Federal Court of Appeal Cour d'appel fédérale

Date: 20220304

Dockets: A-299-20
A-300-20

Citation: 2022 FCA 37

CORAM: **PELLETIER J.A.**
RENNIE J.A.
GLEASON J.A.

Docket: A-299-20

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

KRISTEN MARIE WHALING
(FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)

Respondent

Docket: A-300-20

AND BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

WILLIAM WEI LIN LIANG

Respondent

Heard at Vancouver, British Columbia, on November 30, 2021.

Judgment delivered at Ottawa, Ontario, on March 4, 2022.

REASONS FOR JUDGMENT BY: PELLETIER J.A.

CONCURRED IN BY: RENNIE J.A.
GLEASON J.A.

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REASONS FOR JUDGMENT

PELLETIER J.A.

I. Introduction

[1] These reasons deal with two appeals, one brought by Ms. Whaling in file no. A-299-20 and the other brought by Mr. Liang in file no. A-300-20. These appeals arise from one decision of the Federal Court reported as 2020 FC 1074 (the Decision), which applied to two proposed class actions in which Ms. Whaling (file no. T-455-16) and Mr. Liang (file no. T-456-16) were the proposed representative plaintiffs. These reasons will deal with both files since the issues are the same in both. A copy of these reasons will be placed in file no. A-300-20.

[2] Her Majesty the Queen (HMQ) appeals from the certification order resulting from the Federal Court's Decision. Specifically, HMQ objects to the Federal Court's refusal to include in the certification order three preliminary questions of fact and law and one common question, which she says are required to satisfy the commonality and preferability criteria for certification.

[3] For the reasons that follow, I would dismiss the appeals.

II. The Facts and the Decision under appeal

[4] Both Ms. Whaling and Mr. Liang (the respondents) are former federal inmates who, in light of their status as first-time non-violent offenders, were eligible for accelerated parole review under the statutory scheme in place at the time they committed their offences. The

coming into force of the *Abolition of Early Parole Act*, S.C. 2011, c. 11 (the Act) on March 28, 2011, as its name suggests, abolished the availability of early parole (or accelerated parole) review for those who had previously been eligible for it.

[5] The respondents' statements of claim seek damages pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [Charter] because the retrospective application of the Act infringed their Charter rights. In *Canada (Attorney General) v. Whaling*, 2014 SCC 20, [2014] 1 S.C.R. 392, the Supreme Court ruled that the retrospective application of the Act was a violation of Ms. Whaling's right to be free of double jeopardy pursuant to paragraph 11(h) of the Charter.

[6] In Mr. Liang's case, the British Columbia Court of Appeal held that the retrospective loss of the right to early parole review effectively increased the penalty for the offence for which he was convicted. This was held to be a violation of his right under paragraph 11(i) of the Charter to the benefit of the lower punishment where the punishment for an offence has been varied between the time of the commission of the offence and the time of sentencing: *Liang v. Canada (Attorney General)*, 2014 BCCA 190, 311 C.C.C. (3d) 159, leave to appeal to SCC refused, 35972 (29 January 2015).

[7] As is often the case in class proceedings, the progress of these actions has been tortuous, but they have now been certified as class proceedings by the orders which are the subject of these appeals. The statements of claim in the two actions are substantially the same.

[8] As mentioned, both Ms. Whaling and Mr. Liang, as representative plaintiffs for the classes of former inmates who were similarly affected by the Act, seek damages under subsection 24(1) of the Charter for the violation of their Charter rights. They claim that "the Crown, and its employees, servants and/or agents" have a duty to ensure, or at least take good faith steps to ensure, that any legislation they pass or implement is in accordance with the Charter. In this case, the respondents claim, the Crown (and associated individuals) knew that the Act infringed the Charter and passed it anyway. They claim this shows bad faith such that the plaintiff classes are entitled to damages.

[9] In certifying these actions as class proceedings, the Federal Court accepted the respondents' submission that the following questions were appropriate common questions of law and fact to be determined at trial:

> (1) Did the [*Abolition of Early Parole Act*] breach the s. 11(h) *Charter* rights of the class members?
>
> (2) If so, was the s. 11(h) breach justified under s. 1 of the *Charter*?
>
> (3) If the s. 11(h) breach was not justified under s. 1 of the *Charter*, are damages pursuant to s. 24(1) a just and appropriate remedy for:
>
> [the subclasses referred to in each certification order]
>
> (4) Is the claim statute-barred under section 39(1) of the *Federal Courts Act* and does section 39(2) apply?

