Federal Court  Cour fédérale

Date: 20231206

Docket: T-1931-13

Citation: 2023 FC 1636

Ottawa, Ontario, December 6, 2023

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

JOHN DOE, SUZIE JONES and PENNY KOZMENSKI

Plaintiffs

and

HIS MAJESTY THE KING

Defendant

JUDGMENT AND REASONS

[1] The Plaintiffs bring this motion for summary judgment pursuant to Rule 215(3) of the *Federal Courts Rules*, SOR/98-106 [the *Rules*]. The Plaintiffs seek a determination of ten certified common questions in their class action regarding their claims for negligence and breach of confidence.

[2] The Plaintiffs' claims arise from Health Canada's mass mail-out of over 41,000 letters to participants in the Marihuana Medical Access Program [MMAP] in November 2013. The letters were sent in an envelope with a see-through window, which displayed the sender's return address as "Marihuana Medical Access Program" and the full name and address of the recipient (i.e., the Class Members). The Plaintiffs allege that the mass mail-out "outed" their participation in the program, disclosed their confidential information, and violated their right to privacy. They allege the mail-out was an act of negligence and breach of confidence by Health Canada.

[3] For the reasons that follow, the motion for summary judgment is granted, but only in part in favour of the Plaintiffs. The Court finds that the Plaintiffs have not established that the Defendant's breach of the duty of care owed in the circumstances caused class-wide damage to the Class Members and, as a result, the Defendant's liability for damages for negligence cannot be determined as a common issue. The Court also finds that the Plaintiffs have not established that the Defendant breached their confidence. The Common Issues are answered at paras 222-223.

I. Background

A. *The 2013 MMAP Mail-Out*

[4] Health Canada, the administrator of the MMAP, sent letters to 41,457 MMAP participants in November 2013 [the mail-out]. Health Canada used 9"x12" envelopes that had a see-through window, permitting the cover page of the letter (referred to as the banner page) to be seen without opening the envelope. The banner page displayed the full name and address of each participant along with the following return address:

Marihuana Medical Access Program
Health Canada
AL: 0300A
Ottawa ON K1A 0K9

[5] At the time of the mail-out, marihuana was a controlled substance and regulated under the *Controlled Drugs and Substance Act*, SC 1996, c 19. The vast majority of participants in the MMAP had to apply and obtain authorizations to possess and/or produce marihuana for their own personal medical use under the (now repealed) *Marihuana Medical Access Regulations*, SOR-2001-227 [*Regulations*]. Participants were required to provide declarations that they suffered from medical conditions and/or symptoms warranting medical marihuana treatment (*Regulations*, paragraph 6(1)(b)), and to provide a separate declaration from their medical practitioner (*Regulations*, paragraph 4(2)(b)).

[6] A smaller number of participants applied and obtained only a "Designated Person Production Licence" [DPPL], which authorized the licence holder to produce, store, and provide medical marihuana for medical purposes on behalf of a participant licensed to possess and use medical marihuana. Participants who obtained only a DPPL were not required to disclose their medical condition.

[7] Some participants held more than one authorization (i.e., a license to both produce and use medical marihuana).

[8] Prior to the mail-out, Health Canada's practice was to use envelopes that indicated only a generic Health Canada address as the return address without any reference to the MMAP.

[9] The mail-out was intended to inform MMAP participants about upcoming changes to the *Regulations*, including a new prohibition on growing marijuana in a private dwelling. Health Canada sought to notify participants well in advance of the changes and to advise them about the next steps.

[10] Health Canada contracted Canada Post for the mail-out (printing, packaging, labeling, and delivery of the letters). On October 24, 2013, Health Canada provided pre-printed envelopes to Canada Post that did not identify the MMAP or have see-through windows.

[11] On October 30, 2013, Canada Post advised Health Canada that the pre-printed envelopes were damaged and there was an insufficient quantity. Canada Post also advised that the envelopes were not compatible with their equipment for mass mail-outs. Canada Post proposed that Health Canada use more generic, oversized, windowed envelopes.

