fee of $175 per client but the payment may be more or less, in the discretion of the lawyer.

5(3) The use of the defined term “Client” does not mean that the Client is a client in the usual solicitor/client relationship. The Client is a member of a proposed class. Class members are not clients of the lawyer in the ordinary meaning of client as developed by the common law. Merchant Law Group is only agreeing to pursue a class action on behalf of the “Client” and is not retained as his/her individual lawyer in relation to their dealings with the CRA or any other legal matters.

…

7(1) Upon the settlement of this matter, or upon the completion of any legal proceedings in which the Client recovers judgment, the Lawyer will provide the representative plaintiff[s] with an account in writing separately setting out the amounts recovered for special and other damages, and for costs, charges, disbursements and taxes, and showing the amounts charged to the Class under this Agreement.

…

9. Any representations by the Lawyer not in this Agreement as to the responsibility for payments to the Lawyer by the Client are intended to be considered with this Agreement as one agreement with the Client. And the Client is intended to have the benefit of the more favourable interpretation of those conjoined terms.

10. This Agreement shall be governed by the law of the jurisdiction of the Client’s residence.

> 11. The Client resides in the province or territory of British Columbia and acknowledges to have read and understood this Agreement and the paragraphs attached as **Appendix A** of this agreement, which are relevant to the jurisdiction of residence as regards the duty of the Lawyer to disclose the rules regarding contingency agreements because part of the payment that the Client will be expected to make to the Lawyer is conditional upon their success or partial success in the Legal Proceedings and which also, depending on the Client's province of residence, alerts the Client to the right of assessment or review of any legal account by court officials.

[24] Appendix A to Mr. Mayer's Retainer Agreement read:

> APPENDIX A
> (British Columbia)
>
> The person who has entered into this Agreement with Merchant Law Group may, within 3 months after the agreement was made or the retainer between the solicitor and client was terminated by either party, apply to a district registrar of the Supreme Court of British Columbia to have the agreement examined, even if the person has made payment to the lawyer under the agreement.

[25] Mr. Mayer signed and returned the Retainer Agreement.

[26] Mr. Kepic received a Retainer Agreement from Merchant Law on January 14, 2016. Mr. Kepic's agreement is identical to Mr. Mayer's, except that it states it is governed by the laws of Ontario.

[27] Ms. Luscott was also sent a Retainer Agreement, which she signed on November 7, 2015.

[28] After paying the Retainer, Mr. Laughlin and his wife were sent Retainer Agreements, but did not sign them. There appears to be a factual dispute regarding whether all individuals who did not sign the Retainer Agreement were refunded their Retainers. Mr. Laughlin asserts he has not received a refund.

F. Use of the Retainer Funds

[29] It appears that the Retainer funds received from proposed class members (the "Retainer Funds") were pooled and held in an MLG-controlled trust account.

[30] The plaintiff alleges that the Retainer Funds were distributed in a manner inconsistent with MLG's legal and ethical obligations. Specifically, the plaintiff alleges that the Retainer Funds were used to:

a) pay MLG $368,728.51 for legal work, including work on the *Scheuer Action*: *Piett SC* at para 43. MLG does not dispute that Retainer Funds were used to pay *Scheuer Action* accounts, but argues that it was entitled to apply the Retainer Funds in this way, given that the *Scheuer Action* was expressly referenced in the Retainer Agreement;

b) pay improper referral fees to various non-lawyer salespeople. Specifically, it is alleged that MLG paid Mr. Mitchell, Mr. Piett, and others $1.34 million from the Retainer Funds for their assistance in soliciting class members: *Piett SC* at para 43. MLG does not dispute that it used Retainer Funds for this purpose, but states that this was a legitimate expense covered by the terms of the Retainer Agreement.

[31] None of Mr. Mayer, Mr. Kepic, Ms. Luscott, or Mr. Laughlin received statements of account from MLG regarding any distribution of their Retainer. Once again, MLG does not deny this, but suggests again that the Retainer Agreement allowed for accounts to be sent only to Mr. Piett as the representative plaintiff.

G. The Death of the *Piett Action*

[32] As noted above, the *Piett Action* collapsed when it was found to be an abuse of process. Leave to appeal was denied. The Court in *Piett SC* held as follows:

> [50] In my view, the evidence adduced in this case demonstrates that the background conduct of the litigation giving rise to the *Piett Action* constitutes an abuse of process. Mr. Piett, Mr. Shoeman, and others have undermined the integrity of the class actions adjudicative process by advancing this litigation to the certification stage for an improper purpose: to profit from the class members that they purport to represent.
>
> [51] The class actions process is intended to provide access to justice. However, Mr. Piett, Mr. Shoeman and a third party, Mr. Mitchell, have subverted that process to enrich themselves, without disclosing their enrichment to class members and without seeking approval from the court for their Fee Arrangement. They have also created a two-tiered structure for

class members – where those who pay to participate may get more information than those who do not. All of this is improper.

…

[55] The following evidence demonstrates that the conduct of the *Piett Action* was focussed on creating profit for the *Piett Action*'s promoters at the expense of class members, resulting in an abuse of process:

a) Mr. Mitchell, a former senior executive of GLGI, Mr. Piett and plaintiffs' counsel established a steering committee to drive the *Piett Action*. Through the steering committee it was decided that Mr. Piett would be the representative plaintiff and Mr. Piett agreed to be the representative plaintiff on the condition that he be financially compensated for doing so;

b) Mr. Mitchell created the websites, *Merchant Law Helps* and *Donors4Donors*, in order to solicit class members to pay a retainer to plaintiffs' counsel to participate in the class action, without court approval;

c) The content of the *Merchant Law Helps* website was created or approved by plaintiffs' counsel;

d) Mr. Mitchell used a list of donors from his work for the defendant, GLGI, to contact potential class members;

e) If putative class members did not pay $500, they were advised that they would be "technically" part of the class action, but would receive less notice and information about the proceeding. This created a two-tiered structure for class members, where those who paid to participate had greater access to information than those who did not pay, violating the purpose and intent of the *CAA* and specifically s. 6(1)(ii);

f) Mr. Shoeman and Mr. Piett "sold" participation in the class action to class members for a finder's fee and these recruited putative class members were the same donors to whom they had sold the Gift Program;

g) The $500 fee solicited from putative class members (which total approximately $1.7 million) was largely used to pay finder's fees and/or consulting fees to Mr. Piett, Mr. Shoeman, and Mr. Mitchell. The money was not used primarily for legal fees as it was stated it would be on the *Merchant Law Helps* website;

h) Plaintiffs' counsel did not seek the court's approval of the Fee Agreement, but did pay itself for legal fees and disbursements;

i) No statements of account were sent to class members showing the payments from plaintiffs' counsel's trust account; and,

j) Plaintiffs' counsel would not have commenced the *Piett Action* but for the Fee Arrangement: Piett Undertakings at para. 153.

…

> [62] The two funding schemes set up through *Merchant Law Helps* and *Donors4Donors* have generated approximately $1.7 million from putative class members. As noted, Mr. Piett received approximately $100,000 through the funding scheme and Mr. Shoeman received approximately $25,000. Mr. Mitchell, who is not a party to the action, received hundreds of thousands of dollars. All of these payments were received before the action in question even proceeded to a certification hearing. None of these arrangements were approved under s. 41(2) of the *CAA*, and it is unlikely that they would be. It was necessary for plaintiffs' counsel to seek approval of any solicitation of contributions from individuals who would be class members. This did not happen, and therein lies one aspect of the impropriety.
>
> [63] In addition to violating the requirement for court approval, the funding scheme devised by Mr. Piett, Mr. Mitchell and plaintiffs' counsel is contrary to the purpose and objectives of the *CAA*. As Justice Belobaba described in *McCallum-Boxe*, inappropriate funding schemes disincentivize counsel and representative plaintiffs from striving for advantageous settlements on behalf of the class. They incentivize ill-conceived class actions. This brings the administration of justice into disrepute and is an abuse of process.

[33] MLG did not issue refunds of any part of the Retainers paid by prospective class members following the collapse of the *Piett Action*.