[10] HMQ agrees that these questions are appropriate but argues that another question (the Common Question or CQ) should be added to these and determined at trial:

> On the facts of this case, can the Crown in its executive capacity, be held liable for government officials and Ministers implementing s. 10(1) of the [*Abolition of*

> *Early Parole Act*], a legislative provision which was subsequently declared invalid by a Court pursuant to s. 52(1) of the *Constitution Act, 1982*?

[11] In addition, after a certain amount of back and forth between the parties, HMQ proposed that three other questions be added to the certification order as questions to be answered in advance of the trial (the Preliminary Questions of Law or PQOL):

> Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?
>
> Can the Crown, in its executive capacity, be held liable in damages for Parliament acting a Bill into law, which legislation was later declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?
>
> After a law has been declared invalid pursuant to s. 52(1) of the *Constitution Act, 1982* by a Court in one jurisdiction, can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers implementing that law in other jurisdictions?

[12] The Federal Court dealt with the first two PQOLs in its Decision but was silent on the third question, a matter to which I shall return later.

[13] The Federal Court declined to add HMQ's Common Question to the certification order. It found that the question would not be determinative of these cases nor would it advance the cases in any significant way, because answering the question would not be dispositive of the larger case the respondents assert, as set out in the other common questions. The Court held that the respondents were entitled to make their case as they had pleaded it.

[14] As for the three Preliminary Questions of Law submitted by HMQ, the Court found they were hypothetical and would not assist in determining the Crown's potential liability:

> I am not satisfied that any of the above questions should be answered in advance of trial. As discussed above, in the absence of an evidentiary record, the proposed questions are all hypothetical and answering them would not be of assistance in determining the Defendant's potential liability. It would still remain to be decided what factual circumstances would be sufficient to trigger *Charter* damages. These are matters of mixed fact and law that will require proof. I would add that the Defendant's proposed questions are subsumed within the agreed common questions of fact and law and are unnecessary for the resolution of the cases.
>
> Decision at para. 19.

III. Statement of issues

[15] HMQ's memorandum of fact and law recites that the issue in these appeals is the Federal Court's failure to include its proposed CQ and PQOLs in its certification order. She argues that the Court erred when it failed to take proper account of the commonality and preferability criteria set out in Rule 334.16 of the *Federal Courts Rules*, S.O.R./98-106.

IV. Analysis

[16] I begin by addressing a request for supplementary submissions addressed to the parties asking them whether the findings that Ms. Whaling and Mr. Liang's Charter rights had been violated amounted to *res judicata* as regards the balance of the class. This request turned out to be unhelpful since, as the parties politely pointed out, the class members were not the proxies of the representative plaintiffs in those proceedings and so *res judicata* is not an issue. HMQ did acknowledge however that she had no intention of re-arguing the question of whether Charter rights had been violated in the case of those class members whose claims were subject to the

findings of the Supreme Court and the British Columbia Court of Appeal by virtue of *stare decisis*.

[17] To the extent that HMQ intends to argue that the rights of certain class members not subject to those decisions were not violated, that is not a matter for these appeals.

[18] Certification orders are discretionary and are reviewable on that basis: correctness for questions of law and palpable and overriding error for questions of mixed fact and law, save for extricable errors of law which are reviewable on the correctness standard: *Hospira Healthcare Corporation v. Kennedy Institute of Rheumatology*, 2016 FCA 215, [2017] 1 F.C.R. 331 at para. 79.

[19] HMQ cites *Mahjoub v. Canada (Citizenship and Immigration)*, 2017 FCA 157, [2018] 2 F.C.R. 344 [*Mahjoub*] at paragraph 74 for the principle that an extricable error of law occurs when a discretionary decision "was 'infected or tainted' by some misunderstanding of the law or legal principle": HMQ's memorandum at para. 55. *Mahjoub* should not be understood as a modification of the test set out in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 [*Housen*], upon which it is based:

> Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact". Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" and is subject to a more stringent standard.
>
> *Housen* at para. 36.

[20] As the respondents point out, a decision by a certification judge (who is typically also the case management judge) is entitled to "substantial deference". It goes without saying that this is only relevant to the judge's findings on questions of fact or mixed fact and law. This deference is due to the judge's greater familiarity with the intricacies of the file than that of an appellate court, but also because "it involves weighing and balancing a number of factors": *Pearson v. Inco Ltd., et al*. (2006), 78 O.R. (3d) 641 (CA), 20 C.E.L.R. (3d) 258 at para. 43, cited with approval in *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949 at para. 65.

