Court of Queen's Bench of Alberta

Citation: Engen v Hyundai Auto Canada Corp., 2021 ABQB 740

Date: 20210917
Docket: 1601 17138
Registry: Calgary

2021 ABQB 740 (CanLII)

Between:

Robert Engen

Plaintiff

- and -

Hyundai Auto Canada Corp., Hyundai Motor America, Hyundai Motor Manufacturing Alabama LLC and Hyundai Motor Co.

Defendants

Corrected judgment: A corrigendum was issued on September 21, 2021; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Reasons for Decision of the Associate Chief Justice J.D. Rooke

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I. Introduction

[1] This action is a proposed class proceeding under the *Class Proceeding Act*, RSA 2000, c. – C. 16.5 (Act[1]).

[2] By Statement of Claim filed December 20, 2016 (SofC), Amended Statement of Claim filed December 18, 2017 (ASofC), Amended Amended Statement of Claim filed April 23, 2018 (AASofC) and Certification Application filed July 30, 2018 (Application), Robert Engen (Engen), as proposed representative plaintiff (PRP), sought certification of this action under the Act as against Hyundai Auto Canada Corp., Hyundai Motor Manufacturing Alabama LLC and Hyundai Motor Co.[2] (collectively, Hyundai), for a class defined as: "All persons in Canada, except for [Excluded Persons] who own, owned, lease or leased one of the [Vehicles]"[3].

[3] In his affidavit in support of certification, Engen alleges (para 10) that, in relation to failed Hyundai Panoramic Sunroofs (PS):

> ... when designing and promoting the PS, Hyundai failed to meet engineering and manufacturing challenges, resulting in PS being installed that are susceptible to spontaneous shattering[4]; Hyundai knew that the PS were shattering as early as mid-2012; Hyundai failed to disclose that the PS were susceptible of shattering; Hyundai failed to disclose that the shattering of the PS <u>endangers</u> the proposed Class Members and others; Hyundai made certain representations about the Vehicles (defined below), as detailed in the AASofC, either intentionally or negligently; Hyundai provided certain warranties when selling the Vehicles, as detailed in the AASofC, and breached those warranties[5]; and Hyundai breached the *Sale of Goods Act*, RSA 2000, c. S-2 [AB SGA – and in other jurisdictions generally - SGAs], the *Competition Act*, RSC 1985, c. C-34 [Comp. Act], and the *Fair Trading Ac*t, RSA 2000, c,. F-2 [FTA][6] and equivalent consumer protection statutes across Canada. [Emphasis added.]

[4] A settlement of a similar action was achieved in the US and referenced by Engen, which information I accept is not privileged, and that may indicate a not unusual event with Hyundai vehicles in Canada (Jan 15/20 TR 53/23 – 38)[7] for some. However, to be clear, I don't otherwise rely on same in relation to any of the Hyundai Defendants, for any purpose in these Reasons: ***Kaufmann v. Edmonton (City) Police Service***, 2019 ABCA 272, at paras 17 & 19.

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1 I will used defined terms throughout these Reasons including substitution for some words in quotes.

2 The claim against Hyundai Motor America in the SofC and ASofC was discontinued by Order of this Court dated May 1, 2018.

3 "Excluded Persons" are defined in the aforementioned documents are persons related to or being authorized motor vehicle dealers of Hyundai, and "Vehicles" as the 6 Hyundai vehicle types built from 2011 (or 2013) to 2018 referenced in the AASofC, equipped with Hyundai manufactured and factory-installed or replacement "Panoramic Sunroofs" (PS).

4 Engen in his certification brief (Engen Brief), at paras 3 and 25- 26 alleges that the PS "are and were susceptible to spontaneous shattering under every day, normal driving conditions", and whether "stationary or moving", without "external impacts".

5 The alleged representations and warranties are detailed in Appendix A to the Application.

6 Now the *Consumer Protection Act*, RSA 2000, c C-26.3 [AB CPA, and generally "CPA" legislation].

7 This formula will be used for all references to the transcripts of the certification hearing of January 13 and 15, 2020, being reference to the date, page(s) and line(s).

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II Summary of Decision

[5] The action is certified, with the exception of certain aspects identified *infra*.

III Class Proceedings Criteria, Issues and Analysis

[6] As all counsel who bring or defend against class proceeding certification applications should know, at this procedural certification stage, the Court need not assess the merits of the claim, but, rather, a PRP has only to show and the Court to find that the criteria of the Act have been satisfied; in this case, primarily s. 5(1) to (3) inclusive, and (8)[8]. To do so the PRP need only provide a minimum/low evidentiary basis – some basis in fact – although the "evidentiary burden is not onerous: it requires only a minimum evidentiary basis"[9] - for each of the criteria in s. 5(1), except for the cause of action requirement in s. 5(1)(a)[10]. To do otherwise is not acceptable: see, *inter alia*, ***Lambert v. Guidant Corp***., [2009] OJ No 1910, at paras 59-60 & 71.

[7] This is consistent with the three primary objectives of the Act, namely, to achieve judicial economy, promote access to justice and modify the behaviour of wrongdoers: see Engen Brief, at para 39 and the authorities relied on therein, as well as ***Warner***, at para 9.

[8] Departing from my usual practice, as recently as August 31, 2020 (***Bruno v. Samson Cree Nation***, 2020 ABQB 594), I have decided that, in these Reasons, 20 years after ***Western v. Dutton*** 2001 SCC 46 and ***Hollick v. Toronto (City)***, 2001 SCC 68, and other subsequent decisions, it is no longer necessary to cite every single authority for the now relatively trite certification criteria[11] under the Act. All who are informed of the provisions of s. 5 of the Act, and who have made submissions to a court, or are a Court who has decided a case under the Act, or similar class proceedings, know those criteria and they need not be restated in these Reasons. It is sufficient to merely confirm basic principles and then deal with issues where more recent considerations have arisen. In the result, I have not addressed certification criteria not specifically raised between the parties.

[9] For the reasons that follow, I find, on the record of this case, that all of the criteria in s. 5(1) and (2) of the Act have been met without issue, sufficient to justify certification herein, except for the following: any requirements for privity of contract between class members and sellers under the SGAs, and of consumers and suppliers under the CPAs, so as to constitute causes of action under s. 5(1)(a) (the only causes of action addressed by Hyundai[12]); s. 5(1)(b) whether the claims raise at least one common issue (which Hyundai challenges); and depending thereon, whether a class action is the preferable procedure, under s. 5(1)(d), referencing s. 5(2)

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[8] One of the issues herein is the potential for identification of a subclass under s. 5(8)(e) in relation to SGA and CPA claims.

[9] See, *inter alia*, ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2013 SCC 57, at paras.99-105 and ***Warner v. Smith & Nephew Inc***, 2016 ABCA 223, at para 13.

[10] See my decision in ***Windsor v. Canadian Pacific Railway***, 2006 ABQB 348 (***Windsor ABQB***), at para 54 (upheld, except as to class definition: 2007 ABCA 294) and ***Andriuk v. Merill Lynch Canada Inc***, 2013 ABQB 422, at paras 67-8, except for the processes of gatekeeping and "winnow[ing] out actions which are clearly frivolous or manifestly unfounded" (***Kristal Inc. v. Nicholl and Akers***, 2006 ABQB 422, at para 85), neither of which apply to this case, or a "meaningful screening device" (***Pro-Sys*** at paras 103-4).

[11] Although there still seems to be, what I consider unnecessary, debate, as to the line between sufficient and not sufficient evidence to establish "some basis in fact", on which I will touch somewhat.

[12] Para 50 of the Hyundai RB.

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(where Hyundai only challenges same on the basis that it alleges that there are no common issues).

[10] Specifically, other than these exceptions to which I will return, as addressed by Engen at para 44 of his Reply Brief (Engen RB), Hyundai:

a. Makes no submissions on s. 5(1)(e)[13], so I conclude that there is no challenge to the qualifications of Engen to be the PRP – that is, there is no challenge to his ability to fairly and adequately represent the interests of the class and follow the workable litigation plan he has prepared, nor are there conflicts in the interests of other prospective class members. A sub-class may be necessary for some SGA and CPA claims, depending on the need for privity discussed below;

b. Does not, under s. 5(1)(a), challenge the causes of action of: express[14] or implied warranty[15], except statutory breaches under the SGAs and CPAs; negligence[16]; negligent misrepresentation[17]; or breaches of the Comp. Act[18]; leaving only some of the SGA and CPA cause of action claims being challenged. Thus, by default, all those causes of action, except the last aforementioned two, and except for unjust enrichment, which Engen has abandoned as discussed *infra*, form a basis for certification and are so certified. Simply put, those cause of action claims, being unchallenged, meet the low/minimal threshold that the "facts as pleaded are assumed to be true and the requirement [of disclosing a cause of action] is satisfied unless it is 'plain and obvious' that the plaintiff's claim cannot [otherwise] succeed": Engen Brief at para 43; ***Pro-Sys*** at para 63; and ***Warner***, at para 12 (and authorities therein referenced); with Hyundai making no claim that, but for those exceptions, it is "plain and obvious" that the pleadings do not disclose causes of action for the purposes of s.5(1)(a); and

c. Does not challenge that there is a class of 2 or more identified persons – indeed there is evidence of more than that – see paras 20 and 70 of the Engen Brief[19].