III. EVIDENTIARY ISSUES

A. General Principles

[34] Justice Tammen recently reviewed the evidentiary principles applicable to a certification application in *C.D. v Facebook, Inc. (Meta Platforms Inc.)*, 2024 BCSC 2081:

> [11] A plaintiff is required to show some basis in fact for each of the certification requirements set out in the *CPA*, other than the requirement that the pleadings disclose a cause of action: *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540 at para. 25. It is for that reason that evidence is received on a certification motion.
>
> [12] The rules and principles governing admissibility of evidence on a certification motion are the same as for other civil proceedings. The rules of evidentiary admissibility are not relaxed: *Ernewein* at para. 31.
>
> [13] The court on certification plays an important gatekeeping role with respect to the admissibility of evidence. While the "some basis in fact" test creates a modest evidentiary hurdle, that hurdle must be discharged by evidence which meets the usual criteria for admissibility: *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837 at para. 15. The presiding judge should rule on evidence of questionable admissibility and not simply assess objections as part of the weighing

> exercise: *Huebner* at para. 15; *O'Connor v. Canadian Pacific Railway Limited*, 2023 BCSC 1371 at para. 72.
>
> [14] Paragraphs in affidavits and their appended exhibits which offend the rules of evidence should be struck and therefore should not form part of the certification record.
>
> [15] The sole "evidentiary shortcut" available to plaintiffs on a certification motion is that which applies on all interlocutory applications. Specifically, hearsay is admissible so long as a specific source of the hearsay is identified: *Supreme Court Civil Rules*, R. 22-2(13). Hearsay remains inadmissible if it is unattributed or at multiple levels, subject to application of the specific exceptions or the principled approach.

B. Evidentiary Issues

1. Use of the Court Decisions in the Piett Action

[35] The defendant suggests that the Court cannot rely on the decisions in the *Piett Action,* given that it is a separate piece of litigation involving different parties.

[36] I disagree. The fundamental exercise at certification is to determine the proper form and structure of the proposed litigation. What better evidence of the issues and procedural challenges likely to arise in the present matter than a similar evaluation by another court in a related piece of litigation? The *Piett Action* demonstrates how another court addressed allegations of misconduct by MLG.

[37] It would be foolish not to consider the *Piett Action* decisions, not because they bind this Court as to the proper outcome, but rather because they assist in determining what issues are likely to arise, and how another court was able to structure its consideration of similar issues. For example, the decisions in the *Piett Action* help determine how likely it is that the issues proposed for evaluation in the present case can be managed within a single action. The decisions also help illustrate the nature of the evidence that may be available to the parties to aid in evaluating the issues.

[38] Finally, at a more substantive level, the plaintiff may be able to establish in the present action that allowing the defendant to contest facts previously found in the *Piett Action* would be an abuse of process. I find support for this possibility in *British Columbia (Attorney General) v. Malik*, 2011 SCC 18 [*Malik*], which concerned the

use of the evidence and findings from a prior judicial decision, a *Rowbotham* application, in a subsequent proceeding for a *Mareva* injunction. The Court held that the previous decision was admissible:

> [7] In my view, for the reasons that follow, a judgment in a prior civil or criminal case is admissible (if considered relevant by the chambers judge) as evidence in subsequent interlocutory proceedings as proof of its findings and conclusions, provided the parties are the same or were themselves participants in the prior proceedings on similar or related issues. It will be for that judge to assess its weight. The prejudiced party or parties will have an opportunity to lead evidence to contradict it or lessen its weight (unless precluded from doing so by the doctrines of *res judicata*, issue estoppel or abuse of process).
>
> …
>
> [42] Of course the weight of the prior judgment will depend on such factors as the similarity of the issues to be decided, the identity of the parties, and (because of the differing burdens of proof) whether the prior proceedings were criminal or civil. As the Sopinka text points out: "The fact that it is a civil judgment only would be significant in terms of weight. The party against whom the judgment was rendered would have a greater opportunity to explain it or suggest mitigating circumstances" (Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *Sopinka, Lederman & Bryant: The Law of Evidence in Canada* (3rd ed. 2009), at §19.177).

[39] I conclude that the decisions in *Piett* are properly considered on this certification application, not only as legal precedent, but also (1) at a procedural level, evidence as to how a court may be able to resolve similar issues, and (2) at a substantive level, as an illustration of how simplification of the merits trial may be achieved through the abuse of process principles. While MLG was not a party to *Piett,* it was a participant in the proceeding as counsel. The abuse of process finding was also based partly on MLG's conduct in the *Piett Action*. I note that the evidence supporting the abuse of process finding in *Piett* comes in part from the cross-examinations of Mr. Piett and Mr. Shoeman, as well as disclosures from MLG: *Piett SC* at paras. 10, 43.

[40] In conclusion on this point, while the defendant may be able to challenge the findings in *Piett* on their merits, I find that for the purpose of certification, the decisions in *Piett* are admissible given that they are helpful in determining whether there is some basis in fact for various certification requirements.

2. The Website History

[41] The defendant objects to Mr. Mayer's inclusion of a version of the *Merchant Law Helps* website obtained through the Wayback Machine. The plaintiff says the evidence is "second-and third-degree hearsay evidence" and inadmissible.

[42] I find that the printout of the *Merchant Law Helps* website does not qualify as hearsay. It is not tendered for the truth of its contents, but merely for the fact that the impugned statements were made. Even if the printout could be classified as hearsay, I find that it is admissible as an admission against interest, particularly given that MLG did not directly contest its authenticity and accuracy, notwithstanding (1) its statutory obligation to confirm that it provided all facts material to certification, and (2) its asserted copyright over the material: *British Columbia v. Apotex Inc*., 2025 BCSC 92 (*"Apotex")* at paras. 193-199.

[43] The defendant also objects to admissibility on the grounds that the webpage printout is merely attached to a layperson's affidavit. In *Apotex,* the defendants objected to the admission of printouts from various websites, including one from the Wayback Machine, that were attached to affidavits. Justice Brundrett held that printouts from websites could be authenticated provided the affiant identified the website URL from which the document was accessed: paras. 189-191. That requirement is met here, as the relevant *Merchant Law Helps* and Wayback Machine URLs are identified for each printout. Further, the Wayback Machine has been accepted by other courts "as a reliable source for evidence as to the state of websites in the past": *GNR Travel Centre Ltd. v. CWI, Inc.*, 2023 FC 2 at para 72. Finally, Mr. Laughlin says that he visited the *Merchant Law Helps* website while it was active.

IV. CERTIFICATION

A. General Principles

[44] I reviewed the general principles applicable to class certification in *Krishnan v. Jamieson Laboratories Inc*., 2021 BCSC 1396 ("*Krishnan SC*"), appeal dismissed *WN Pharmaceuticals Ltd. v. Krishnan*, 2023 BCCA 72, leave to appeal dismissed

Jamieson Laboratories Ltd. v. Uttra Kumari Krishnan, et al., 2023 CanLII 103771 (SCC):

> [39] The test for class certification is set out in s. 4 of the *CPA*:
>
> > 4(1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
> >
> > (a) the pleadings disclose a cause of action;
> >
> > (b) there is an identifiable class of 2 or more persons;
> >
> > (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
> >
> > (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
> >
> > (e) there is a representative plaintiff who
> >
> > > (i) would fairly and adequately represent the interests of the class,
> > >
> > > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> > >
> > > (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
> >
> > (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
> >
> > > (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> > >
> > > (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
> > >
> > > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> > >
> > > (d) whether other means of resolving the claims are less practical or less efficient;
> > >
> > > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

> [40] The plaintiff bears the onus of satisfying each of these five certification requirements. The plaintiff must show “some basis in fact” for each of the certification requirements, other than the cause of action requirement in s. 4(1)(a), which is decided based on the pleadings alone: *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 at para. 25.
>
> [41] The court has an important gate-keeping role requiring it to screen proposed claims to ensure they are suitable for class action treatment. In *Thorburn v. British Columbia*, 2012 BCSC 1585, appeal dismissed 2013 BCCA 480, the court stated:
>
> > [117] The goal of the *CPA* is to be fair to both plaintiffs and defendants… “it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency.”
>
> [42] That said, the *CPA* must be construed generously in order to achieve its objectives of access to justice, judicial economy, and behavior modification: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal ref’d [2010] S.C.C.A. No. 32 [*Infineon*].
>
> [43] The certification stage does not involve an assessment of the merits of the claim, and is not intended to be a pronouncement on the viability or strength of the action. Rather, it focuses on the form of the action so as to determine whether the action can appropriately go forward as a class proceeding*: Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Microsoft*] at para. 102. The court should not weigh or seek to resolve conflicting facts and evidence at this stage. As the Supreme Court of Canada held in *AIC Ltd. v. Fischer*, 2013 SCC 69, "the court cannot engage in any detailed weighing of the evidence but should confine itself to whether there is some basis in the evidence to support the certification requirements" (para. 43).

B. Do the Pleadings Disclose a Cause of Action?

1. Generally

[45] The pleadings test under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*] is akin to that applied on an application to strike a proceeding under Rule 9-5(1) of the *Supreme Court Civil Rules*. A court will only refuse to certify the action on this basis if it is plain and obvious that the plaintiff’s claim is bound to fail, assuming the facts alleged in the pleadings are true: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.