[12] As noted in the Plaintiff's record, there was an email exchange between Health Canada and Canada Post over a period of several days. Health Canada completed a form from Canada Post approving the details of the mail-out, including the use of the envelopes and the return address. On or around November 13, 2013, Canada Post delivered the letters to MMAP participants with their full name and address and with the name "Medical Marihuana Access Program" visible as the sender in the return address.

[13] Health Canada became aware of concerns from program participants shortly after the envelopes had been delivered.

[14] On November 21, 2013, the Deputy Minister of Health Canada issued a statement acknowledging that the manner of the mail-out as a mistake and an "administrative error". The Deputy Minister stated:

> Health Canada recently sent approximately 40, 000 informational letters to individuals with an interest in upcoming changes to the Marihuana Medical Access Program.
>
> I have been advised that as a result of an administrative error the envelopes were labelled to indicate that they were sent by the Program. This is not standard Health Canada practice.
>
> On behalf of Health Canada, I deeply regret this administrative error. Health Canada is taking steps to ensure this does not happen again.
>
> Protection of personal information is of fundamental importance to Health Canada. We are in discussion with the Office of the Privacy Commissioner of Canada.

B. *The Report of the Privacy Commissioner*

[15] The Office of the Privacy Commissioner of Canada [OPC] initiated its own investigation pursuant to subsection 29(3) of the *Privacy Act*, RSC 1985, c P-21 [*Privacy Act*]. The OPC received 339 individual complaints from recipients of the mail-out. The OPC conducted a joint investigation rather than investigating each complaint separately. The results of the investigation were shared with all the complainants. The OPC issued a report [the OPC Report] in 2015 titled "Accidental disclosure by Health Canada".

[16] The OPC summarized the complainants' concerns (at para 15-16):

> 15. The complainants alleged that HC [Health Canada] failed to protect their privacy by including the name of the MMAP in a clearly visible manner on the mail-out packages, thereby revealing their personal information (i.e. their identity and involvement with

> the MMAP) to CPC [Canada Post Corporation]employees and members of the public.
>
> 16. The complainants cited several concerns relating to the impact of HC's actions on their personal lives. In particular:
>
> > *a. Career and financial position*: Some individuals raised concerns that they could lose their jobs if their employers learned of their usage of medical marihuana.
> >
> > *b. Reputation*: The use of marihuana, even for medical purposes, carries a social stigma due to its status as a prohibited substance. Some complainants alleged that they received comments from people about their association with the program as a result of the HC mail-out.
> >
> > *c.* S*afety*: As mentioned in HC's letter to its clients regarding the program, "*The current practice of allowing individuals to grow marijuana for medical purposes poses risks to the safety and security of Canadians. The high value of marijuana on the illegal market increases the risks of violent home invasion and diversion to the black market*." Disclosure of the fact that a person is associated with the program thus increases the above-mentioned risks to these individuals and this statement demonstrates that HC recognizes these risks.
> >
> > d. *Health or well-being*: The purpose of the program is to offer medication to individuals who have serious medical conditions. Many of the complainants in this case alleged that their health was adversely affected due to stress following the disclosure.

[17] The OPC summarized its findings:

> 56. We conclude that the reference to the MMAP in HC's return address in combination with the name of the addressee constitutes sensitive personal information under the *Privacy Act*. HC has not satisfied the OPC that it had appropriate consent for the disclosure of this information, nor did it establish that any of the permissible disclosures under section 8(2) of the *Act* would apply in the circumstances. We accordingly conclude that HC was in contravention of the *Act*. Therefore, the complaints are well-founded.

[18] The OPC included other observations, at paras 57-60, noting that the mail-out did not reflect Health Canada's usual practices and was an administrative error, and that Health Canada had since established strict mail out protocols and created a Privacy Working Group. The OPC Report also noted that Health Canada should consider the sensitivity of the information it holds and the high level of protection required.