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[13] Para 51 of the Hyundai RB.

[14] Hyundai acknowledges (Jan 13/20 TR 33-4) that the express warranty provided by Hyundai, with exclusions, is provided in Engen's 2103 Service Passport, as contained in Exhibit "G" of Engen's December 2019 Affidavit, and constitutes a cause of action that is pleaded by Engen.

[15] Articulated at paras 44-6 of the Engen Brief, in relation to paras 40-7 of the AASofC, and while it might not apply to Engen personally, because he had his sun roof replaced by Hyundai at no cost, I find that the pleading of this express warranty is sufficient at this certification stage and does not now require a formal filing of the express warranty document on the record, as asserted in the Hyundai RB, paras 109-12, such that I can conclude that there is both pleading and some basis in fact of express warranty available to other members of the class.

[16] Law and pleadings referenced at paras 47-52 of the Engen Brief, including paras 14, 19, 20-8, and 48-51 of the AASofC.

[17] Paras 53-4 of the Engen Brief, noting paras 36-7 and 52-6 of the AASOC.

[18] S. 52(1) and (1.1) of the Comp. Act (which ***Bondy v. Toshiba of Canada Limited***, [2007] OJ No 784 (ON SCJ) at para 47, describes as "a repetition of the allegations of negligent misrepresentation, but couched in statutory terms") and paras 57-9 of the Engen Brief, and, *inter alia*, paras 26, 36-8 & 61-3 of the AASofC.

[19] However, Counsel for Hyundai claimed without Hyundai providing *any* evidence (Jan 15/20 TR 13/6-14/20), that representations from Engen's Counsel do not constitute evidence of numbers – and yet Counsel for Hyundai purports to give evidence on behalf of his client. In the result, though, Hyundai admits that it is at least 33. The following discussion between the Court and Hyundai's Counsel (Jan 15/20 TR 14/24-15/17) is, in light of the last reference, sufficient to promote a reconsideration of the current policy in Alberta (and other jurisdictions) of

A. Cause(s) of Action

1. SGAs & Consumer Protection Acts

[11] While the statutes are different, the legal issues herein pertaining to these two types of statutes were treated substantially the same by the parties. While I will focus my analysis on the SGAs, the arguments and result will be substantially the same, *mutatis mutandis*, to the CPAs.

[12] Hyundai argues (paras 7, 11 & 59-63 of the Hyundai Response Brief (Hyundai RB)) that there cannot be any SGA cause of action – or, as we will see later, any consumer protection causes of action - because there is no privity of contract between Hyundai and members of the proposed class, the only privity of contract being between putative class members and individual Hyundai authorized dealers.

[13] Section 16(2) of the AB SGA provides, in circumstances reasonably applicable to the sale or lease of automobiles, as in this case, that "there is an implied [warranty[20] or] condition that the goods are reasonably fit for that purpose". That clearly includes an automobile sunroof, which should not spontaneously shatter. Under s. 52(1)(b) of the AB SGA, where there is a breach of warranty, the buyer can "maintain an action against the *seller* for damages for the breach of warranty" (emphasis added). "Seller" is defined in s. 1(l) of the AB SGA as "a person who sells or agrees to sell goods", which Engen says, in this case, is Integrity Hyundai, the authorized Hyundai dealer in Lethbridge, Alberta. In effect, while Hyundai acknowledges that it manufactures and distributes such vehicles, as identified herein, it asserts (paras 59-62 of the Hyundai RB), but provides no evidence to support the position, that it is not the *seller* ("none of the defendants are parties to any contract of sale with any of the proposed class members") and thus there is no privity between members of the proposed class and Hyundai, and, accordingly, no cause of action.

[14] Similarly, see ss. 7-7.3 & 13 of the AB CPA. Except as noted herein, the following arguments apply equally to the SGAs and the CPAs.

[15] For this position, Hyundai relies on ***Richardson v. Samsung***, 2018 ONSC 6130 at paras 36-41[21], and other cases referenced therein, pertaining to the Ontario SGA, which it submits is "identical in all material respects" to the provisions of the AB SGA. Hyundai adds (para 60 of the RB), using similar wording to ***Richardson*** at para 41, that "[o]n the face of the pleadings, there was no contract of sale between the consumer and the manufacturer" (Jan13/20 TR 34/23-35/41-).

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allowing Defendants in class proceedings to hide behind the "no need to defend", premise when the tenor of the evidence is that a defendant is playing a shell game: see reference to this term in, *inter alia*, ***R. v. Phillips***, 2003 ABCA 4 at para 79; ***Gaastra v. Tri-Link Consultants Inc***. 2012 ABCA 394 at para 4; ***Envacon v. 829693 Alberta Ltd.*** 2018 ABCA 18, at para 14 and 2018 ABCA 313 at para 51 (both referencing 2017 ABQB 623 at para 22); and ***Starratt v. Mamdani***, 2017 ABCA 92 at para 13. As stated at Jan 15/20 TR 16/13-16, it relates to defendants "lay[ing] out there in the weeds".

[20] By virtue of interpretation in reading s. 16(1), which says there is "no implied warranty or condition … except as provided in this section", and s. 16(2) which states what is quoted *supra*, while not expressly adding the word "warranty", implies it.

[21] Hyundai also relies on (Jan 13/20 TR 25-26 & 32) ***Arora v. Whirlpool Canada LP***, 2013 ONCA 657, at paras 31 & 40-1 and ***De Groot v. Casey Dean Lincoln Mercury Sales. Co***., 1981, 9 ACWS 2454.

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[16] Engen has three responses.

[17] First, Engen alleges (*inter alia*, paras 17-23 of the Engen RB), that the allegations in his pleadings are sufficient to bypass Hyundai's privity of contract argument under the SGAs. Specifically, Engen states (para 17 of the Engen RB) that there is no evidence proffered by Hyundai – i.e. there is no evidence to support Hyundai's "bare assertion" - that "none of the defendants are parties to any contract of sale with any proposed class members".

[18] Further, on the positive side, Engen argues (Engen RB, para 18 and Jan 13/20 TR 2/38 – 3/22) that the AASofC in paras 3, 7, 8 & 10:

> ... expressly alleges that [Hyundai] is involved with *inter alia* the sale of Vehicles in Canada"; "... causes the Vehicles ... to be distributed and **sold** worldwide, including in Alberta and Canada"; and "the business of [Hyundai] is inextricably interwoven for the purposes of designing, engineering, manufacturing, testing, inspecting, promoting, marketing, distributing and **selling the Vehicles..."** (emphasis in the original).

Engen buttresses this argument by saying (Jan 13/20 TR 3/16 - 22 & 4/18 - 29) that what Hyundai is "trying to do at this stage is have a merits argument", but that "it's not merits based, it is threshold based", and that by Engen pleading the allegations, including that the selling dealership is an agent of Hyundai, and "that meets s. 5(1)(a) [of the *Act*]".

[19] Engen further asserts (paras 15, 19, 20 & 37 of the Engen RB) that, unlike ***Baker v. Suzuki Motor Co.*** [1993] AJ No. 605, 143 AR 1[22] where the dealer was named a defendant, and where the issue of privity was for a determination on the merits only after a full trial, the application here is for certification, where, in effect, there does not need to be proof of privity of contract (a merits based position[23]), but only an allegation of same, Engen argues that the aforementioned pleadings in the AASoC meet this requirement.

[20] Engen also argues (para 20 of the Engen RB, referencing para 31 of the AASofC and para 3 of the Engen July 20, 2018 affidavit, filed July 30, 2018), and as elaborated on at para 21 of the Engen RB) that:

> …the facts pleaded and the evidence tendered by [Engen] show that there is a sales contract between Engen and Integrity Hyundai, **the authorized Hyundai**

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[22] I will return to ***Baker*** in the context of the common issues.

[23] Relying on ***Lambert,*** at paras 59-60. ***Lambert***, at paras 63-65, is also relied upon by Engen (Engen RB, paras 3-4) in support of facts that (akin to arguments in ***Spring v. Goodyear Canada Inc***, 2020 ABQB 252 (***Goodyear QB***), discussed infra):

> …Hyundai have not proffered any evidence to challenge Engen's certification application…. Hyundai are wholly in control of the information that they allege has not been advanced.

and the proposition that:

> … where a defendant fails to proffer evidence to resist certification, a defendant's bare contention cannot be considered legitimately in issue. To the extent that Hyundai challenges Engen's position absent proffering evidence, such a challenge should be disregarded, not only because Engen has not had the ability to respond, but also because there is <u>no competing evidence to the contrary</u> and certification is simply not the place to embark on such analysis. [Emphasis added.]

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> **dealer**. The legal relationship between an authorized dealer and [Hyundai] will be an issue to be decided as this Action advances. The allegation in the AASofC is that the nature of the relationship between [Hyundai] and their authorized dealers is such that there is a direct contractual relationship of purchase and sale between Engen and the putative Class Members and [Hyundai]. [Emphasis in the original].