[46] The claim “must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery

information," and unsettled points of law must be permitted to proceed: *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 at paras. 136-138. Courts are to consider the claims both as they are, and as they may be amended: *Sharp v. Royal Mutual Funds Inc.*, 2020 BCSC 1781 at para. 22.

2. Breach of Trust

[47] In the Court's view, the breach of trust plea is the best "fit" for the present fact pattern, given the alleged mistreatment of the Retainer Funds. I note parenthetically that plaintiff's counsel in class actions often tend to adopt a "kitchen sink" approach to the number of causes of action pleaded. The cumbersome certification process that has developed across the common law provinces would be more manageable and proportionate if counsel had the confidence to rely on the "best fit" cause of action rather than weighing down the process with less applicable or duplicative pleas.

[48] Breach of trust occurs when a trustee fails to fulfill their obligations with respect to the administration of the trust: *F. Williams Logging Co. Ltd. v. Roethel* (1995), 58 B.C.A.C. 84, 1995 CanLII 2606 (C.A.) at para. 6. The defendant did not aggressively contest that there was a proper cause of action pleaded in this respect. This was reasonable, given that lawyers are clearly not allowed to use retainer fees indiscriminately. In *Law Society of British Columbia v. Guo*, 2022 BCCA 154, the Court of Appeal stated:

> [49] … The law draws a distinction between commercial relationships and lawyer-client relationships in respect of fee agreements. The Law Society points to this statement from Mark Orkin, *Legal Ethics: A Study of Professional Conduct* (Toronto: Cartwright & Sons Limited, 1957) at 162–163.
>
> > The relation between solicitor and client being a confidential and fiduciary one, transactions between them are not to be considered in the same way as dealings of private individuals. Since a solicitor is not entitled to make any profit at the expense of his client other than his fair professional remuneration, no transaction between them will be allowed to stand unless the solicitor has disclosed his interest and all facts within his knowledge and the client was properly advised upon them, and the transaction is basically a fair and reasonable one. The measure of his duty is to disclose all material facts within his knowledge which would affect the judgment of a reasonable man and the onus of proving that this was done is on the solicitor.

[50] It is clear that the law imposes fiduciary responsibilities on lawyers. As stated in *Strother v. 3464920 Canada Inc.*, 2007 SCC 24:

> [34] When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement. The solicitor-client relationship thus created is, however, overlaid with certain fiduciary responsibilities, which are imposed as a matter of law. The Davis factum puts it well:
>
> > The source of the duty is not the retainer itself, but all the circumstances (including the retainer) creating a relationship of trust and confidence from which flow obligations of loyalty and transparency. …

[51] One of these fiduciary responsibilities is to fully and fairly advise clients of the terms of the retainer and to obtain the client's informed agreement: *Inmet* at para. 44. … As Newbury J.A. explained in *Inmet*:

> [49] The obligation of candour requires the solicitor to be candid with the client on all matters concerning the retainer, including ensuring that in any transaction between the two from which the solicitor receives a benefit, the client has been fully informed of the relevant facts and properly advised upon them: *R. v. Neil*, *supra*, at para. 19; *London Loan & Savings Co. of Canada v. Brickenden* 1933 CanLII 7 (SCC), [1933] S.C.R. 257 at 261-62, [1933] 3 D.L.R. 161. As seen above, this duty was cogently expressed in the reasons of Madam Justice Southin in *Ladner Downs v. Crowley, supra*, and is reflected in the Law Society of British Columbia's *Professional Conduct Handbook*, Chapter 9, Rule 7, which states:
>
> > A lawyer must fully disclose, to the client or to any other person who is paying part or all of the lawyer's fee, any fee that is being charged or accepted
>
> As well, chapter 11 of the Canadian Bar Association's *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 2006), provides that a lawyer shall not "stipulate for, charge or accept any fee that is not fully disclosed, fair and reasonable."

[52] While the court in *Inmet* was addressing the amount of fees charged, the principle of candour applies to all aspects of a retainer. Given the importance of the duty to disclose and to obtain informed agreement from a client, lawyers are not entitled to accept any advance payment from a client as their own funds without having sought and obtained the client's informed agreement to do so. This applies to any kind of fee agreement, including fixed fee agreements, as any advance payment is not "earned on receipt" where no legal services have yet been performed. Therefore, absent such an agreement from the client, such advance payments must be received by the lawyer in trust.

[Emphasis in original.]

[49] Furthermore, a lawyer cannot "charge or accept a fee or disbursement, including interest, unless it is fair and reasonable and has been disclosed in a timely fashion": Law Society of British Columbia, *Code of Professional Conduct for British Columbia*, Rule 3.6-1 [*BC Code*]. In their commentary on this provision, the Law Society states that a lawyer: "should provide to the client in writing, before or within a reasonable time after commencing a representation, as much information regarding fees and disbursements, and interest, as is reasonable and practical in the circumstances, including the basis on which fees will be determined".

[50] A lawyer must not appropriate any client funds held in trust or otherwise under the lawyer's control for or on account of fees, except as permitted by the governing legislation: *BC Code*, Rule 3.6-10.

[51] Specifically, a lawyer must first render a bill before withdrawing trust funds, unless the client instructs the lawyer otherwise in writing (*Law Society Rules*, Rules 3-65(2) and (4)).

[52] Finally, the lawyer cannot share, split or divide their fees with a non-lawyer, or "give any financial or other reward for the referral of clients or client matters to any person other than another lawyer.": *BC Code*, Rule 3.6-7.

[53] The rules governing lawyers in Saskatchewan are similar: *Law Society of Saskatchewan Rules*, Rules 1512(1)(b), 1513(1); The Law Society of Saskatchewan, *Code of Professional Conduct*, Rules 3.6-1, 3.6-7, 3.6-10. Analogous provisions exist in other provinces, to the extent that class members' claims may be governed by local law: see for example, Law Society of Ontario, *Rules of Professional Conduct,* Rules 3.6-1, 3.6-7, 3.6-10; Law Society of Ontario, *By-Law 9,* Rule 9; Law Society of Alberta, *Code of Conduct,* Rules 3.6-1, 3.6-7, 3.6-9; *The Rules of the Law Society of Alberta*, Rule 119.28(3); *The Law Society of Manitoba Rules*, Rules 5-44(1)(d), 5-57; The Law Society of Manitoba, *Code of Professional Conduct*, Rules 3.6-1, 3.6-7.

[54] In this case, the plaintiff alleges that:

a) The retainer fees were not used for their intended purpose, as the Retainer Funds were used to pay referral fees to Messrs. Piett, Mitchell and their sales force, and to recompense MLG for fees incurred in the *Scheuer Action.*

b) No account was rendered to the plaintiff or any other proposed class member (the "Class") prior to the withdrawals.

[55] The alleged misapplication of trust funds is adequately pleaded in my view. As noted, the defendant did little to suggest otherwise. MLG may have defences based on the language of the Retainer Agreement, but: (1) the plaintiff seeks to set aside the Retainer Agreement, (2) the Retainer Agreement has a clause which appears to incorporate pre-retainer statements rather than an "entire agreement clause" (see para. 9), and (3) the challenging contractual interpretation issues raised are best resolved on the merits with a full record.

3. Negligence

[56] The negligence claim advanced is somewhat complicated by the fact that this is a claim for pure economic loss. Such claims are governed by the law set out in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.,* 2020 SCC 35.

[57] To recover for negligently caused loss, the plaintiff must establish that:

a) the defendant owed the plaintiff a duty of care;

b) the defendant's conduct breached the standard of care;

c) the plaintiff sustained a loss; and

d) the damage was caused by the defendant's breach.

[58] Lawyers obviously owe a duty of care to their clients. The plaintiff here has done enough to plead a solicitor/client relationship, even though there may be a debate about the limits placed on that relationship through the language in the Retainer Agreement. That is an issue best considered on the merits.

[59] In terms of breach of the standard of care, the plaintiff has alleged that the defendant breached its duty of care by establishing a solicitation scheme involving actors who were in conflict of interest with the Class, and by failing to properly disclose the nature of this scheme. The other elements are also properly pleaded.

[60] In terms of Quebec class members, the plaintiff has adequately pleaded the closest civil law parallel to a negligence claim, being Art. 1457 of the *Civil Code of Quebec,* CQLR, c CCQ-1991.

4. Negligent or Fraudulent Misrepresentation/Deceit/Breach of Fiduciary Duty/Equitable Fraud

[61] These causes of action generally rest on the same material facts, i.e. that MLG did not adequately advise the Class that (1) payment of the Retainer was not necessary in order to participate in the class proceeding, and (2) the Retainer Funds would be used for purposes other than the prosecution of the proposed class action.