C. *The Statement of Claim*

[19] The Plaintiff's Statement of Claim, originally made in November 2013 and subsequently amended six times, seeks, in addition to an order for certification and appointment of the representative Plaintiffs:

> …
>
> c. A declaration that Health Canada owed a duty of care to the Plaintiffs and other Class Members, and the Defendant breached that duty causing the Plaintiffs and class members to suffer damages;
>
> d. A declaration that Health Canada breached the confidence of the Plaintiffs and other Class Members;
>
> e. Damages for negligence and breach of confidence, including damages for, among other harms,
>
> i. costs incurred to prevent home invasion, theft, robbery and/or damage to personal property including marijuana plants and related paraphernalia;
>
> ii. costs incurred for personal security;
>
> iii. damage to reputation;
>
> iv. loss of employment;
>
> v. reduced capacity for employment;
>
> vi. mental distress;

vii. damages for distress, humiliation and anguish associated with realizing that their participation in the medical marijuana program had been made public to anyone who had seen the envelope, including;

a) A sense of loss of control over informational privacy:

b) Anxiety and worry about who and in what circumstances anyone had access to this information; and

c) Fear and uncertainty about whether others were aware that they were participants

viii. out of pocket expenses; and

ix. inconvenience, frustration and anxiety associated with taking precautionary steps to reduce the likelihood of home invasion, theft, robbery and/or damage to personal property and to obtain personal security;

f. General damages;

g. Aggravated damages;

h. Punitive damages; [no longer sought]

i. An Order pursuant to Rule 334.28(1) and (2) for the aggregate assessment of monetary relief and its distribution to the Plaintiffs and the Class Members;

j. Pre-judgment and post-judgment interest pursuant to sections 36 and 37 of the Federal Courts Act, R.S.C. 1985, c. F-7;

k. Costs, if appropriate; and,

l. Such further and other relief as this Honourable Court deems just.

[20] The action was ultimately certified as a class proceeding with ten Common Questions (*John Doe v Canada*, 2022 FC 587 [*John Doe 2022*]).

D. *Class Members and Representative Plaintiffs*

[21] The Class Members are defined as:

> All persons who were sent a letter from Health Canada in November 2013 that had the phrase Marihuana Medical Access Program or Programme d'Accès à la Marihuana à des Fins Médicales visible on the front of the envelope.

[22] There are three representative plaintiffs. The two anonymous representative Plaintiffs, John Doe and Suzie Jones, provided affidavits in 2014 at the time certification was sought. Penny Kozmenski is the named Plaintiff, as required by the Federal Court of Appeal in *Canada v John Doe*, 2016 FCA 191 [*John Doe FCA 2016*]). Ms. Kozmenski swore her affidavit in November 2016 when she was added as a named representative Plaintiff. No additional or more recent affidavits from the representative Plaintiffs have been provided.

[23] John Doe attested that he lives in a rural area and is employed in the health care field. He attested to suffering from spinal cord disease and arthritis. Health Canada granted him authorization to possess and produce marihuana for his personal use. He attested that he had only informed three people of his participation in the MMAP, that he only consumed marihuana in his home in private and that he kept his medical conditions private. He expressed concern that if his use of medical marihuana was discovered, his employer would reprimand him and his professional regulatory body would question his competence, even though his use of marihuana did not affect his abilities. Mr. Doe also asserted that he would be targeted for home invasion. He stated that the receipt of the November 2013 mail out caused him "considerable stress and anxiety" and that he was "dumbfounded" when he saw the envelope.