[21] I note that the legal relationship between an authorized dealer and Hyundai will not be an issue to be decided in the common issues trial, in this context, if there is no cause of action certified under the heading of the SGAs. With respect to the issue of a direct contractual relationship between Engen and the putative Class Members and Hyundai, is the pleading by Engen that there is privity between Engen and Hyundai sufficient to get Engen past the certification stage? This requires further investigation.

[22] There is a serious issue whether the mere allegation of a situation in a pleading is sufficient to meet the criteria of s.5(1)(a) of the *Act*, without any evidence to support the pleading, or even when there is some evidence to the contrary. This issue arose in my decision in ***Setoguchi v. Uber*** 2021 ABQB 18, now under appeal, and it may arise here. If it is pleaded, even if there is evidence to the contrary, is the mere pleading sufficient for certification? The Court of Appeal will tell us the answer in the appeal of ***Setoguchi***.

[23] A review of para 31 of the AASofC reveals that it is deficient in pleading a relationship of privity, as compared to the arguments Engen makes *supra*. The statement in the pleading is that the vehicle in question was "purchased … from Integrity Hyundai" and the only connection to Hyundai is the statement that Integrity Hyundai is "an authorized Hyundai dealership". This is consistent with the admissions of Engen as set out at para. 11 of the Hyundai RB. This is not a pleading sufficient to establish privity between Hyundai and Engen or members of the class, where privity is a requirement of the AB SGA. Simply put, in spite of the spin that Engen would put on words such as "authorized" or "direct contractual relationship", Hyundai is not the seller of the PRP's vehicle, nor is there a direct contractual relationship between them, nor, to my knowledge, in respect of any vehicle owned or leased by any class members.

[24] Engen also argued (para 22 of the Engen RB) that ***Richardson*** is distinguishable because, in that case, the pleadings (referencing paras 34-5 of that decision) were that the defendant, "was just a manufacturer", whereas Engen pleads that Hyundai operates a "dealer network arrangement with their authorized dealers, and not that they [the dealers] are an independent retailer" and that Hyundai "is involved in the sale of the Vehicles to the putative Class Members", with Hyundai submitting "no evidence to suggest otherwise". However, Engen in reply oral argument acknowledged that it was an "uphill battle": Jan 15/20 TR 54/5-6.

[25] Third, however, Engen points out in reply oral argument (Jan 15/20 TR 55-6) that the AB CPA is, in fact, different from the ON CPA in that it focuses not on the actual seller, but the supplier. It deals (s. 1(1)(c)) not only with an agreement between a consumer and a supplier (which would include the Hyundai dealer, but not Hyundai, as there is no agreement between Engen and Hyundai here) but also more broadly with liability of a "supplier" to a "consumer transaction", which is defined (s. 1(1)(l) to include one who "provides goods", or "manufactures, assembles or produces goods", or "promotes the use or purchase of goods", which would include Hyundai. Moreover, s. 2.1 of the AB CPA makes it clear that when considering the application of the Act, "a court ... must consider the real substance of the entity...". See also ss. 6, 7.3, 8 and 13.

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[26] That said, in the result on this issue of privity, not all is lost for Engen, because there are two additional issues arising in the context of Hyundai's privity of contract defence.

[27] First, there are some provinces and territories where the SGAs are applicable without privity of contract, thus, without naming the seller as a defendant: namely, all except AB, ON, PEI and NL. Likewise, for some provinces and territories, the CPAs are applicable without naming the supplier as the defendant (Hyundai RB, para 67): QC, BC, SK and MB[24]. Thus, the failure to name the sellers/suppliers for class members resident, or who purchased/leased vehicles, in these Provinces, there is no bar to claims under the SGAs/CPAs and such causes of action are eligible for certification, as Hyundai acknowledges (Jan 15/20 TR 7/32-39). Hyundai advises (para. 68 of the Hyundai RB, footnote 54) that the CPAs for Nova Scotia and the Northwest Territories "do not deal with practices that are unfair, unconscionable or of a similar nature". Thus, it is only Alberta (for the AB SGA only, not the CPA), Ontario, Prince Edward Island, and Newfoundland and Labrador[25], where proposed class members have a privity of contract requirement, for which I find that Engen's pleadings are not adequate for claims under the SGAs or CPAs, and thus for which there are no causes of action that could proceed to certification.

[28] However, while it might be "patently ridiculous" (see discussions at Jan 13/20 TR 22/4-5) to require privity in these situations, it appears that is the case in some provinces. Thus, in the result on the current law, two things follow: certification is not granted for class members in provinces for which privity is required, but is granted where privity is not required; and there will need to be a sub-class for those provinces for which privity is required, as an exception to cause of action certified under the SGAs and CPAs where it is not required.

[29] Second, and finally, if Engen did not, or now does not, want to take the risk that certification might be denied as to some provinces for failure to plead privity of contract against the sellers, the answer is simple (as discussed, somewhat generically, at Jan 15/20 TR 54-5). As in ***Pauli v. ACE INA Insurance***, 2003 ABQB 107[26], Engen could have added (and still can add[27]) as a Defendant, Integrity Hyundai (the Hyundai dealer from which Engen bought his vehicle) and, as necessary, every Hyundai dealership in any jurisdiction in this national class proceeding where privity of contract is necessary.

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[24] Relying on Hyundai's RB and Jan 13/20 TR 34/23-39: *Consumer Protection Act*, CQLR c P-40.1, ss 219-22, 272; *Business Practices and Consumer Protection Act*, SBC 2004, c 2, ss 1-2, 4-5, 8-10, 171-2; *The Consumer and Business Practices Act*, SS 2013, c C-30.2, ss 2. 4, 6-9, 91; *The Consumer Protection Act*, SS 1996, c C-30.2, ss 3, 5-8, 14; and *The Business Practices Act*, CCSM, c B-120, ss 1-5, 23.

[25] *Business Practices Act*, RSPEI 1988, c B-7, ss 1-4; and *Consumer Protection and Business Practices Act*, SNL 2009 c C-31.1, ss 2, 7-10.

[26] Upheld on the merits, 2004 ABCA 84, cost issues dealt with in 2003 ABQB 354 and 2004 ABCA 253. This was a representative action before the *Act* came into force relating to the deductibility of the recovery of salvage of vehicles damaged in collisions for which insurance proceeds was paid. In commencing the action, Pauli actually named, as Defendants, every insurance company registered/licensed in Alberta. There were some discontinuances for insurance companies that never offered auto insurance, and for other reasons, but the case proceeded against the balance. Presumably, there are public (or otherwise accessible) records of all Hyundai dealerships in Canada, that could be used for that purpose. It might require some discontinuances in the future, as happened in ***Pauli***, and would almost certainly generate third party claims by those dealers against Hyundai, but it would solve any legal problem of lack of privity for the implied warranty claims under the SGAs – and, as we will see, the Cons. Pro. Acts.

[27] Hyundai (Jan 13/20 TR 23/28-24/4) says "must add" – see also discussion at Jan 13/20 TR 29/22-30. It is unlikely that Engen would need to apply to the Court to add under the Rules as the pleadings are not closed.

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B. Common Issues

1. Basis Principles

[30] Engen sets out the legal principles pertinent to common issues under s. 5(1)(c) of the *Act*, at Engen Brief, para 75[28] and Engen RB, paras 73-6 & 78. Those principles need not be further elaborated on here.

[31] Engen also asserts its position on common issues, any remaining individual issues (referencing ***Cloud v. Canada (Attorney General)***, [2004] OJ No 4924 (ONCA), at paras 52-3), at the Engen RB at paras 77, 79-80, & 85-90, and references similar issues in similar cases (Engen RB at paras 81-4). I will examine these issues *infra*, as necessary.

[32] Except for s. 5(1)(a) of the Act, the other provisions of s. 5(1) are (***Warner***, at para 13, and cases refenced therein):

> …procedural and are intended to establish whether a class proceeding is the appropriate procedure for the prosecution of the claim. The [PRP] must show that there is "some basis in fact" for each of these certification requirements and must bring evidence to establish them. In conformity with the liberal and purposive approach to certification applications, the evidentiary burden is not onerous: it requires only a "minimum evidentiary basis…. [Emphasis added.]

[33] It is on this basis that I will consider the requirements of s. 5(1)(c), common issues, which requirement Hyundai challenges Engen as having not met (paras 1-2 of the Hyundai RB).

2. Defects and Causes of Defects

[34] Hyundai first asserts (Hyundai RB, para 3 *et seq*, and 83) that Engen "has not provided evidence of any defect[29] in the Sunroofs".

[35] Engen responds (Engen RB, para 6, buttressed by references set out in footnote 4 therein):

> ... there are hundreds of reported instances of the Panoramic Sunroofs shattering. The evidence before this Court is that putative Class Members across Canada are experiencing shattered Panoramic Sunroofs and that there are scientific reasons for the modes of failure. This is not an isolated issue which affected Engen...: there are hundreds of other reported instances in evidence.