[62] Beginning with negligent misrepresentation, the elements of the tort are detailed in *Hedley Byrne & Co. v. Heller & Partners*, [1964] A.C. 465 (H.L.) and *Queen v. Cognos Inc.,* [1993] 1 S.C.R. 87, 1993 CanLII 146:

a) there must be a duty of care based on a 'special relationship' between the representor and the representee;

b) the representation in question must be untrue, inaccurate, or misleading;

c) the representor must have acted negligently in making said misrepresentation;

d) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and

e) the reliance must have been detrimental to the representee in the sense that damages resulted.

[63] All of these requisite elements for a claim in negligent misrepresentation are properly pleaded.

[64] In terms of fraudulent misrepresentation, also referred to as civil fraud or the tort of deceit, the requirements are similar. In *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21, the Court set out the requirements:

a) a false representation by the defendant;

b) some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);

c) the false representation caused the plaintiff to act; and

d) the plaintiff's actions resulted in a loss.

[65] Notably, for fraudulent misrepresentation, a plaintiff's reliance does not have to be reasonable: *Huang v. Li*, 2020 BCSC 1727 at para. 346.

[66] I find that fraudulent misrepresentation is properly pleaded in this case. The closely related claims for breach of fiduciary duty and equitable fraud are also properly pleaded.

[67] In terms of breach of fiduciary duty, the elements are that (1) the parties were in a fiduciary relationship, (2) the defendant acted in a manner inconsistent with that fiduciary relationship, and (3) that loss or damage occurred: *Testar Estate v. Leslie*, 2023 BCSC 611 at para. 46, affirmed 2024 BCCA 129. The plaintiff claims that the defendant was in a fiduciary relationship with the plaintiff; that the defendant acted in a manner inconsistent with that fiduciary relationship (including acting in the face of a conflict, preferring a personal interest, and dishonestly using trust funds for undisclosed and improper purposes), and that damages occurred.

[68] In terms of equitable fraud, this cause of action has been described by the Supreme Court of Canada as including "transactions falling short of deceit but where it is unconscientious for a person to avail himself of an advantage obtained":

Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19 at para. 39. Here, the plaintiff alleges that MLG was in a special or fiduciary relationship with the plaintiff and the proposed class members, and that MLG acted unconscionably by, *among other things*, creating and implementing an improper solicitation scheme and using the trust funds raised thereby for undisclosed and improper purposes. This is sufficient to meet the pleading requirement for this cause of action.

5. Unjust Enrichment

[69] A claimant has a cause of action for unjust enrichment where there has been (1) an enrichment of the defendant, (2) a corresponding deprivation of the plaintiff, and (3) an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 30.

[70] The plaintiff alleges that the Retainers were received as a result of MLG's wrongful acts, and there is no juristic reason for MLG to retain any benefit. The plaintiff argues that the Retainer Agreement itself cannot provide a juristic reason for expending money improperly and arguably in a manner inconsistent with its own terms. As Justice Kelleher explained in *Tyk v. Graham*, 2017 BCSC 920, "[w]hile the existence of a contract can be a sufficient juristic reason for enrichment, the benefit obtained must be within the scope of the contract": para. 101. I find that unjust enrichment is properly pleaded.

6. Limitations

[71] The defendant argues that the Court is in a position to declare that the entire class is subject to a limitation period, such that the claim can be dismissed at the certification stage. I disagree.

[72] The defendant suggests that the claims were discoverable by the time of the certification hearing in the *Piett Action* in December 2019. However, I find it arguable that MLG's misconduct only became known to the Class following the *Piett*

decisions, as the particulars regarding the use of the Retainer Funds were not fully disclosed or reported to the proposed class prior to those decisions.

[73] Limitation period arguments should only be considered at the certification stage in exceptional circumstances. In particular, such arguments should not be considered at this stage when the limitation defence is "bound up" in the facts, as here: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at paras. 67-68, aff'd *Pioneer Corp. v. Godfrey*, 2019 SCC 42. Findings of fact regarding the conduct of MLG and its agents, the extent of its alleged deception in concealing the use of the Retainer Funds, and the enforceability of the Retainer Agreement would all be necessary to resolve the limitation issue properly.

[74] In *Wilkinson v. Chartier*, 2025 BCCA 53, the Court of Appeal's reasons illustrate the level of factual inquiry that must be engaged in order to consider the discoverability issues that arise in a case such as this:

> [54] Section 12(2) requires actual, not constructive, knowledge on the part of the plaintiff before the limitation period begins to run. The relevant question under s. 12(2) is not when Diane could have drawn a plausible inference of liability based on facts she knew or ought to have known. The question is when she became fully aware of the facts set out in s. 12(2)(a)–(c), and fully aware that a court proceeding was an appropriate means to seek to remedy the loss. The judge did not ask this question. If he had asked this question, in my view he could not have concluded it was beyond doubt that by March 2017 Diane had actual knowledge that: (1) Elaine was asserting an interest in the Family Residence that was inconsistent with a trust; or (2) alternatively, that Elaine had exercised undue influence over Ruby or that Ruby lacked capacity. The evidence supporting these conclusions was not incontrovertible. For instance, one view of the evidence was that Diane had suspicions, but that she required more information from the respondent in order to gain awareness of the circumstances. While there may be other inferences that could be drawn from the evidence, it was not for the judge to weigh the evidence on the summary judgment application.
>
> [Emphasis in original.]

[75] For all these reasons, I find that it is premature to consider the limitation issues at this time.

C. Common Issues

1. Generally

[76] Section 4(1)(c) of the *CPA* requires the plaintiff to demonstrate that there are one or more common issues that will avoid duplication of fact-finding or legal analysis.

[77] As the BC Court of Appeal states: "the commonality threshold is low; a triable factual or legal issue which advances the litigation when determined is sufficient": *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at para. 132.

[78] When assessing proposed common issues, the following principles apply:

a) The commonality question should be approached purposively;

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

c) It is not essential that class members be identically situated *vis-a-vis* the opposing party;

d) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues; and

e) Success for one class member on a common issue need not necessarily mean success for all, but it must not mean failure for another.

Pro-Sys Consultants Ltd. v. Microsoft Corporation, 2013 SCC 57 at para. 180; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45.

[79] Before applying the test, I need to comment on the debate regarding the so-called "two-step test" for determining whether a common issue exists. In my view, the discussion around this issue has involved a great deal of "sound and fury,

signifying nothing" (or very little). The *CPA* and the case law require simply that there be some basis in fact to conclude that there are "common issues". It is true that this phrase breaks down into an adjective ("common") and a noun ("issues"). However, there is nothing particularly notable or unusual about this structure. The same structure applies to the criminal concept of "reasonable doubt". But we do not instruct criminal juries that this term establishes a two-stage test. Rather, we simply ensure that each jury understands that any doubt must be reasonable.

[80] To the extent that the language I used in para. 115 of my initial certification reasons in *Krishnan SC* has been interpreted as approving of a formal two-stage test, that was not the Court's intention. I find that the proper approach to this issue is set out in *Apotex* at paras. 583-593, where the Court noted that courts "in British Columbia have generally not found it useful to split the commonality analysis into two steps".

[81] The common issues proposed in this case are outlined in Schedule "A" to this judgment, and are assessed below.

1. Breach of Trust/Breach of Fiduciary Duty/Equitable Fraud Issues

[82] I agree that the proposed breach of trust and fiduciary duty issues are common. The Retainer Funds were pooled by MLG itself, thereby ensuring common treatment. MLG agrees that funds were used outside the *Piett Action*; thus, it should generally be a question of contractual interpretation whether this was allowed. There is at least some basis in fact to support the existence of this issue.

[83] Section 5(5)(b) of the *CPA* requires MLG to certify that all facts material to certification have been disclosed; therefore, MLG should have disclosed any individually imposed restrictions on the use of the funds, if any. No such individual terms were disclosed.

2. Negligence Issues

[84] The negligence common issues seek a determination of whether MLG owed the Class a duty of care and whether it breached the relevant standard of care.

[85] These issues are common to the Class. It is reasonable to argue that proposed class counsel owes the same duty of care to all putative class members, and that the same standard of care must necessarily apply to each of them. Indeed, in this case, one of the findings of the chambers judge in *Piett SC* leading to the conclusion that the *Piett Action* was an abuse of process arose from the fact that MLG purported to create a two-tiered class membership structure, which she found was contrary to the intent of the local class proceedings state: *Piett SC* at paras. 51, 55.