[21] With this in mind, I turn to the analysis of the problem raised by these appeals.

A. *The context*

[22] On my reading of HMQ's memorandum of fact and law, her position in the litigation rests on the following propositions:

> Constitutional principles such as parliamentary privilege and the separation of powers, tell us that legislative processes and law-making are <u>categorically</u> not reviewable for damages: HMQ's memorandum at para. 78 (my emphasis).
>
> The Motions Judge did not recognize that the conduct of state actors drives the potential for liability for *Charter* damages and that such questions are legal questions aimed at determining whether certain categories of conduct could <u>ever</u> lead to liability for *Charter* damages, regardless of the underlying facts: HMQ's memorandum at para. 66 (my emphasis).

The second proposition sweeps in another proposition, which is that "[a] court will need to identify whose 'fault' it can assess if it is going to consider liability": HMQ's memorandum at para. 75.

[23] I pause here to note that the use of the word "liability" in these actions is ambiguous. In normal circumstances, there is a distinction between legal liability and availability of remedies. A defendant may be liable to a plaintiff as a result of some wrongful conduct such as, for example, a violation of their Charter rights. The finding of liability, however, does not guarantee that every remedy sought is available. There are conditions governing the availability of certain forms of relief such as, for example, Charter damages. As a result, in the context of an action for Charter damages, a statement such as "[a] court will need to identify whose 'fault' it can assess if it is going to consider liability" can either refer to assessing the appellant's behaviour to see if it entitles the respondents to any remedy or to determining whether the facts satisfy the conditions for a particular remedy, in this case, Charter damages. For present purposes, this ambiguity is irrelevant but it may well be very relevant going forward.

[24] Returning to the task at hand, HMQ's categorical positions call to mind the Supreme Court's comments in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 at para. 21 [*Imperial Tobacco*]:

> The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.) introduced a general duty of care to one's neighbour premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners, Ltd.*, [1963] 2 All E.R. 575 (H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *Donoghue v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim.

[25] These comments were made in the context of a motion to strike pleadings for failing to disclose a cause of action, but the principle articulated by the Court applies in this context as well. The application of the principles established in *Vancouver (City) v. Ward*, 2010 SCC 27, [2010] 2 S.C.R. 28 [*Ward*] to the facts alleged in the statements of claim is novel. The plaintiffs' claims should not fail on that ground alone. Those seeking to extend the boundaries of the *Ward* principles are not entitled to succeed but they are entitled to try.

[26] It may well be that liability for Charter damages cannot be assessed in the absence of misconduct by one or more state actors whose "fault" can be attributed to Canada "writ large", but the Supreme Court's statement in *Ward* perhaps leaves that possibility open:

> …an action for public law damages "is not a private law action in the nature of a tort claim for which the state is vicariously liable but [a distinct] public law action directly against the state for which the state is primarily liable". In accordance with s. 32 of the *Charter*, this is equally so in the Canadian constitutional context.
>
> *Ward* at para. 22.

[27] In fairness, *Ward* also leaves open the possibility that:

> …considerations that are engaged when awarding private law damages against state actors may be relevant when awarding public law damages directly against the state. Such considerations may be appropriately kept in mind.
>
> *Ward* at para. 22.

[28] But this does not necessarily mean that Charter damages are only available in circumstances in which private law damages would be available under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50, which explicitly deals with vicarious liability and requires both an identifiable state actor and an identifiable fault.

B. *Are HMQ'S Preliminary Questions of Law hypothetical?*

[29] The Federal Court's Decision relies heavily on the question of whether the proposed questions are hypothetical. The reason for this emphasis is the Federal Court's view that hypothetical questions are of no assistance in determining HMQ's potential liability: see Decision at paras. 9, 12, 16, and 19.

[30] HMQ's first two PQOLs read as follows:

> Can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers preparing and drafting a proposed Bill that was later enacted by Parliament, and subsequently declared invalid by a Court pursuant to s. 52(1) of the *Constitution Act, 1982*?
>
> Can the Crown, in its executive capacity, be held liable in damages for Parliament enacting a Bill into law, which legislation was later declared invalid by a Court pursuant to s. 52(1) of the *Constitution Act, 1982*?