[36] It should be noted that the existence of defects can be proved either, "affirmatively or through inference from other evidence" (Hyundai RB, at paras 103-5), relying on: ***McCann v. Sears Canada Ltd***., [1998] OJ No 2664, at paras 21-22, and ***Schreiber Brothers v. Currie***

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[28] Relying on: ***Andriuk*** at para 124; ***Condominium Plan No 0020701 v Investplan Properties Inc,*** 2006 ABQB 224 at para 63; and ***Ayrton v PRL Financial (Alta) Ltd,*** 2005 ABQB 311 at paras 84-85. See also ***Berg v. Canadian Hockey League***, 2017 2608, at para 232, relying on ***Dell'Aniello v. Vivendi Canada Inc***, 2014 SCC 1, at paras 45-6 and ***Kuiper,*** at paras 98-101.

[29] Defined by an expert in ***Evans v. General Motors of Canada Co***., 2019 SKQB, at para. 17, as "a shortcoming, imperfection or lack [of something]". Yet Hyundai acknowledges that there is at least some evidence of a defect, even if disputed (Jan 15/20 TR24/8-9). I will come back at the end of this section, to the issue of some basis in fact for defects and their causes, in relation to the information imbalance/defence silence between the parties in a more over-arching way, in relation to my colleague, Campbell J's decision in ***Goodyear QB***, as considered on appeal (2021 ABCA 182 (***Goodyear CA***).

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Products Ltd. [1980] 2 SCR 78, at paras 13, 16-7. ***McCann***, at paras 21-2, quotes collected excerpts from ***Schreiber***, at paras 13, 16-7, to the result that "it is enough here that the plaintiff show a defect ...without being required to prove the cause of the defect" [emphasis added], for which inferences can be relied upon – ***Schreiber***, at para 17.

[37] See ***Reid v. Ford Motor Company,*** 2003 BCSC 1632, as authority for a number of relevant or potentially relevant propositions: at para 26, based on ***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.,*** [1995] SCR 85 that suits in tort for dangerous defects are not included in the prohibition of suits for pure economic loss; at para 88, for the proposition that the debate regarding the ability to determine a theory of a common defect through a battle of experts should proceed to a trial of the common issues and "not be halted at certification"; at para 51, for inference as to class wide defects – in effect evidence of a defect in many products leads to such an inference for all, "although other collateral factors may make a particular vehicle more or less likely to fail" does not diminish the concern of a defective design[30]; and, at paras 60-5, that arguments about causes of defects are "premature" until the common issues trial, and only the finding of a defect is necessary at certification. Supporting these propositions, Engen argued (Jan 13/20 TR 6/6-715) that the cause of defects was a "highly merits focused analysis" for the common issues trial, not a requirement for certification. In oral reply argument, Counsel for Engen emphasized this point (Jan 15/20 TR 62/23-63/4) adding:

> What you have not heard the Defendants say ... is a dispute regarding the circumstances happening ... [but]the class that we're seeking to certify here is not simply those individuals whose sunroofs shattered, but it's also [about] other individuals... whose sunroofs have not shattered, but it was kept from them the circumstances of shattering sunroofs. ...we have met the threshold.

[38] More evidence of causation can be provided at trial by admissions by Hyundai and/or expert evidence. It can also be based on circumstantial evidence (acknowledged by Hyundai at Jan15/20 TR 23/12-3), together with a "methodology for determining whether a class-wide defect exists": ***N&C Transportation Ltd. v. Navistar Internal Corp***., 2016 BCSC 2129 (***N&C (BCSC))***, at para 110 *et seq* & 128 (substantially upheld at 2018 BCCA 312 (***N&C (BCCA***), quoted at ***N&C (BCCA)*** at paras 63-4[31], and independently set forth at para 96, with findings at paras 98 & 100.

3. Misrepresentations

[39] On another point, unrelated to the last, and as an aside to the discussion on defects and their causes, but relevant to common issues, ***N&C (BCCA)***, at paras 133-4, in reference to ***CIBC v. Green***, 2015 SCC 60, also establishes that:

> ... common issues must be assessed on the basis of the pleadings and claims in issue and, *for misrepresentation claims, there may be circumstances where it is appropriate to certify common issues other than reliance.* In this case, proposed

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30 See also ***Grafikom Speedfast Ltd v. Heidelberg Canada Graphic Equipment Ltd***, 2013 ABCA 104, at paras 21-2.

31 Including reference to there being considerable evidence supporting the finding of a common defect, and, referencing para 128, "a [proposed] methodology for determining whether a class-wide defect exists combined with the extensive circumstantial evidence … is in my view to establish that there is some basis in fact for supporting a finding of a common class-wide defect" – "enough to meet the test": Jan 15/20 TR 24/31-25/20.

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> Common Issues ... [are to] be determined on a class-wide basis without requiring individual evidence from class members.
>
> ... the existence of oral representations from salespeople [does not defeat] commonality. The Amended Notice of Civil Claim does not refer to oral representations and the plaintiffs do not rely on individual oral representations in support of the misrepresentation claim. Rather, they rely on written representations made by Navistar that were available on the Internet. If it is necessary to clarify the sources of the representations relied on by the plaintiffs, this can be done by an amendment to the pleadings.

[40] In this regard, Engen argued (Jan 13/20 TR 5/2-38) that in ***N&C BCCA*** (no para reference given), the Court disagreed with ***N&C BCSC***, and held that a misrepresentation common issue could go ahead without foundering on individual reliance, and further that the "mere purchasing of the vehicles demonstrate[d] reliance", which would make it a common, not an individual, issue. Moreover, Hyundai's representation of safety in its common brochures, which were found wanting in the shattering of PSs - and outside "puffery" and "lifestyle advertising", as I will discuss in more detail, *infra*– do form a basis in fact of a misrepresentation in general, under the CPAs and as a basis for materially false or misleading representations under the Comp. Act, that are common across the class. On this analysis, I agree that misrepresentations generally, under the CPAs (where privity exists) and under the Comp. Act, can go ahead as common issues for certification.

[41] While Engen and Hyundai proceeded to argue about the reports and evidence of Engen's expert, Dr. Perovic (as Hyundai admits, a qualified material science professor, qualified in fractology - Jan 15/20 TR 41/3-5), I find that the statement (*supra*) of Engen, and the references therein and otherwise on the record, provide, by their very presence, that there is/are a defect(s), as it/they were clearly not intended that PSs would spontaneously shatter. Rather, and contrary to the submissions of Hyundai (paras 4, 14 and 108 of the Hyundai RB), the sales brochures and other information on the record (put into evidence by Engen's Affidavit affirmed and filed December 5 and 13, 2019, and references to cross-examinations of Engen on affidavits are contained in paras 12-13 of Engen's Brief), even if implicitly, establish general "common representation(s)" by Hyundai of the quality of the products they have manufactured. These are buttressed by Engen-specific pleadings in para 37 of the AASofC (as acknowledged by Hyundai, at para 13 of the Hyundai RB).

[42] Moreover, there is not any provision in s. 5 that requires some basis in fact of specific – or indeed any – representations. Most of the alleged representations are implied, and that provides "some evidence" based on the material on the record. Engen addresses this at para 24 of the Engen RB:

> The purpose of this section [s. 5(1)(c)] is to determine whether the claims raise common issues – not, as Hyundai state, whether there is a basis in fact for the common issues. The key element is the commonality requirement.

4. Defects and Causes Continued

[43] Additionally, without getting into a debate as to Dr. Perovic's methodology and findings or, indeed, the weight of his evidence, a matter of merits for the common issues trial, not certification (raised by Hyundai at, *inter alia*, paras. 17-48 of the Hyundai RB, and responded to

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in Engen Brief paras 9-12, and at Jan 13/20 TR 12/10- 18/5*et seq*), I find that the mere exercise demonstrates that there are "scientific reasons for the modes of failure", and I do not need, and indeed, should not –weigh the evidence that goes to the merits of the issues at the common issues trial.[32] The bottom line is that the cause of the shattering is that "the glass is defective". Even if Dr. Perovic has not conclusively identified (or been retained to identify) the specific cause(s)[33], that is the "ultimate issue for [the common issues] trial", not certification. Thus, this debate has ended for this certification process, and Dr. Perovic, or some other expert(s), can opine at the common issues trial as to the specific cause(s) of defects – see Cross-Examination of Dr. Perovic (TR 150/9 to 152/25) referenced at para 9 and footnote 6 of the Engen Brief. Accordingly, I agree with Engen (para 7 of the Engen RB) that, "he has met the applicable threshold" as to common issues sufficient for certification to proceed under s. 5(1)(c).5

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5. Informational Imbalance in Defects in Product Liability in Class Proceedings

[44] Before ending this section, I want to come back to a case that I mentioned *supra*, decided by my colleague, Campbell J., which I believe is of present and future relevance – indeed, I believe has an over-arching effect - in cases of alleged defects and the causes of defects in consumer goods products, considered in light of the principles of class proceedings: ***Goodyear QB***. There Campbell J dealt directly with the effect of defence silence in class proceedings in relation to such cases.