[86] The issue of whether the defendant owed a duty of care, and if so, whether the standard of care was breached, is routinely certified when a proposed class is similarly situated to the defendant: *Mostertman v. Abbotsford (City)*, 2024 BCSC 906 at paras. 113, 118; *Collette v. Great Pacific Management Co. Ltd.,* 2004 BCCA 110 at para. 32.

3. Misrepresentation, Deceit and Equitable Fraud Issues

[87] At the hearing, the Court raised concerns that the proposed common issues did not particularize the precise representations at issue, particularly given that different class members may have seen or heard different representations at different times. The plaintiff responded that:

a) all the challenged commentary could be reduced to three core representations; and

b) these three core representations would have been the basis for each representative's decision to pay the Retainer.

[88] The three core misrepresentations by MLG particularized by the plaintiff in oral argument were as follows:

a) The proposed class members had to join the *Piett* class action in order to receive any benefits therefrom.

b) To join the *Piett* class action, class members had to pay a Retainer to MLG.

c) The Retainer Funds paid to MLG would be used for the prosecution of the *Piett* class action.

(the “Misrepresentations”)

[89] I accept that there is some factual basis for each of the three alleged core Misrepresentations. However, there is an issue in that none of the three is clearly specified in the pleading. The plaintiff must further amend his pleading to explicitly articulate these three core Misrepresentations. I grant leave to do so.

[90] When considering the wrongfulness of the first alleged misrepresentation, class proceedings legislation creates a trade-off between (1) the autonomy of class members and (2) the necessity for a structure that provides adequate compensation for class counsel's work on behalf of the class.

[91] The necessary bargain supporting most class proceedings is as follows:

a) Class counsel agrees to work on the case without receiving any compensation unless and until they recover something for the class.

b) Class counsel assumes the significant risk of non-payment in return for a statutory promise that the court will approve a reasonable fee for them at the end of the day, should they be successful. The fee determination will consider the recovery of the entire class, not simply the recovery they achieved for their named client.

c) The class benefits greatly from this bargain, given that class counsel agrees to prosecute the case on their behalf without the class members having to:

i. positively sign up to participate in the action;

ii. pay class counsel during the pendency of the proceeding; or

iii. be involved in the prosecution of the action until the common issues are resolved.

d) In return for these benefits, the class notionally cedes control over the prosecution of the action to the named representative plaintiff, who is the direct client of class counsel.

e) Finally, the court's role in this grand bargain is to facilitate its smooth operation by:

i. selecting a competent representative plaintiff and class counsel;

ii. deciding whether the action should be certified;

iii. case managing the action after certification;

iv. approving any settlement negotiated by class counsel;

v. hearing any common issues at trial;

vi. establishing a fair process for any necessary individual proceedings; and

vii. establishing a reasonable fee for class counsel at the end of the day.

[92] The Misrepresentations allegedly disrupted this grand bargain by suggesting that class members are actually required to positively "pay to play" in order to participate in a class proceeding.

[93] The commonality of the proposed misrepresentation issues is aided by the Class's argument that no class member would have paid the Retainer absent the Misrepresentations. MLG accepts that no one paid the $500 Retainer as a gift or donation. This concession opens the door for the Class to argue that each class

member must have assumed they were receiving something for their Retainer, specifically the right to participate in and assist in the prosecution of the proposed class action.

[94] I am reassured in my decision to certify the misrepresentation issues based on the guidance in the following certification decisions.

[95] In *Carom v. Bre-X Minerals Ltd.* (2000), 196 D.L.R. (4th) 344, 2000 CanLII 16886 (ON CA), leave to appeal dismissed [2000] S.C.C.A. No. 660, the Court of Appeal certified a negligent misrepresentation cause of action against a public issuer, notwithstanding that the alleged misrepresentations were found in 160 statements. The Court held that certification was appropriate given that the plaintiff's theory was that the various misrepresentations effectively reduced themselves to one core misrepresentation – that the issuer owned a mine with gold in mineable quantities:

> [45] … There are two core issues in this litigation: first, was there gold in mineable quantities in the Busang; and second, if there was not, what was the various defendants' knowledge of the true state of affairs?
>
> [46] The defendants' conduct with respect to the first question was manifested in the 160 statements and press releases which informed the public about exploration developments in the Busang….
>
> [48] I make one other observation with respect to the overlap of factual issues common to both torts. Both the motions judge and the Divisional Court attached great significance to the fact that the contested representations by Bre-X were not made on a single occasion; rather, they took the form of 160 statements and press releases. In the eyes of the motions judge and the Divisional Court, this posed particularly difficult problems on the reliance component of the tort of negligent misrepresentation. As expressed by the Divisional Court [at pp. 316-17 O.R.]:
>
> > The alleged negligent misrepresentations include 160 or more Bre-X press releases over a four-year period beginning May 10, 1993. The representations were different in content and made at different times by different people for different reasons. . . . As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.
>
> [49] With respect, I think it is a mistake, at this early juncture of the litigation, to overemphasize the number and diversity of Bre-X's representations. One of the potential benefits of a class action with certified common issues

> relating to the knowledge and conduct of the defendants is that the resolution of those issues might narrow substantially the subsequent inquiries on the plaintiffs' side of the coin. As I understand the theory of the plaintiffs, the named defendants participated in a scheme to promote Bre-X shares by embarking on a program of issuing press releases they knew to be false, that portrayed the assay results from the Busang site as demonstrating the existence of a gold mine of staggering dimensions. If these facts can be established by the plaintiffs, the questions raised in para. 8(f) of the order declaring the common issues must be addressed. What did the individual defendants know about the promotional fraud? Here, if knowledge of the fraud cannot be attributed to a given defendant, the lesser degree of complicity respecting carelessness can be addressed. At this stage of the proceedings, the court does not know what this will entail by way of evidence. It is possible -- I put it no higher -- that fixing the knowledge and conduct of each Bre-X insider will present a much clearer picture. For example, if the moment when a Bre-X insider became careless about a representation or representations in which he participated could be isolated, the subsequent consideration, admittedly in individual trials, of such issues as duty of care and reliance might be rendered more focussed and manageable. This would "move the litigation forward". In short, the existence of 160 representations should not be used as a reason to refuse certification as a class action; rather, certification is, potentially, a way of reducing those 160 representations to a much smaller number of relevant ones.

[96] The chambers judge in *Carom* declined to certify negligent misrepresentation issues against various investment advisors who encouraged clients to purchase Bre-X shares: *Carom v. Bre-X Minerals Ltd*., 1999 CanLII 14794 (ON SCDC), 1999 CarswellOnt 1456. This finding was not disrupted on appeal. The refusal to certify this aspect of the case was largely due to the fact that the nature of the conversations between each investment advisor and the firm’s clients was likely to be more varied and individualistic than the core representations coming from the issuer itself. The Court stated:

> 259 In these actions, I do not consider a class proceeding to be the preferable procedure for the resolution of the common issues. The plaintiffs are candid in conceding that each class member will have to participate in an individual trial in order to establish essential elements, reliance, causation and damages, of the causes of action pleaded. However, their contention that these individual issues can be determined in "mini-trials" is not borne out by the evidence. The elements of reliance, causation and quantum of damages are significant issues that will remain to be resolved following a common issue trial. The record on these motions shows that these individual issues will have to be decided from a complex factual matrix which is further complicated by the idiosyncratic nature of the relationship between each class member and the particular investment advisor. In consequence, the individual trials themselves will be complex, lengthy, individualistic inquiries

> which would be the polar opposite of the simplistic, abbreviated procedures envisioned by the plaintiffs.
>
> 260 The plaintiffs conceded in argument that each cause of action asserted on behalf of the class turns on the specific representations made to each individual class member. This concession is incorporated in the litigation plan proffered by the plaintiffs. It would be an involved undertaking to determine whether any particular representation contained in the analysts' reports was relied upon by a class member in consideration of the volume of representations, the transactional histories, the intervention of the investment advisor, the availability of information from other sources and other factors. In the context of the relationships in this action, it is a complex matter. Conversely, in my view, the determination of the common issues proposed by the plaintiffs will be relatively straightforward.

[97] I find that the present case is more akin to the case against the issuer in *Carom* than that against the investment advisors:

a) The evidence suggests that there were far fewer channels of communication between MLG and class members than between the investment advisors and their clients in *Carom*.

b) The communications here were generally transmitted through channels that would have been received by many class members in the same form, such as the Retainer Agreement, public websites, and group teleconferences.

c) There is no evidence of MLG having one-on-one conversations with individual class members regarding the nature and treatment of the Retainer Funds.

d) MLG itself put the entire Class in the same situation by depositing the Retainer Funds into a single pooled trust account.