[31] The Federal Court pointed out, at paragraph 9 of its Decision, that "[p]urely hypothetical questions should not be approved". While the Federal Court did not expand on this point, it is rooted in the jurisprudence. Asking purely hypothetical questions as preliminary questions can preclude the leading of evidence which might put a legal question in another light and lead to a different answer. This is why, for example, in a motion for the determination of a question of law pursuant to Rule 220(1)(a), the question must be a <u>pure</u> question of law:

> [Rule 474, now Rule 220] merely confers on the Court the discretion to order, on application, that such a determination be made. In order for the Court to be in a position to exercise that discretion, it must be satisfied, as was stated in the *Berneche* case, that the proposed questions are pure questions of law, that is to say <u>questions that may be answered without having to make any finding of fact</u>.
>
> *Perera v. Canada*, [1998] 3 FC 381, 225 N.R. 162 at 391-392 [*Perera*] (my emphasis).

[32] This does not mean that a pure question of law has no factual underpinning. It means that a pure question of law is one that can be decided without the Court having to engage in fact-finding. The facts need not be settled by agreement, though they can be, but the factual matrix in which the question of law arises must be specified, such as, for example, by taking the allegations in the claim as true for the purposes of resolving the question: see *Perera* at 392. The Court cannot decide questions of law on an unsatisfactory, *i.e.* unsettled, record: *Bruyere v. Canada*, 2005 FC 1371, 281 F.T.R. 221 at paras. 10-13.

[33] The same is true when an application is made to strike a claim for failing to disclose a reasonable cause of action pursuant to Rule 221(1). The existence of the cause of action is to be determined on the assumption that the facts pleaded are true: *Imperial Tobacco* at para. 22. Motions pursuant to Rules 220 and 221 differ in important ways but the point being made here is that cases are decided on the basis of the application of the law to the facts. In the case of a preliminary question of law, the factual record must not require fact finding, that is, the facts must be settled. The same is true in the case of a motion to strike a claim for failing to disclose a reasonable cause of action in which the facts pleaded are assumed to be true for the purposes of the motion.

[34] As a result, the Federal Court's characterization of the Crown's PQOLs as "hypothetical" is misleading. It suggests that these questions cannot be answered in their present form. The better view is that they are appropriate questions but only once an appropriate evidentiary foundation has been laid, so that the questions are not so much hypothetical as premature. Once a sufficient or adequate factual record is settled, nothing would prevent the Crown from putting

these questions to the Court and arguing its position as set out earlier in these reasons. The result is that the questions are not appropriately preliminary questions of law, but they remain legitimate questions.

[35] The consequence is that the Federal Court did not err in any way justifying our intervention when it held that the Crown PQOLs should not be certified as such.

[36] I note that paragraph 12 of the Litigation Plan attached to the Decision sets out certain preliminary questions of law. HMQ's PQOLs differ from these preliminary questions in that the latter ask whether a certain law – the *International Transfer of Offenders Act*, S.C. 2004, c. 21 – applied to a certain defined subclass at a certain time, how certain statutory provisions are interpreted in relation to dates, and how the federal scheme interacts with certain provincial legislation. These questions are not premature because they have a factual basis and do not require additional findings of fact to answer. HMQ's PQOLs call for conclusions of law in circumstances where the factual basis is absent or indeterminate at best.

[37] HMQ argues that the Federal Court erred in not addressing its third PQOL:

> After a law has been declared invalid pursuant to s. 52(1) of the *Constitution Act, 1982*, by a court in one jurisdiction, can the Crown, in its executive capacity, be held liable in damages for government officials and Ministers implementing that law in other jurisdictions?

[38] It is true that the Federal Court's reasons do not explicitly refer to this question. The respondents argue that the question was fully and forcefully argued and was dealt with implicitly

when the Court held that no PQOL need be certified when there is a strong disagreement as to its benefit.

[39] I am sympathetic to HMQ's position on this issue in the sense that, the matter having been raised and argued, HMQ was entitled to expect that it would be dealt with in the Court's reasons. Given that the judge who was the case manager and who heard the certification motion has retired, the matter cannot be returned to him for determination. Returning the matter to be heard by a different judge will simply further delay this action.