[45] By way of background, in ***Goodyear QB***, Campbell J. certified a class proceeding for, i*nter alia*, alleged negligence in design, manufacturing and distribution of certain Goodyear tires, as well as for breach of a duty to warn, on the basis of the allegation that the tires in question had an inherent defect.

[46] At para 29, relying on ***Vester v. Boston Scientific Ltd***., 2015 ONSC 7950 at para 5, she noted that product liability claims have four established causes of action, consisting of a manufacturer's duty to:

(i) ensure that no defects in the manufacturing process are likely to cause injury in the ordinary course of use;

(ii) warn consumers of inherent dangers in the product of which the manufacturer knows or ought to know;

(iii) design a product to avoid safety risks and make it reasonably safe for its intended uses; and

(iv) compensate consumers, as a claim for pure economic loss, for the cost of repairing

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32 Note (pointed out at Jan 15/20 TR 62/2-22) reference (*infra*) to para 70 of ***Kuiper***, Perell J. observes that "… the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest. In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge." This follows with references (para 73 and beyond) to the "low evidentiary standard of some basis in fact…".

33 However, see Dr. Perovic conclusions at section 11, p 15 of Dr. Perovic's Report, being Exhibit A of his affidavit sworn and filed July 26 and 30, 2018, which "identified a multitude of potential failures" [emphasis added] and causes of the defects, not a conclusion thereon, as noted in paras 10-12 of the Engen RB. However, whatever the final conclusion of the common issues trial justice on the weight and conclusiveness to be given to Dr. Perovic's evidence in his Report or other expert evidence at trial, in the debate between Counsel, it is nevertheless "some basis in fact" of a cause(s) for certification purposes.

a dangerous product where it presents a real and substantial danger to the public.

[47] As to proof of a specific defect, she held (paras 38 -41):

> *Other product liability cases involving non-pharmaceutical products do not necessarily require proof of a specific defect***.** In such cases the courts have applied a general and flexible test … for defect is described in ***Marcil v. Eastview Chevrolet Pontiac Buick GMC Ltd***, 2016 ONSC 3594 at paras 42, 58. The test is based on what is reasonable to expect of a product in all the circumstances, whether or not the cause of that defect could be determined … it was not necessary to prove what the specific cause of that result or consequence was: at para 58. Thus, it may be possible to establish negligence in design or manufacturing by providing evidence of a defect without evidence of a cause of defect.
>
> Further, the informational imbalance[34] at this stage of the proceeding prevents the Plaintiff from more specifically identifying the exact cause of the [defect] or issue that may exist in the design or manufacturing process[35]. As stated in ***Miller v. Merck Frosst Canada Ltd***, 2015 BCCA 353 at para 52, leave to appeal to SCC refused 36668 (14 April 2016), *a defendant manufacturer has "an enormous informational advantage" over a plaintiff.* Discovery at the certification stage is not a matter of right, and it would be unfair to require a plaintiff to provide evidence that relates to matters exclusively within the manufacturer's specialized knowledge: ***Miller*** at para 52; ***Pro-Sys*** at para 119.
>
> … Without the benefit of further information, the Plaintiff has sufficiently identified what defect he is alleging.
>
> … The pleadings are clear enough that each Defendant knows what is alleged against them, and at this preliminary stage of the proceedings, it is not necessary to identify a specific defect further than that it is alleged that there is a dangerous defect …that results during normal use, which gives rise to the Plaintiff's cause of action in negligence design and manufacturing. [Emphasis added throughout.]

Much of these principles apply quite directly to the case at Bar.

[48] Campbell J. went on to certify a duty to warn (para 45). However, on the question of the existence and cause of a defect, it is significant that different evidence can provide some evidence of a defect. She put it this way (para 110):

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[34] The references to informational imbalance or advantage arising from ***Goodyear QB***, not reversed by ***Goodyear CA***, as discussed (and denied) at paras 29 – 30 of the Hyundai supplemental reply brief, which I find exist in this case, in spite of Hyundai denials, I believe, will, in time, change the way the Courts deal with same at certification. I believe the current such practice of some defendants (e.g. **Setoguchi** and here) to be an unacceptable form of shell game, discussed earlier.
Hyundai argued (para 31 of it's supplemental reply brief, referencing ***Precision Drilling Canada v. Yangarra Resources***, 2013 ABQB 492 at para 57 and ***Wawanesa Mutual Insurance v. Schnider***, 1995 ABCA 419, at para 9) that a PRP can apply to the Court to require cross-examination of a defendant, even in the absence of the defendant filing an affidavit, under Rule 6.8. However, to my knowledge, that has not been the practice of class proceedings in Alberta, but such practices by defendants (such as in ***Setoguchi*** and here) may lead to that.

[35] See further discussion at ***Goodyear QB*** para 117.

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> The first step in every product liability case alleging negligent design, manufacture or marketing requires the plaintiff to provide some evidence that a defect exists: ***Harrington v. Dow Corning Corp***, 2000 BCCA 605 at para 42. As the Court stated in ***Williams***[36] at para 174:
>
>> The evidence necessary to establish that the product is defective and that liability can be determined on a class-wide basis will vary from case to case. … In other cases, the fact that numerous consumers have experienced a product failure under normal operating conditions may suffice. In still other cases, expert evidence may be required.

[49] The reasoning of Campbell J. in ***Goodyear QB*** in relation to alleged defects, and the potential causes of defects, in face of a silent defendant (here Hyundai), I believe, sets the right "weighing of evidence", as ***Goodyear CA*** makes clear, *infra)* and heartens me in certifying the within action.

[50] I asked Counsel for their comments on ***Goodyear QB***. However, it was appealed to the Court of Appeal and the parties sought to reply after the decision in that appeal. On May 17, 2021, in ***Goodyear CA***, the Court of Appeal set aside Justice Campbell's certification decision, but denied Goodyear's claim of reversal of onus. Specifically, the Court of Appeal found that the representative plaintiff had not shown some basis in fact to support a case for common defects with respect to the entire class so as to permit certification (*inter alia*, paras 21, 23, 29 – 31, 34 and 40). However, on the point regarding the inference by the Certification Justice against Goodyear as to "a reversal of the burden of proof", on which I have commented above, the Court of Appeal merely said (para 41):

> ... in the passages identified by Goodyear the case management justice is merely observing that while the representative plaintiff's evidence showing "some basis in fact" may have been thin, it was unrebutted by evidence that was apparently under Goodyear's control. This is merely a weighing of the evidence, not a reversal of the burden of proof.

[51] Unfortunately, the parties' supplemental briefs in response to the ***Goodyear*** cases have become more of a re-argument of their prior (primarily factual) arguments to the Court in this case, and a re-analysis or re-interpretation of the reasoning in ***Goodyear*** cases, rather than extrapolating the legal relevance of the principles set out therein to this case. I shall try to resist the urge to reference all the re-arguments and re-interpretation, when I merely sought submissions on the application of principles from the ***Goodyear*** cases to this case.

[52] Engen responded to requests for submission on the decisions in ***Goodyear*** by arguing in its initial supplemental brief of June 4, 2021 that: (paras 4 and 16 – 18, 20 and 23(a)) the evidence (or lack of it) in ***Goodyear*** was different from the positive evidence of Engen and absence of refuting evidence by Hyundai, in the case at Bar; the difference in the nature of the products at issue (paras 5 and 25) inasmuch as "Panoramic Sunroofs ... do not wear out, nor are

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[36] ***Williams v. Cannon Canada Inc,*** 2011 ONSC 6571 at para 174.

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they routinely replaced”[37], and that there is only one product in issue (albeit in different sizes).Engen further pointed to paras 39 and 117 of ***Goodyear QB***:

> [t]he informational imbalance at [a certification hearing] prevents a Plaintiff from more specifically identifying the exact cause of the [alleged defect]. A defendant manufacturer has ‘an enormous informational advantage’ over a plaintiff. Discovery at the certification stage is not a matter of right and it would be unfair to require a plaintiff to provide evidence that relates to matters exclusively within the manufacturer’s specialized knowledge
>
> ...
>
> It is not unusual in a certification hearing for a plaintiff to contend that the facts relating to a defendant’s knowledge, conduct and information that are exclusively within the defendant’s knowledge and directly relevant to the determination of the claims against it are disputed and in issue: ***Miller*** at para 52; ***Pro-Sys*** at para 119. This tactic recognizes that the merits of a claim are not assessed in a certification application and opportunities for discovery in a full trial setting are not necessarily available to a plaintiff at this time.

As Engen points out, at para.12 of his supplemental brief, the “Court of Appeal did not vary this key finding”, ie. that a plaintiff is at a massive informational disadvantage at this early stage of a proceeding, at para 26 of his supplemental brief:

> ... Engen has put forward evidence showing some basis in fact for a common defect, some basis in fact for common causes of the defect, as well as some basis in fact for a methodology that can conclusively determine the cause of the defect.