[98] In *McKenna v. Gammon Gold Inc*., 2010 ONSC 1591, Justice Strathy (as he then was) stated as follows:

> [135] It has been generally accepted that the cause of action in negligent misrepresentation requires proof that the plaintiff relied on the misrepresentation. It is for this reason that courts have usually concluded that

> negligent misrepresentation claims give rise to such individual inquiries as to reliance that they are unsuitable for certification.
>
> [136] Issues of reasonable reliance have usually been considered to be individual issues that are not capable of being resolved on a common basis.
>
> [137] Exceptions may be made where there is a single representation made to all members of the class or there are a limited number of representations that have a common import.
>
> [Emphasis added, citations omitted.]

[99] Certification of the negligent misrepresentation claims was ultimately refused in *McKenna*. However, the scope and nature of the alleged misrepresentations in that case were far more diffuse and varied than in the present case:

> [160] …In this case, multiple misrepresentations are alleged throughout the ten month Class Period, in press releases, regulatory filings, conference calls, annual reports and a multitude of other written and oral forms. The alleged misrepresentations relate to a variety of complaints, not simply the level of gold production. The plaintiff complains of undisclosed equipment failures, contracts with insiders, stock option expenses, non-compliant financial statements and inadequate disclosure controls. Individual inquiries would have to be made into what alleged misrepresentations were made to each class member and whether he or she relied upon any of those representations.

[100] In *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399, another case involving a failed charitable tax giving scheme, Strathy J. did certify common issues relating to negligent misrepresentation on the basis that the case only engaged the consideration of two documents:

> [324] In my view, there are some parallels between the *Bre-X* case and this case. As I have suggested earlier, it is arguable that there was a single misrepresentation: "you will receive a valid charitable receipt much greater than your cash contribution" that permeated every other representation about the Gift Program. If the donation program was a fraud, the Court could find that every representation, no matter how it was made or who made it, was tainted by the fraud. The question would then be: what did each defendant know and what did each defendant do in relation to the fraud? These are issues that can be addressed without reference to the behaviour of individual Class members.

[101] I find that in the present case, "it is [also] arguable" that the core Misrepresentations "permeated every other representation".

[102] In *Dugal v. Manulife Financial*, 2013 ONSC 4083, leave to appeal dismissed, 2014 ONSC 1347 (Div. Ct.), the Court accepted that, in certain cases involving negligent misrepresentation, it can certify appropriate common issues. A core misrepresentation was also alleged in *Dugal*:

> [19] The plaintiffs have defined the key misrepresentation in terms of a Representation and an Omission. The Representation is defined as follows:
>
> > The statement that MFC had in place enterprise-wide risk management systems, policies and practices that were comprehensive, effective, rigorous, disciplined and/or prudent, and the substantially similar statements that are particularized in the statement of claim.
>
> [20] The plaintiffs also say that the defendants failed to disclose material facts in the company's "core documents" as that term is defined in Part XXIII.1 of the OSA. These alleged omissions amounted to misrepresentations within the meaning of the OSA and made the Representation materially misleading…
>
> [21] I am satisfied for the purposes of both the leave and certification motions that the Representation, although referencing various examples in the statement of claim, can stand alone as a single Representation that is judicially manageable in a class proceeding. I am also satisfied that the same can be said about the Omission. Here, five specific omissions are listed but omissions (a) to (d) are, in essence, flip-sides of the Representation, albeit with some additional nuances. Omission (e), about the failure to set out the 20% and 30% market decline scenarios, is different. This is an omission that does not fall with the penumbra of the Representation and stands apart but, in my view, is also judicially manageable.
>
> [22] Put simply, contrary to the submission of the defendants, the common issues trial judge will not have to deal with multiple representations over a multi-year time frame. The alleged Representation and Omission are reasonably confined and, again, judicially manageable.

[103] In *Fantl v. Transamerica Life Canada*, 2015 ONSC 1367, appeal dismissed 2016 ONCA 633, leave to appeal dismissed 2017 CanLII 8570 (SCC), the Divisional Court allowed certification of a negligent misrepresentation common issue (excluding reliance and damages) stating:

> [43] In contrast to negligent misrepresentation cases involving multiple representations (such as *Bayens v. Kinross and Green v. Canadian Imperial Bank of Commerce*, [2012] O.J. No. 3072, 2012 ONSC 3637 (S.C.J.)), courts have certified negligent misrepresentation claims involving a single written representation, a uniform set of misrepresentations, or even a number of separate representations "all having had a common import", notwithstanding the need to prove reliance and damages individually. See *Ottawa (City)*

> *Police Assn. v. Ottawa (City) Police Services Board*, *supra*, at para. 59; *Cannon v. Funds for Canada Foundation*, [2012] O.J. No. 168, 2012 ONSC 399 (S.C.J.), at paras. 340 and 350-51; *Ramdath v. George Brown College of Applied Arts and Technology*, [2010] O.J. No. 1411, 2010 ONSC 2019 (S.C.J.), at para. 103; *Carom v. Bre-X Minerals Ltd*., at paras. 48-49; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2003 CanLII 38170 (ON SCDC), [2003] O.J. No. 2069, 172 O.A.C. 59 (Div. Ct.), at para. 35; *Lewis v. Cantertrot Investments Ltd*., [2005] O.J. No. 3535, [2005] O.T.C. 741 (S.C.J.), at para. 20; *Hickey-Button v. Loyalist College of Applied Arts & Technology*, 2006 CanLII 20079 (ON CA), [2006] O.J. No. 2393, 267 D.L.R. (4th) 601 (C.A.); *Murphy v. BDO Dunwoody LLP*, 2006 CanLII 22809 (ON SC), [2006] O.J. No. 2729, 32 C.P.C. (6th) 358 (S.C.J.); *Silver v. IMAX Corp*., 2009 CanLII 72334 (ON SC), [2009] O.J. No. 5585, 86 C.P.C. (6th) 273 (S.C.J.).
>
> [44] This case involves one uniform written representation that was included in a disclosure document required by legislation, that was given to each class member and that each class member acknowledged receiving. To prove actual reliance, the class members do not need to prove that the misrepresentation was the only factor that induced them to invest in the Can-Am Fund, but simply that they relied on the misrepresentation (*NBD Bank, Canada v. Dafasco Inc*. (1999), 1999 CanLII 3826 (ON CA), 46 O.R. (3d) 514, [1999] O.J. No. 4749 (C.A.), at para. 78, leave to appeal to S.C.C. refused [2000] S.C.C.A. No. 96). [page240] Thus, the individual inquiries with respect to reliance need not be complex.

[104] I find that the issue of what class members thought they were getting in return for the payment of the Retainer is a sufficiently core issue to ground the proposed misrepresentation issues. Evaluating the Misrepresentations in a common issues trial represents a reasonable approach to moving core issues forward. Did class members pay the Retainer because they reasonably understood that it was necessary in order to participate in the class proceeding? Once the Retainer was paid, were they entitled to expect that the Retainer would be used exclusively for the prosecution of the class proceeding? Based on the current record, I conclude that these issues could be resolved simultaneously.

[105] That said, I would require that proposed common issues 15-16 be modified as follows in order to maintain a more singular focus on the core Misrepresentations, rather than risk the case devolving into other misrepresentations potentially made only to specific individuals:

> 15. Did the Defendant make <u>the following</u> false representations to the Class Members, directly or indirectly?

a) You had to join the class action in order to receive any benefits therefrom.

b) To join the class action, you had to pay a Retainer to MLG.

c) The Retainer would be used for the prosecution of the class action.

(the "Misrepresentations")

~~16. If so, what were the false representations (the "Misrepresentations")?~~

(The numbering system for the balance of the common issues will need to be adjusted accordingly.)

[106] I turn next to the specific issue of whether the issue of reliance should also be certified. In *Cannon*, the Court found that the entire tort could be certified because the whole purpose of the scheme was to secure a tax deduction. As such, it could be reasonably inferred that individuals did not participate in the scheme because they wanted to donate to the underlying charity; they did so due to the representation that they would receive a tax deduction:

> [350] As I have indicated above, in my view, this is a case, like *Ramdath* and *Hickey-Button*, in which there is effectively one, or perhaps two representations, contained in written materials supplied by ParkLane to every Class member: "This is a legitimate tax avoidance program that has been designed to satisfy the requirements of Revenue Canada. You will receive a tax credit that exceeds the amount of your actual donation."
>
> [351] This is also a case in which it may be possible to infer that each donor relied on the representation. The entire purpose of the elaborate structure was to achieve the ramped-up tax deduction. It can reasonably be inferred that taxpayers did not participate in the Gift Program only because they wanted to make a gift to the underlying charity. They did so due to the representation that they would receive an enhanced tax deduction.

[107] I note that this finding was cited with approval by the Ontario Court of Appeal in *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921 at para. 88.