[40] In these circumstances, I believe it is appropriate for this Court to rule on this question. While this question is not premature to the extent that it incorporates material facts, *i.e.* "declaration of invalidity in one provincial jurisdiction" and "implementing that law in other jurisdictions", I am not satisfied that these are the only material facts which the parties might put before the Court, given that there are nine subclasses in the *Liang* matter. The question is a legitimate one but, in my view, fairness to the subclass members suggests that the question is best answered with an appropriate evidentiary foundation.

C. *HMQ's Common Question*

[41] HMQ's Common Question reads as follows:

> On the facts of this case, can the Crown, in its executive capacity, be held liable for government officials and Ministers implementing s. 10(1) of the [*Abolition of Early Parole Act*], a legislative provision which was subsequently declared invalid by a court pursuant to s. 52(1) of the *Constitution Act, 1982*?

[42] This question does not suffer from being premature in the sense that it would be decided in a factual vacuum, since it will be decided in a pre-trial proceeding with an appropriate factual basis or after the facts are found by the trial judge. The Federal Court found that this question would not be determinative of either of the respondents' cases and would not advance those cases in any significant way: Decision at para. 10.

[43] HMQ argues that the Federal Court erred in law in not certifying its Common Question having decided in an earlier proceeding to defer until later the question of whether the Crown, in its executive capacity, was liable for damages when members of the Executive Branch directed the public service by whatever means to implement legislation they knew, or ought to have known, was unconstitutional.

[44] The respondents argue that "[t]he appellant's proposed [CQ] asks whether the appellant can be liable '*on the facts of this case*' and purports to do so independent of the *Ward* framework. This betrays a misconception of the law, according to which all claims for *Charter* damages are to be analyzed within the *Ward* framework": Respondent Whaling's memorandum of fact and law at para. 85, emphasis omitted.

[45] In my view, the relevant question is whether the proposed Common Question adds anything to the common question certified by the Federal Court that asks "[i]f the s. 11(h) breach was not justified under s. 1 of the *Charter*, are damages pursuant to s. 24(1) a just and appropriate remedy …". On the understanding that this question is designed to identify the actors and the behaviour which the respondents say satisfies the test of clearly wrong, in bad faith or an

abuse of power, then it is difficult to see how the Common Question adds anything to the existing common questions.

[46] As a result, I have not been persuaded that the Federal Court committed a palpable and overriding error in failing to certify HMQ's Common Question.

D. *Commonality and preferability*

[47] HMQ argued commonality and preferability as grounds for allowing the appeals. These concepts flow from Rules 334.16(1) and (2) which, in their material parts, provide as follows:

334.16 (1) Subject to subsection (3), a judge shall, by order, certify a proceeding as a class proceeding if	334.16 (1) Sous réserve du paragraphe (3), le juge autorise une instance comme recours collectif si les conditions suivantes sont réunies :
…	…
(c) the claims of the class members raise common questions of law or fact, whether or not those common questions predominate over questions affecting only individual members;	c) les réclamations des membres du groupe soulèvent des points de droit ou de fait communs, que ceux-ci prédominent ou non sur ceux qui ne concernent qu'un membre;
(d) a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and	d) le recours collectif est le meilleur moyen de régler, de façon juste et efficace, les points de droit ou de fait communs;
…	…
(2) All relevant matters shall be considered in a determination of whether a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact, including whether	(2) Pour décider si le recours collectif est le meilleur moyen de régler les points de droit ou de fait communs de façon juste et efficace, tous les facteurs pertinents sont pris en compte, notamment les suivants :

(a) the questions of law or fact common to the class members predominate over any questions affecting only individual members;	a) la prédominance des points de droit ou de fait communs sur ceux qui ne concernent que certains membres;
(b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate proceedings;	b) la proportion de membres du groupe qui ont un intérêt légitime à poursuivre des instances séparées;
(c) the class proceeding would involve claims that are or have been the subject of any other proceeding;	c) le fait que le recours collectif porte ou non sur des réclamations qui ont fait ou qui font l'objet d'autres instances;
(d) other means of resolving the claims are less practical or less efficient; and	d) l'aspect pratique ou l'efficacité moindres des autres moyens de régler les réclamations;
(e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.	e) les difficultés accrues engendrées par la gestion du recours collectif par rapport à celles associées à la gestion d'autres mesures de redressement.

[48] It can be seen that there is a certain overlap between the commonality and preferability factors. Preferability refers to whether class proceedings are the preferred way of resolving the common questions.