[24] Suzie Jones attested that she lived in a larger city at the time of the mail-out and was working as a paralegal. She attested to suffering from endometriosis and chronic pain. Health Canada granted her authorization to possess marihuana for her personal use. She attested that her medical condition was well known by her friends and family, and several knew of her participation in the MMAP. She expressed the same concerns as Mr. Doe about possible reprimands from her employer and her professional regulatory body and about home invasion. Ms. Jones also attested that she experienced "considerable stress and anxiety" and was "dumbfounded" upon receipt of the envelope.

[25] Ms. Kozmenski attested that she lived in Windsor, Ontario and, at the time of the mail-out was employed as a personal support worker. She attested to suffering from pain from herniated and bulging discs in her back, arthritis in her shoulders and hips, and fibromyalgia. Health Canada granted her authorization to possess and produce marihuana for her personal use. Ms. Kozmenski attested that she only disclosed her MMAP participation to 12 people. She noted that her then 16 year-old daughter retrieved the mail-out and, as a result, she had to explain her condition and marihuana use to her daughter and her then 7-year-old son. Ms. Kozmenski attested that she suffered "considerable stress and anxiety", was "dumbfounded" upon receipt of the envelope, and feared for her safety. Ms. Kozmenski ultimately decided to move two years after receiving the envelope. Ms. Kozmenski also attested that she joined the Cannabis Rights Coalition and the Cannabis in Canada group in 2014.

E. *Certification Proceedings*

[26] The procedural history of this class action since 2013 is summarized briefly below.

[27] In the context of the Plaintiffs' motion for certification, the Defendant sought to strike three paragraphs from the affidavit of the Plaintiffs' affiant, Mr. David Robins [the Robins' affidavit], which had been tendered to support certification. In *John Doe v Her Majesty The Queen*, 2015 FC 236 [*John Doe 2015*], Justice Rennie dismissed the Defendant's motion. The paragraphs at issue summarized information provided by a "self-selected and unidentified group of potential class members" in response to a questionnaire. The information included responses about the impact of the mail-out (for example, concerns about reputation, employment, security, and stress).

[28] Justice Rennie found that the paragraphs at issue were not impermissible hearsay given that the affidavit was tendered only to support certification and not to address the merits of the claim, noting at para 8: "[t]he evidence is not being tendered to establish that putative class members *have* suffered damages, but that the individuals claiming to be class members *allege* that they suffered damages" [emphasis in original]. Justice Rennie concluded that the evidence was not hearsay given its purpose (at paras 11, 13).

[29] In *John Doe v Canada*, 2015 FC 916, Justice Phelan found that the Plaintiffs' claims could proceed as a class proceeding, noting, at para 51, that "the common issues will move the litigation forward". The Court certified the common questions proposed by the Plaintiffs alleging six different torts – breach of contract, breach of warranty, negligence, breach of confidence, intrusion upon seclusion, publicity to public life, and breach of the reasonable expectation of privacy under the *Charter* – noting, at para 65, that some refinement to the common questions might be needed.

[30] In *John Doe FCA 2016*, the Federal Court of Appeal granted the Defendant's appeal in part and struck several causes of action, leaving only the causes of action in negligence and breach of confidence.

[31] In *Canada v John Doe*, 2019 FCA 8, the Federal Court of Appeal dismissed the Defendant's appeal of the certification of the common question regarding aggregate damages. The Court of Appeal noted, at para 1, that it had previously determined the appeal of the certification order (*John Doe FCA 2016*) and found that "the portion of the certification order dealing with the aggregate assessment of damages as a common question" was a final decision. The Federal Court of Appeal added, at para 3, that it remained open to the Defendant to make the same arguments regarding the propriety of an aggregate assessment of damages in respect of the causes of actions remaining at the trial of the common issues.

F. *The Common Questions*

[32] In *John Doe 2022*, Justice Phelan certified the class action, defined the Class Members, set out the nature of the claims (negligence and breach of confidence), and identified ten Common Questions:

1. Did Health Canada owe the Class Members a duty of care in its collection, use, retention and disclosure of the Personal Information?