[53] Engen replies to Hyundai’s supplemental brief[38] by re-asserting some of its examples of establishing some basis in fact (paras 6 – 8, and 13-15) and (paras 3, 4 and 16-18) that, “particularly considering the significant informational disadvantage faced by the Plaintiff”, Hyundai continues at certification to engage in:

> ... an impermissible merits-based analysis, and are attempting to hold the Plaintiff to an unduly high threshold: essentially arguing that the Plaintiff is required to identify a definitive cause for the Panoramic Sunroofs shattering at this stage.

I agree.

[54] In its Supplemental Brief, Hyundai argues (paras 4 and 5) that there must be “actual evidence of a common defect”. While absolutely conclusive evidence of common defect is, in my view, unnecessary, I find that, based on the evidence provided by Engen, there is some basis in fact for “an actual defect” on several vehicles that appears to be episodic, but common, subject to further evidence at the common issues merits trial. Hyundai’s allegation of the need for the establishment of the cause of the actual defects established by Engen (para 12), which I do not accept as a matter of principle. is different than an opinion on the precise “potential cause” for such actual defects. The issue of actual negligence in design and/or manufacture (paras 28 - 29)

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[37] The fact that there are different sizes of sunroofs as there are different sizes of tires (Hyundai supplemental reply brief, paras 25 and 26) does not change the validity of the Engen submission, but only requires more evidence beyond some basis in fact for the cause of the defects.

[38] The supplemental reply briefs, for each party, were provided on June 18, 2021.

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is for the common issues trial. Moreover, as to Hyundai's para 7, Dr. Perovic's expert evidence is not Engen's "sole evidence", and I disagree with Hyundai's arguments (para 33 of the Hyundai supplemental brief and para 2 of the Hyundai supplemental reply brief) that Engen, "has tendered no evidence of an actual defect" and "not provided evidence of any defect, never mind a common one".

[55] I also reject Hyundai's position (para 20 of the supplemental reply brief) that "the mere fact of Sunroof failures does not provide evidence of a defect". Indeed, there being no evidence of an external force, I find that the "mere fact" does provide some basis in fact of a defect, and that there are a number of such failures alleged provides some basis in fact of commonality, albeit without identifying the precise internal cause of the defect. Moreover, the last sentence of that paragraph says, "that in some cases, evidence of a product failure *may be* evidence of a defect" (emphasis added), relying on ***Williams***, even though, in subsequent paragraphs, Hyundai argues that the facts in ***Williams*** do not support that conclusion in that case.

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6. Specific Common Issues

a. Negligence and Duty to Warn

[56] The duty in negligence and duty to warn in products liability claims is set out succinctly in ***Kuiper v. Cook (Canada) Inc***., 2018 ONSC 6487[39] at paras 109-112, 116, 118 & 124; see also ***Rozenhart v. Skier's Sport Shop (Edmonton) Ltd.,*** 2002 ABQB 509 at paras 56-9 (aff'd 2004 ABCA 172), distinguishing between inherent risks and obvious risks, and setting the standards for duty to warn. The latter standard is set out at para 118 of ***Kuiper***:

> ... manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge.

There is also some basis in fact on the record of Hyundai's actual knowledge of shattering PSs.

[57] Here, unlike ***Kuiper*** (paras 126-137), I find that Engen has pleaded the necessary prerequisites, and has, through Dr. Perovic, put forward some basis in fact for a claim in

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[39] Upheld by the Divisional Court (2020 ONSC 129) as to the finding of no basis in fact for the common issue with respect to defective design, but reversed and certified on duty to warn that survived the some basis in fact test for certification. At para 26, the Divisional Court noted, with approval (paras 29 & 35-6) on a "low evidentiary burden", that Justice Perell correctly applied the two step process for showing some basis in fact for the common issue: "(1) that the proposed common issue actually exists, and (2) that the proposed issue can be answered in common across the entire class" (paras 40-6), and upheld him in his finding that there was not some basis in fact actually provided. Unlike before Perell J in that case, in this case, the physical evidence is clear that there have been common defects that apply across the class that demonstrate (provide some evidence/basis in fact – contrary to the argument of Hyundai at Jan 15/20 TR 18/19-20 – i.e. that the "evidentiary record is sufficient to [establish] … that there's some basis in fact of a defect") - a design defect of yet unknown cause(s), even with Engen and class members having both hands tied behind their back (see reference to ***Goodyear QB***, *supra)*, with Dr. Perovic giving evidence of the that, while trying to find the cause. While Perell J., at para 116, sets the test that to "succeed in a cause of action for negligent design of a product, the plaintiff must identify the design defect in the product", there is no requirement for this to be established at certification. While I find that there is some basis in fact for the conclusion of a likely design defect, in the case at Bar, sufficient for certification, much more evidence will follow at the common issues trial when Hyundai has to put forward its evidence. To say that "glass can just break, even without a defect" (J15/20 21/26) is disingenuous because this is not about merely glass breaking but a vehicle being unsafe because the design allows a key component of the vehicle – the PS to break, causing potential injuries and loss, and a breach of safety standards that Hyundai touts.

negligent design and other evidence for a duty to warn, sufficient, I find, for the purposes of certification.

[58] More specifically, on the whole of this record, including the evidence of Engen and the expert evidence of Dr. Perovic, I reject Hyundai's submission (Jan 15/20 TR 21-23) that the alleged defects in the PS are "merely speculation" and that there is "no evidence of any kind ... to support that there is a defect". Rather, I find that there is some basis in fact sufficient for certification.

[59] Additionally, in ***Goodyear QB***, Campbell J. held, relying on ***Martin v. Astrazeneca Pharmacueticals PLC***, 2012 ONSC 2744 at para 152, aff'd 2013 ONSC 1169, that "negligent marketing falls within the duty to warn". Moreover, she further held (para 35) that:

> In a non-pharmaceutical product liability class action, pleading negligent design and manufacture together may be appropriate: ***Barwin*** [***Barwin v. IKO Industries Ltd***, 2013 ONSC 3054] at paras 22-23. Product liability class actions, including those for motor vehicle defects, frequently allow causes of action for negligence in design and manufacturing: ***Thorpe v. Honda Canada Inc***, 2011 SKQB 72; ***Evans v. General Motors of Canada Co***, 2019 SKQB 98; ***Soroktski v. CNH Global NV***, 2007 SKCA 104.

[60] Moreover, common issues, such as "negligent design/manufacture, duty to warn, breach of express/implied warranty" (referenced at para 3 of Hyundai's RB), which are "predicated on the existence of a defect", are exactly that. The fact that a clear, apparent, defect is pleaded, and there is some basis in fact not only for the existence of a defect, but the issues identified that follow, absent evidence of any other cause, justifies certification. In the result, I reject all of Hyundai's arguments that are based on "no evidence of defect", noting that Engen, in his RB, at para 30, responds to Hyundai on this issue and ends with the statement: "Dr. Perovic identified several potential defects and potential modes of Panoramic Sunroof failure"[40].

[61] At paras. 84-5 & 7 of the Hyundai RB, Hyundai argues (relying on ***Rozenhard*** at paras. 56-9, 63 and 78): "Just as a manufacturer is under no duty to warn a consumer that a knife can cut, the defendants are under no duty to warn that glass can shatter". To equate this to: (1) there is no duty to warn that "a knife can cut" or that "[g]lass is fragile"[41], or the danger from fire when riding a motorcycle (***Baker*** at para. 137); to (2) "class members ought to be aware that glass sunroofs can shatter", without external impact, is disingenuous. Evidence of unpredicted failure is evidence of defect(s) – not a "hidden defect", although the cause is not yet fully known. Thus, it is very apparent that there is an allegation in the pleadings of a duty to warn, based on some basis in fact[42]. These may be common issues, but may also depend on individual finding of facts at the common issues trial (Hyundai RB, para 90).

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[40] See Perovic Report at pp 1 and ((Jan 13/20 TR 7/26-8) 11 to 141; Perovic Transcript at questions 725-6, referenced at paras 46 & 47, and footnotes 40 & 41of the Hyundai RB.

[41] At para 78, the Court states "It is dangers that have no way of being known to the consumer that give rise to a duty to warn, not dangers that are reasonably evident, but go unconsidered." It is the first that arise in the case at Bar.

[42] See ***Reid*** at paras 73-6 regarding deceptive acts or practices within the *Trade Practices Act* by failing to disclose a known defect. A similar statement is seen in ***Moffatt v. Witelson***, (1980), 111 DLR (3d) 712, at paras 25-6.

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[62] Engen addresses the issue of the requirement for the PRP to provide some "basis in fact" for common issues in s. 5(1)(c), and after debating cases raised by Hyundai, states (paras 26-7 of the Engen RB): "there must be a rational connection between the class and the common issues" ... which "required that the plaintiff provide some basis in fact that the **proposed common issues are in fact common**; it does not require the PRP to prove that they will be successful in proving each common issue – that requirement is reserved for trial" (emphasis in original). I agree. Moreover, as to "common", there seems to be nothing to distinguish between the shattering glass defects identified collectively and by individual class members, resulting in Engen asserting (para 28 of Engen's RB) that "there is simply no basis to dispute commonality. The resolution of the ... proposed common issues are all 'necessary to the resolution of each class member's claim'". Again, I agree – thus, their claims are, for the purposes of certification, "in fact, common".