[108] In *Krishnan*, this Court certified an issue concerning the inference of reliance on a misrepresentation based on the purchase of a purported product with the name on the front of the label. The Court analogized to a situation in which a milk carton says “Milk” on the front. I found that is reasonable to infer from the circumstances that the purchaser relies on that statement when selecting the item from the shelf: paras. 169-173.

[109] The same logic applies here in terms of the decision to pay the Retainer – the “entire purpose” for the payment was arguably to obtain the benefit of the class action. As such, I am also prepared to certify the proposed reliance issue.

[110] This conclusion is supported by the fact that the Class may not actually initially carry the burden of establishing reliance for the fraudulent misrepresentation tort. As Justice Edelmann (as he then was) stated in *Cornerstone Global Partners Inc. v Hill Road Capital Inc*., 2021 BCSC 1517, “[o]nce intention, materiality and causation of loss are proven by the Plaintiff, the burden of proving non-reliance shifts to the Defendant”: at para. 61. See also *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company* Ltd., 2009 BCCA 307 at para. 58; and *Dhami v. Bath*, 2014 BCSC 751 at para. 71.

[111] The plaintiff has pleaded the required elements to shift the burden of proof.

[112] MLG relies on the decision in *Mackinnon v. Volkswagen Group Canada Inc.*, *et al.* 2024 ONSC 4988, to suggest that the Court should refuse to certify a reliance issue in this case:

> [196] To the extent reliance is an element of the claims, it is not amenable to class-wide treatment. As Perell J. held in *Peters*, at paras. 232-235, reliance is the problematic constituent element of misrepresentation from a class action perspective. It is idiosyncratic, raising a question of fact as to the plaintiff’s state of mind.
>
> [197] In *Ramdath v. George Brown College of Applied Arts and Technology*, 2015 ONCA 921, 392 D.L.R. (4th) 490, at para. 88, the Court of Appeal found that reliance will not normally be a common issue in a class action, as it will depend on the individual history of each class member.
>
> [198] I accept that there are times when inferred reliance may be amenable to class-wide determination. However, in this case, the plaintiff’s proposed common issue of inferred reliance cannot be certified. Inferred reliance

> makes sense when dealing with a core representation. In this case, there is no core representation. The TDI vehicles were represented to have a number of features, most of which they actually had. Unlike a product bought to obtain glucosamine sulphate that has no glucosamine sulphate, the TDI vehicles were not worthless; they were worth less than originally thought because they did not have one particular feature, that is, the low NOx emissions.
>
> [199] The plaintiff argues that the Divisional Court's decision, which includes the statement that "all [class members] desired to buy clean emissions vehicles" means that there is a uniform representation with a common import. In my view, read as a whole and in context, the Divisional Court was not straying into the question of whether there is a common issue of inferred reliance because all class members desired to buy clean emissions vehicles. That was not the focus of its reasons, or of the appeal before it. Certainly nothing in the Divisional Court's order suggests that it was making a finding about the proposed common issue involving inferred reliance.
>
> [200] In my view, proposed common issue (l)(iii) cannot be certified because it cannot be determined in common.

[113] I distinguish the decision in *MacKinnon* on the basis that I have found sufficient basis to conclude that there were limited core Misrepresentations in the present case.

[114] MLG also suggests that the language of the Retainer Agreement clarified any earlier misunderstanding that may have developed. With respect, (1) the language of the Retainer Agreement is not so clear as to mandate a particular result at this stage of the proceeding, and (2) the effect of the "anti-entire agreement clause" in paragraph 9 of the Retainer Agreement will need to be considered in this respect. These issues should be addressed on their merits.

4. Unjust Enrichment Issues

[115] Courts have certified claims for unjust enrichment in numerous cases, including *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228, at paras. 37-40, aff'd 2006 BCCA 260 at para. 17; *Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd. et al.*, 2006 BCSC 1018 at paras. 49-50; *Bodnar v. Payroll Loans Ltd. et al.*, 2006 BCSC 1132 at paras. 43-44; *Watson v. Bank of America Corporation*, 2015 BCCA 362 at paras. 175-183; *Pioneer Corp. v. Godfrey*, 2019 SCC 42.

[116] The question of whether MLG was entitled to be enriched through the use of the Retainer Funds is common to the Class. There is some basis in fact for the argument that payment to MLG for its work in the *Scheuer Action* account was an enrichment. Similarly, there is an adequate factual basis for the argument that any funds paid to others for recruitment of class members or class member communication, equated to a saving for MLG of amounts that it would have otherwise had to pay at first instance: *Carleton (County of) v. Ottawa (City)*, [1965] S.C.R. 663 ,1965 CanLII 15, at 668-669.

[117] Insofar as certain class members may not have signed the Retainer Agreement, which agreement may be raised as a juristic reason for any enrichment, I address this through subclassing below.

[118] As discussed above, MLG argues that the Retainer Agreement creates a juristic reason for the enrichment, and that any complaint about the Retainer Agreement should properly be brought as a breach of contract claim. However, (1) the plaintiff is entitled to advance the causes of action he wishes, so long as it is not plain and obvious that they will fail, and (2) the plaintiff is actually seeking to set aside the Retainer Agreement, which would destroy MLG's ability to invoke it as the juristic reason for any enrichment.

5. Contingent Fee Agreement Issues

[119] This analysis naturally leads to the next set of common issues, wherein the plaintiff seeks to have the Retainer Agreement declared null and void, which would negate MLG's ability to rely on certain terms it intends to use to defeat the plaintiff's claims. These include its alleged ability to use the Retainer Funds to pay its accounts in the *Scheuer Action* and the ability to send accounts only to the proposed representative plaintiff.

[120] There is no evidence of multiple forms of Retainer Agreement, thereby providing some basis in fact for the commonality of such an assessment.

[121] These issues are only material to class members who signed the agreement and hence are more properly treated as subclass issues. However, I am prepared to certify them on this basis.

6. Damages Issues

[122] I accept that there is a reasonable prospect, although no guarantee, that the Court will conclude that aggregate damages can be awarded, particularly in relation to the breach of trust claims. As such, it is appropriate to allow for that possibility at this stage by certifying damages as a common issue. Aggregate damages can be certified as a common issue even though it is unknown whether they will ultimately be awarded following a common issue trial: *LaSante v. Kirk*, 2023 BCCA 28 at paras. 84-94; *Tucci v. Peoples Trust Company*, 2020 BCCA 246 at para. 122.

[123] Similarly, I find that the plaintiff has pleaded a degree of professional misconduct adequate to sustain a punitive damages common issue. Punitive damages are used to punish misconduct that is "malicious, oppressive, and high-handed" and which "represents a marked departure from ordinary standards of decent behaviour". Punitive damages are a certifiable common issue if properly pleaded and supported by some basis in fact: *Kirk v. Executive Flight Centre Fuel Services Ltd*., 2019 BCCA 111 at paras. 138-140.

[124] At paragraphs 98-99, the Notice of Civil Claim pleads the following particulars:

> 98. The defendant's conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, wilful, and in contumelious disregard of the plaintiff's rights and the rights of the Class Members.
>
> 99. The defendant's deliberate decision to work with the Steering Committee to further financially exploit the Class Members, who had already been subjected to the sham Gift Program, represented a flagrant betrayal of their trust and vulnerabilities, and was of such a serious nature as to justify awarding aggravated, exemplary, and punitive damages.

[125] Finally, if it is possible to determine damages collectively, that would also allow for interest to be determined collectively, supporting the last proposed common issue.

D. Class Definition

1. Generally

[126] Section 4(1)(b) of the *CPA* requires the plaintiff to demonstrate some basis in fact that “there is an identifiable class of 2 or more persons”: *Godfrey v. Sony Corporation*, 2017 BCCA 302 at paras. 135-137, aff'd *Pioneer Corp. v Godfrey*, 2019 SCC 42.

[127] The purpose of the class definition is to identify who is entitled to notice, who is entitled to any relief awarded, and who is bound by the judgment: *Jiang v. Peoples Trust Company*, 2017 BCCA 119 at para 74.

2. Application to this Case

[128] The proposed class definition is as follows:

> All persons who made a retainer payment to Merchant Law Group LLP in respect of either an intended class action relating to their participation in the Global Learning Gifting Initiative or in *Piett v. Global Learning Group Inc*., QBG 590/16 (the "*Piett* Action"), and excluding Lorne Piett, Randy Shoeman, Ryan Mitchell, and any Defendant or Third Party in the Piett Action or in Ontario Superior Court of Justice Court File No.: CV-17-583573-OOCP.

[129] The proposed class is identifiable. Indeed, MLG should likely be able to provide a complete list of class members once the matter is certified.