[49] The Supreme Court has described the "underlying question" when performing a commonality analysis as "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis": *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 39 [*Dutton*]. The resolution of the common issues or questions does not need to be "determinative of each class member's claim", but the issue must be a "substantial common ingredient" of the claim: *Dutton* at para. 39; see *also Pro-*

Sys Consultants Ltd. v Microsoft Corporation, 2013 SCC 57, [2013] 3 S.C.R. 477 at paras. 108-113 [*Pro-Sys*]; *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, at paras. 44-46. In *The Queen v. Greenwood*, 2021 FCA 186, [2021] F.C.J. No. 1006 at para. 180, this Court recently held that "[t]he requisite commonality will exist if the common issue will meaningfully advance class members' claims, which may be said to be the case unless individual issues are overwhelmingly more significant".

[50] These principles can be seen in the language of Rules 334.16(1)(c) and 334.16(2)(a), quoted above, and demonstrate the connection between the commonality and preferability analyses.

[51] Trial judges in class proceedings have significant discretion to manage the proceedings as they go forward. Rule 334.19, for instance, gives the judge the power to amend a certification order, and the Supreme Court has stated that even if, for example, a question of appropriate remedy is not certified as a common question, the trial judge may still address it if they consider it appropriate: *Pro-Sys* at para. 134. In addition, a trial judge may provide a "nuanced answer" to a common question and is not limited to merely yes or no: *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 at para. 32.

[52] Whether there are enough common issues to require a class proceeding, or whether they address a sufficient number of the issues in the case, is more properly addressed in the preferability analysis, as noted by Rule 334.16(2)(a).

[53] Given the powers of the trial judge to amend the certification order or to treat questions that were not certified as common questions, I conclude that every possible common question need not be certified as such.

[54] HMQ's memorandum cites the case of *Campbell v. Flexwatt Corp*. (1997), 44 B.C.L.R. (3d) 343 (CA), [1998] 6 W.W.R. 275 [*Campbell*] for the following proposition:

> This question of commonality of issues lies at the heart of a class proceeding, for the intent of a class proceeding is to allow liability issues to be determined for the entire class based on a determination of liability of the defendants to the proposed representative plaintiffs.
>
> *Campbell* at para. 52.

[55] But it does not follow from this that, as noted, every question which might be common to the members of the class must be certified or that every question must be determinative of the defendant's liability: *Campbell* at para. 53.

[56] The heart of HMQ's position on the issue of the commonality of her PQOLs is that "they must be determined to establish, if, as a matter of law, the Respondent is entitled to damages on her theory of liability" and that "[r]esolution of these proposed common issues at an early stage would lead to a more efficient, just and expeditious process and class proceeding to such an extent that certification should not have occurred without them": HMQs memorandum at para. 65. HMQ's position is understandable given the position expressed in the two propositions quoted earlier in this analysis.

[57] That said, it should be clear from the discussion of premature questions that the determinations which HMQ seeks to have made will not lead to a more efficient, just and expeditious proceeding because these findings cannot be made in a factual vacuum. If the facts must be established for the purpose of making such a determination, then there will be no saving of time and effort and therefore the proceeding is no more “efficient, just and expeditious” than it would otherwise be. As a result, the certification of HMQ’s PQOLs as common questions would not assist achieving the goals sought by Rule 334.16.

[58] Preferability is to be determined on the basis of the factors set out in Rule 344.16(2). There are five such criteria, whose object is to determine if the class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact. HMQ did not object to the certification of the four common questions put forward by the respondents which the Federal Court certified: see Decision at para. 7. The question as to whether those questions, by themselves, satisfied the preferability criterion involved the weighing and balancing of many factors. The fact that HMQ’s CQ and PQOLs were not included in the certification order is a conclusion which is owed “substantial deference”. I have not been satisfied that it involves an extricable question of law which the Federal Court answered incorrectly.

V. Conclusion

[59] As a result, I would dismiss the appeals.

"J.D. Denis Pelletier"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
Mary J.L. Gleason J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-299-20
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. KRISTEN MARIE WHALING (FORMERLY KNOWN AS CHRISTOPHER JOHN WHALING)
AND DOCKET:	A-300-20
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. WILLIAM WEI LIN LIANG
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	NOVEMBER 30, 2021
REASONS FOR JUDGMENT BY:	PELLETIER J.A.
CONCURRED IN BY:	RENNIE J.A. GLEASON J.A.
DATED:	MARCH 4, 2022

APPEARANCES:

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David Honeyman Katherine Shortreed	FOR THE RESPONDENTS

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