[63] Engen notes that, in additional response to Hyundai's assertion that there is "no evidence of a defect", Engen tendered evidence of Dr. Perovic of actual "clear evidence that the PS contain defects": Engen RB, paras 30 & 31. Engen elaborates on this further at para 31 of the Engen RB, relying on para 108 of ***N&C (BCSC)***:

> ... in order to meet the common issue requirement, a plaintiff must establish that there is some basis in fact for the proposition that the product it owns shares a common defect with the products owned by all members of the class', ... [noting that] [t]he Defendants have tendered no evidence to suggest that there is no defect or that the defects ... are not consistent across all the Vehicles. Accordingly, the Plaintiff has satisfied the commonality requirement. [Emphasis is added].

Moreover, Engen notes at para 32, relying on para 102 of ***N&C (BCCA)***that, *inter alia*, "... a defendant, who fails to provide evidence to support its position on a motion of certification, risks facing an unsatisfactory outcome." With the support of my colleague's decision in ***Goodyear QB***, as to information imbalance, discussed *supra*, I agree with both statements, applicable to the case at Bar.

[64] As to duty to warn, at para 33 of the Engen RB, he challenges Hyundai's "bald and flippant assertions", that Hyundai has "no duty to warn that glass can shatter", considering that the allegations relate not to being struck by an object or in a collision, but to shattering while operating under normal conditions or at a complete standstill. Again, I agree.

b. Negligent Misrepresentation and Breach of the Competition Act and Consumer Protection Acts

[65] Here, I address only the common issues associated with those claims by Engen where I have found causes of action to exist, as discussed *supra*.

[66] As to Hyundai's alleged "lack of evidence [by Engen] of representations made by Defendants", Engen, in para 34 of his RB references the evidence (filed by Engen's December Affidavit, after Hyundai's RB – (see Jan 13/20 TR 10/31-37)). Engen also asserts that these representations made by Hyundai[43] "cannot be classified as "mere puffery", like the vague representation in ***Evans*** at paras 62-3. I find that the evidence proffered by Engen is, to use the flipside of the words at para 63 of ***Evans***, sufficient "evidence to demonstrate some basis in fact

[43] See Jan 13/20 TR 37/41-340/19 in reference to puffery, "lifestyle advertising" and "sales talk fluff", and referencing, and referencing ***Andronyk*** at paras 55 & 59.

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that there were misrepresentations relating to the quality, fitness or safety of the [PSs] of the sort that could ground an action in negligent misrepresentation or pursuant to ... the Comp. Act", for certification of these as common issues. See also: ***Andronyk v. Williams*** [1986] 1 WWR 148 (MBCA) at paras 55 & 59; *Black's Law Dictionary*, Ninth Edition, at 1353; ***Sherritt v. 690624 Ontario Inc***. [2000] O.J. No. 2840 (OSCJ) at paras 6 & 22; all of which distinguish between mere praise of one's own goods (puffery), as compared to an intermingling of facts punctuated by details (representations[44]), all as discussed at Jan 15/20 TR 22/4-5. I find that the Hyundai warranty material on safety under "Santa Fe Sport Specifications" (Exhibit A to Engen's Affidavit of December 6, 2019) is more of the latter. Further, on this evidence, different from the lack of evidence in ***Evans***, the debate as to substance vs puffery can go to the issue of merits, in the common issues trial.

[67] As to common issues 10 and 11, to say (Hyundai RB, paras 91-7 & 108) that there is no evidence of "media releases, sales brochures and other marketing materials", is inconsistent with the evidence on the record of this case, "common written representations made to the entire class" (Engen Affidavit affirmed on December 5, and filed December 13, 2019 – after the Hyundai RB). As noted *supra*, I find that, at Bar, these representations do constitute some basis in fact, not mere "puffery", as in ***Evans*** (paras 62-3). Moreover, this is more than a mere allegation in a pleading and constitutes some basis in fact: ***Fulawka v. Bank of Nova Scotia***, 2012 ONCA 443, at para 79. See also discussions in Engen's Brief, at paras.81 – 85 & 116-7, in reference to ***Reid, N&C (BCSC)*** and ***Bondy***, which support the following propositions in cases like this one (not all on the point of negligent misrepresentations, but on common issues):

> "... a determination that the product in question is defective or dangerous as alleged will advance the claim to an appreciable extent and that an alleged inherent defect in a product is the type of question for which a class proceeding is ideally suited": ***Reid***, at para 48, relying on ***Chase v. Crane Canada Inc.*** (1998) 44 BCLR (3d) 264 (B.C.C.A.);
>
> "I agree with the plaintiff… each class member ... must be able to prove the defendants were the manufacturers and suppliers of their vehicles with the [allegedly defective product component], that they owed a duty of care, the nature of the duty of care and whether it was breached: ***Reid***, at para 58 - these are all common issues (not necessarily identical – see s 5(1) (c) of the *Act*); and
>
> … some evidence, over and above the pleading itself, that [the product] … was deficient … [that] was a design error … [from which] … it could be inferred that the defendants had been negligent in designing the [product], or perhaps negligent in manufacturing the [product] and being negligent in testing the [product]…: ***Bondy***, at para 37, where a common issue of negligent misrepresentation was found at para 46.

[68] In oral reply argument, Counsel for Engen also referenced paras 33, 56, 60, and 63-65 of ***Reid*** in furtherance of the argument that, as to the cause of action of negligence and the element of "a real and substantial danger", the time to discuss the details of defects and their causes is at the common issues trial, not certification, the latter being focused only on the existence of a defect.

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44 With no claim of any oral representations to any class members: Jan 15/20 Tr 60/13-29.

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[69] As to common issues 14 and 15, and alleged breaches of the Comp. Act (Hyundai RB, paras (98-9), there is no lack of evidence, as I noted above. Moreover, as to common issue 12(a)(i) (Hyundai RB, para 106), there is evidence from Engen (December 2019 Affidavit – see previous references) that he relied on Hyundai's representations. Whether ***Baker*** requires individual findings for an implied warranty of fitness, as Hyundai asserts (Hyundai RB, para 107), can be further sorted out at the common issues trial. Until then, I will leave it as a common issue to be proven or for the common issues justice to sent it to individual determinations.

[70] As to breaches referenced in Common issues 15 and 12 respectively (Hyundai RB paras 100-7), they are restricted by the privity issue, discussed *supra*, and are thus limited *infra*. Moreover, as I have held, there is evidence (in response to Hyundai RB, paras 103-5, referencing ***McCann*** and ***Schreiber***) that "the goods in question" are/were defective, both "affirmatively and through inference from other evidence". In answer to *inter alia* Hyundai RB, para 113, there is also a "methodology for determining the causation" – see also Jan 13/20 TR 9/10 -10/18, relying on ***Miller*** at paras 33, 37-8, and see additionally paras 34, 48, 52-3, and 63-6, some of which relates to the manufacturer's "enormous informational advantage over a ... plaintiff" (again see ***Goodyear QB****, supra*), with the presumption going to the plaintiff to: "...find that there is a plausible way in with the plaintiff might establish, on a balance of probabilities" ... [a methodology for causation] such that "what has been produced is sufficient, in light of the available data to meet the low threshold at this early stage". In other words, as I understand these passages from ***Miller***, general, not necessarily scientific, causation, and, to quote para 53, "although a more detailed explicit methodology might be preferable, what has been produced is sufficient <u>in light of the available data</u> [none provided by Hyundai] <u>to meet the low threshold</u>" (emphasis added). I agree that this reasoning is applicable to this case. The result, I find, is that (see para 66 of ***Miller***, discussed at Jan 15/20 TR 61/12-40) there is "evidence, both circumstantial and directly related ... [that] is sufficient to meet the evidentiary threshold that there is a plausible method by which general causation could be proven at a trial of the common issues".

c. Breach of Implied and Express Warranties under the SGAs

[71] Again, as in the last section, I address here only the common issues associated with those claims by Engen, where I have found causes of action to exist, as discussed *supra*. Moreover, I have decided against Hyundai on their assertions of lack of some basis in fact of defects, as a basis for these claims. Thus, I only address the substance of the common issues.

[72] Engen, at para 37 of the Engen RB, references Hyundai's defence based on ***Baker,*** and establishes why, as I agree, it should be distinguished, in addition to my findings *supra* relating to causes of action., These reasons include: ***Baker*** was not a class proceeding, but rather a trial on the merits with a full evidentiary record; in ***Baker*** there was an intervening cause (collision), not the case here; and the ***Baker*** decision is based not on the manufacturer's warranties, but those of the third party vendor defendant, where the Court found no representations.