[130] MLG raised a concern that the definition may include individuals who were refunded their Retainer after not signing the Retainer Agreement. I find that this can be addressed by adding the words “which was not refunded” after the defined term (the “*Piett Action*”).

[131] MLG initially raised an issue about the use of the word “intended,” but no longer pursued that point once it was explained that it was included to address a

concern that omitting the word would exclude class members who provided their Retainer before the *Piett Action* was formally commenced.

[132] The Court was concerned that the class included both individuals who had signed the Retainer Agreement and those who had not, since individuals who signed a Retainer Agreement will need to attempt to:

a) set aside the Retainer Agreement, or

b) interpret the Retainer Agreement in as favourable a manner as possible.

It is appropriate to create a subclass for class members who do not face these additional challenges. Neither party raised any objection to this. I certify a "No Retainer Agreement Subclass" for class members who did not sign a Retainer Agreement, given their differing legal interests.

[133] At this stage, I am confident that Mr. Mayer and his counsel will vigorously and appropriately advance all class members' claims, and I am satisfied to leave Mr. Mayer as the sole representative of the entire class. If a conflict were to arise later (for example, if MLG makes a settlement offer to one group but not the other), the Court may reconsider the need for appointing a separate representative for the subclass.

E. Preferability

1. Generally

[134] Section 4(1)(d) of the *CPA* requires the plaintiffs to demonstrate that a class proceeding is the preferable method for the fair and efficient resolution of the common issues. Section 4(2) outlines relevant non-exhaustive criteria:

> (a) Whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) Whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) Whether the class proceeding would involve claims that are or have been the subject of any other proceedings;

(d) Whether other means of resolving the claims are less practical or less efficient;

(e) Whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[135] Two questions are central to the preferability analysis. The first is whether a class proceeding would be a fair, efficient and manageable method of advancing the claims. When considering this, the common issues must be evaluated in the context of the action as a whole, with their relative importance taken into account. The second question is whether the class proceeding is preferable for resolving the claims compared to other realistically available means for their resolution.

[136] The essence of the preferability analysis was captured by the BC Court of Appeal in *Pro-Sys Consultants Ltd. v. Infineon Technologies* AG, 2009 BCCA 503, leave to appeal ref'd 33522 (3 June 2010) (S.C.C.):

> [75] The chambers judge did not consider whether there were any other more practical or efficient means of resolving the appellant's claims and the respondents did not propose any. Thus, the only apparent alternative to a class action is no action at all. Therefore, if this action does not proceed as a class action there is the potential for an unconscionable result - that the respondents will be allowed to retain their unlawful gains. This potential unconscionability also weighs in favour of certifying this action as a class proceeding.

2. Application to this Case

[137] I find that a class action is the preferable procedure here because:

a) The questions of fact and law common to the proposed Class members predominate over any questions affecting only individual members.

b) A significant number of proposed Class members do not have a valid interest in individually controlling the prosecution of separate actions.

c) The claims are not, nor have they been, the subject of any other proceeding in Canada or other means of resolution.

d) Other means of resolving these claims are less practical and less efficient.

e) The administration of the proposed class proceeding will cause less difficulties than those likely to be experienced if relief were sought by other means.

f) Certification accords with the three principles underlying class action proceedings: access to justice, behaviour modification, and judicial efficiency. Specifically from an access to justice perspective, it is simply not economical for Class members to litigate this case on their own. Class proceedings are intended to address this economic barrier by providing a procedural means to resolve modest or low-value claims.

H. Adequate Representative Plaintiff

1. Generally

[138] The representative plaintiff must be able to fairly and adequately represent the class, have a plan for proceeding, and not have a conflict with the class on the common issues.

2. The Plaintiff

[139] The proposed representative plaintiff, James Mayer, meets these requirements. Mr. Mayer made a retainer payment to Merchant Law in respect of the *Piett Action*. He is prepared to represent the interests of class members, and he is aware of the duties entailed in acting as a representative plaintiff. Mr. Mayer is not aware of any conflicts with other class members with respect to the proposed common issues.

[140] The plaintiff has retained competent and accomplished class action counsel to represent the interests of the class, counsel who are prepared to fund all necessary expenses to prosecute the action.

3. The Litigation Plan

[141] The plaintiff has presented a litigation plan that outlines a workable approach for advancing the litigation. The purpose of the litigation plan at the certification

stage is to aid the court by providing a framework for advancing the litigation and to demonstrate that the plaintiff and class counsel have a clear grasp of the complexities involved in the case. Approving certification is not the same thing as blessing the proposed plan. Courts anticipate that plans will change as the case develops. Any shortcomings can be addressed as part of case management*: Fakhri et al. v. Alfalfa's Canada, Inc. cba Capers*, 2003 BCSC 1717 at para. 77, aff'd 2004 BCCA 549; *Jiang v. Vancouver City Savings Credit Union*, 2019 BCCA 149 at para. 60.

V. CONCLUSION

[142] This class proceeding should be certified, subject to the pleading amendments and revised approach to the class definition outlined above. The parties should set down a further hearing to address the notice issues.

"Branch J."

SCHEDULE "A" – PROPOSED COMMON ISSUES

Defined Terms

"Class" or **"Class Members"** mean:

> All persons who made a retainer payment to Merchant Law Group LLP in respect of either an intended class action relating to their participation in the Global Learning Gifting Initiative or in *Piett v. Global Learning Group Inc*., QBG 590/16 (the "Piett Action"), and excluding Lorne Piett, Randy Shoeman, Ryan Mitchell, and any Defendant or Third Party in the Piett Action or in Ontario Superior Court of Justice Court File No.: CV-17-583573-OOCP.

"Defendant" means Merchant Law Group LLP.

"Retainer Payments" mean payments made by Class Members to the Defendant in respect of either an intended class action relating to their participation in the Global Learning Gifting Initiative or in *Piett v. Global Learning Group Inc.*, QBG 590/16.

Negligence

1. Did the Defendant owe a duty of care to Class Members?
2. If so, what was the standard of care required of the Defendant?
3. Did the Defendant breach the standard of care?

Fiduciary Duty and Breach of Trust

1. Did the Defendant owe a fiduciary duty to Class Members?
2. Did the Defendant breach the fiduciary duty?
3. If so, how was the fiduciary duty breached?
4. Were the Retainer Payments trust funds?
5. If so, what were the terms of the trust?
6. If the Retainer Payments were trust funds, did the Defendant breach the terms of the trust by the manner in which some or all of the trust funds were expended?
7. If the Defendant breached its fiduciary duty owed to the Class Members or acted in breach of Trust, are the Class Members entitled to restitution or disgorgement as a remedy for the breach(es) and if so, in what amount?

Unjust Enrichment

1. Was the Defendant unjustly enriched by the manner in which it expended some or all of the Retainer Payments?
2. Have the Class Members suffered a corresponding deprivation in the amount of some or all of the Retainer Payments?
3. Is there a juridical reason why the Defendant was entitled to expend the

Retainer Payments in the manner in which they were spent?
4. Are the Class Members entitled to restitution or disgorgement as a remedy for the unjust enrichment, and if so, in what amount?

Fraudulent Misrepresentation/Deceit, Equitable Fraud and Negligent Misrepresentation

1. Did the Defendant make false representations to the Class Members, directly or indirectly?
2. If so, what were the false representations (the "Misrepresentations")?
3. Were the Misrepresentations made by the Defendant with the intent that they would be relied upon by Class Members?
4. Did Class Members, by virtue of making the Retainer Payments, reasonably rely on those Misrepresentations?
    a. If so, did the Class Members suffer a corresponding loss?
5. Were the Misrepresentations made by the Defendant knowingly, or without belief in their truth, or recklessly as to their truth?
6. Alternatively, were the Misrepresentations made negligently?
7. Was the Class Members' reliance on the misrepresentations detrimental to Class Members, and did they suffer a loss as a result of their reliance on the Misrepresentations?
8. Were the Misrepresentations unconscientious, unconscionable or unfair, amounting to an equitable fraud upon the Class Members?
9. Is the Defendant liable to pay damages or restitution to the Class, and if so, in what amount?

Contingent Fee Agreement

1. Was the Contingent Fee Agreement between the Defendant and Class Members a nullity, invalid or otherwise unenforceable?
2. If the Contingent Fee Agreement was not a nullity, invalid or otherwise unenforceable, did the Defendant breach its terms by the manner in which the Retainer Payments were expended?

Damages

1. Is the Defendant liable to pay aggravated, punitive, or exemplary damages having regard to the nature of their conduct? If so, in what amount?
2. What is the liability, if any, of the Defendant for court ordered interest?