[73] As to breach of warranty, it is clear that there are pleadings and evidence of warranties and representations, as I have discussed *supra*, as referenced by Engen at footnote 40 of the Engen RB, and as specifically noted by Hyundai at para 109 of its RB (without evidence of any limitation). The shattering of the PS, absent an external incident, with reliance on Dr. Perovic, is clearly some evidence – some basis in fact – of a breach thereof, sufficient for certification. There is also evidence of Hyundai failing to provide warranty by failing to repair some of the

defective PSs – see footnote 42 of the Engen RB. Moreover, relevant to the analysis under s. 5(1)(c), the evidence of both warranty and defect by Engen and Dr. Perovic, and corroborated as to warranty and not denied as to defects by Hyundai, is clearly common to all members of the class.

d. Other Common Issues

[74] Hyundai also argues as to a number of other proposed common issues, including 6 – negligence manufacture and negligent design (Hyundai RB, paras 73-6), that there is no basis in fact for the allegations pleaded. However, I find that there is evidence establishing some basis in fact of defect(s), and an implied link to an allegation of negligent manufacture and/or negligent design as the cause is not a significant stretch – there is an implied basis in fact. There is no evidence that such a defect(s) is/are an act of nature or inevitable accident, or that there is strict liability, so there must be some cause, of which negligence is a logical and permissible implication, not speculation. Such an implication extrapolated from some basis in fact, should, for this purpose, be an implied basis in fact itself. As noted, the "some basis in fact" standard is low, and in this case is much higher than "subterranean"[45].

[75] Some basis in fact of causation (common issue 6(d) - see Hyundai RB, para 79) arising from negligent manufacture or design is identified in the affidavit evidence of Engen, arising from the shattered PS. Further evidence in support of causation can be provided at, or after, the common issues trial.

[76] On another matter, no issue arises as to Engen's need for a better Litigation Plan or a more workable method (Hyundai RB, para 80); see ***Kuiper*** at para 166, and ***Condominium Corp. No. 1122235 v. Surbey***, 2013 ABQB 722, at para 78), as has been directly argued. However, if any issues remain, the Litigation Plan can be amended (by the agreement of the parties) and filed with the Certification Order, or thereafter as the need arises.

[77] Engen asserts (para 40 of the Engen RB) that Hyundai's "positions on all of the remaining common issues are predicated on this Court accepting" Hyundai's argument that the AASofC discloses no cause of action, but rather the AASofC "discloses several causes of action and no evidence is required [beyond pleadings] at this point to prove that the Plaintiff would succeed on any of these causes of action". Except where there is a requirement for, and lack of, privity of contract, as I have found *supra*, I agree.

[78] As to the assertion by Hyundai (Hyundai RB, para 119) in relation to punitive damages as a common issue (proposed common issue 18) not being able to be certified "on its own" (Hyundai relying on ***Kuiper*** at para 157), when associated with a cause(s) of action (see para 43 of Engen's RB), as I have found herein, certification is quite proper: ***Johnson v Ontario***, 2016 ONSC 5314, para 123 (para 88 of the Engen Brief).

[79] As to "waiver of tort", time has passed this by with the nail in the coffin of this once alleged cause of action by the Supreme Court: ***Atlantic Lottery Corp. Inc. v Babstock***, 2020 SCC 19, as I recently noted in ***Bruno***[46].

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[45] Referencing Hyundai's quote from ***Kuiper***, at paras 133-5, 137, & 171. ***Kuiper***, however, also makes it clear (para 70) that for certification "the weighing and testing of evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny is modest. In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge".

[46] I believe the first case in Canada to apply ***Babstock*.**

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[80] Engen concedes (para 43 of the Engen RB and Jan 13/20 TR 3/27-31) that any "claims[47] in unjust enrichment may be better characterized as individual issues following the determination of the common issues". Thus, claims in unjust enrichment are not now sought to be and will not be certified herein as common issues.

e. Approved Common Issues

[81] Based on the discussion *supra*, I approve the 18 common issues, and sub-common issues, proposed by Engen, except as to the following, and with the changes proposed in *italics*:[48]

1. *Are* Panoramic Sunroofs installed in the Vehicles *susceptible* to spontaneously shatter?
2. Change to "... Vehicles were *susceptible to* spontaneously shatter...".
5. Change to "... have a *susceptibility* to spontaneously...".
6. (d) Change to "... cause *danger, risk of harm*[49]*,* losses...".
7. Change to "... were *susceptible* to spontaneously...".

   (e) Change to "... cause *danger, risk of harm,* losses...".
9. Change to "... *were* susceptible to...".
10. (c) Change to "... representations *or lack of full disclosure* about...".

    (d) Change to "... any of them check...".

    (f) Change to "... cause *danger, risk of harm,* losses...".
12. Change to "... warranty *or, in relation to jurisdictions where privity of contract is not a requirement, statutory warranty*, including...".

    (a) Change to "... the *Panoramic Sunroofs or* Vehicles...".

    (b) Change to "... the *Panoramic Sunroofs or* Vehicles...".

    (d) Change to "... suffer *danger, risk,* losses...".
13. Strike completely, as this common issue was abandoned by Engen.
14.[50] (a) Change to "... about *the Panoramic Sunroofs or* the Vehicles...".

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[47] Referenced at para 55-6 of the Engen Brief.

[48] Because the specifics of these proposed changes to the proposed common issues were not specifically the subject of discussion of the certification hearing, I leave it to Counsel for Engen and Hyundai to discuss, and agree on the common issues, with the guidance of these Reasons, or to seek further advise and directions from the Court, if and as necessary.

[49] I note that Engen did not allege actual injury in his case, only some minor small cuts and/or abrasions to his spouse, as I understand it (Hyundai asserts that it was only abrasions – Jan 15/20 TR 40/20-3), and Hyundai apparently replaced his panoramic sunroof. Thus, perhaps, there were no Engen actual "losses or damages", but there may remain issues of danger and risk of harm from which members of the class (identified at, *inter ali*a, para 10 of the Engen Affidavit in support of certification) should not be excluded, so this is broadened – there may be individual issues within these categories. This remains the case, although ***Goodyear CA*** makes it clear (para 46) that risk to the general public is not a cause of action.

[50] Contrary to Hyundai's RB, paras 98-9, following the filing of same, Engen did provide evidence of written representations to support a common issue of breach of s. 52 of the Comp. Act, which was similarly certified in ***Bondy,*** at para 47

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15. Change to "*In relation to jurisdictions where privity of contract is not a requirement*, did the...".

17. Strike completely, as this common issue was abandoned by Engen, and, as noted *supra*, any claim of waiver of tort has now been proscribed by ***Babstock***.

IV. Conclusion

[82] In the last sentence of para 47 of Engen's RB, he submits that "the necessary threshold for certification has been met, and ... certification is appropriate in the circumstances". With the exceptions noted *supra*, I agree, and thus, with those exceptions, I certify this action to move on to a common issues trial.

[83] In the result, with no other arguments being advanced against the Order sought by Engen in para 119 of the Engen Brief, an Order, to be prepared by Engen, subject to approval as to form by Hyundai, will issue as follows (as set out in the said para 119, except as, and with the additions highlighted, in italics *infra*):

(a) Certifying the within Action as a class proceeding pursuant to the *Act*;

(b) Defining the Class as: all persons in Canada, except for Excluded Persons, who own, owned, lease or leased one of the Vehicles;

(c) Appointing Robert Engen as the Representative Plaintiff in this Action;

(d) Stating the nature of the claims asserted on behalf of the Class, as per Appendix A to the Plaintiff's Application;

(e) Stating the relied sought on behalf of the Class, as per Appendix B to the Plaintiff's Application;

(f) Identifying the common issues in this Class Proceeding, as per Appendix C to the Plaintiff's Application, *as amended supra*;

(g) Approving the form and method of Notice of Certification to be given to members of the Class, as per Appendix D to the Plaintiff's Application;

(h) Ordering the Defendants to pay the costs of any Notices ordered by this Honourable Court;

(i) Allowing members of the Class to opt out of this Class Proceeding within 90 days from the date of Notice of Certification to the Class by submitting an Opt-Out Form, as per Appendix E to the Plaintiff's Application; and

(j) Approving the Litigation Plan put forward by the proposed Representative Plaintiff, as per Appendix F to the Plaintiff's Application.

In making such an Order, the Court, in its case management role, will provide such further advice and direction as may be necessary to move this matter forward (see comments at Jan 15/20 TR 63/6-15).

[84] As noted *supra*, costs will follow the event, in any event of the ultimate cause, payable forthwith, as Counsel may agree, or as the Assessment Officer may assess, with leave to return to the Court on any cost issues beyond the jurisdiction of the assessment officer.

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Heard on the 13th and 15th days of January, 2020, and supplemental briefs and reply briefs on June 4 and 18, 2021.

Dated at the City of Calgary, Alberta this 17th day of September, 2021.

J.D. Rooke
A.C.J.C.Q.B.A.

Appearances:

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Lawrence G. Theall, Jeffrey A. Brown, Dan Carroll, Q.C. and Ryan Krushelnitzky
for the Defendants

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Corrigendum of the Memorandum of Reasons for Decision
of
The Associate Chief Justice J.D. Rooke

- Para 3 -- "filed to disclose" should be "failed to disclose"
- Para 46 -- sub-portion (iv) -- "where is presents" should be "where it presents"
- Para 52 (in a portion close to para 53) -- "Court of Appeal did no vary" should be "Court of Appeal did not vary"
- Para 84 -- "asses" should be "assess"

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