2. If yes, did Health Canada breach that duty of care when it sent the Envelope?

3. Did the Class Members communicate the Personal Information to Health Canada?

4. If yes, did Health Canada misuse the Personal Information in its collection, use, retention or disclosure of the Personal Information?

5. If yes, was such misuse of the Personal Information to the detriment of the Class Members?

6. If yes, did Health Canada breach the confidence of the Class Members in its collection, retention or disclosure of the Personal Information?

7. Is the Defendant liable to pay damages incurred by the Class Members for the causes of action?

8. Can the Class Members' damages be assessed in the aggregate pursuant to Rule 334.28(1)?

9. Does Health Canada's conduct justify an award of punitive damages?

10. Are the Class Members entitled to pre- and post-judgment interest pursuant to the *Crown Liability and Proceedings Act*, RSC c C-50?

II. The Motion for Summary Judgment

[33] The issue on this motion is whether the Court should grant summary judgment and, if so, whether and how the common issues should be answered.

[34] Rule 215 of the *Federal Court Rules* states:

If no genuine issue for trial	**Absence de véritable question litigieuse**
215 (1) If on a motion for summary judgment the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.	215 (1) Si, par suite d'une requête en jugement sommaire, la Cour est convaincue qu'il n'existe pas de véritable question litigieuse quant à une déclaration ou à une défense, elle rend un jugement sommaire en conséquence.

Genuine issue of amount or question of law	**Somme d'argent ou point de droit**
(2) If the Court is satisfied that the only genuine issue is	(2) Si la Cour est convaincue que la seule véritable question litigieuse est :
…	…
(b) a question of law, the Court may determine the question and grant summary judgment accordingly.	b) un point de droit, elle peut statuer sur celui-ci et rendre un jugement sommaire en conséquence.
Powers of Court	**Pouvoirs de la Cour**
(3) If the Court is satisfied that there is a genuine issue of fact or law for trial with respect to a claim or a defence, the Court may	(3) Si la Cour est convaincue qu'il existe une véritable question de fait ou de droit litigieuse à l'égard d'une déclaration ou d'une défense, elle peut :
(a) nevertheless determine that issue by way of summary trial and make any order necessary for the conduct of the summary trial; or	a) néanmoins trancher cette question par voie de procès sommaire et rendre toute ordonnance nécessaire pour le déroulement de ce procès;
(b) dismiss the motion in whole or in part and order that the action, or the issues in the action not disposed of by summary judgment, proceed to trial or that the action be conducted as a specially managed proceeding.	b) rejeter la requête en tout ou en partie et ordonner que l'action ou toute question litigieuse non tranchée par jugement sommaire soit instruite ou que l'action se poursuive à titre d'instance à gestion spéciale.

[35] Rule 215, like all of the Rules, must be interpreted in light of Rule 3, which guides the Court to "secure the just, most expeditious and least expensive outcome of every proceeding" and to consider the principle of proportionality, including the complexity and importance of the issues.

[36] As the Supreme Court explained in *Hryniak v Mauldin*, 2014 SCC 7 [*Hryniak*], motions for summary judgment are an important means to avoid the time and expense associated with a full trial in appropriate cases, thereby conserving judicial resources and promoting access to justice. In *Hryniak*, the Supreme Court of Canada stated, at paras 49-50:

> There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.

[37] In *Milano Pizza Ltd v 6034799 Canada Inc*, 2018 FC 1112 [*Milano Pizza*], Justice Mactavish summarized the law regarding motions for summary judgment as they apply in this Court. Justice Mactavish explained the notion of a "genuine issue for trial", the test on a motion for summary judgment, the onus on the respective parties, and other key principles at paras 31, 33–36, and 40. The principles, which have been reiterated in many subsequent cases, are not in dispute. The principles include that:

- the onus is on the party seeking summary judgment to establish that there is no genuine issue for trial;
- all parties, including the responding party, must "put their best foot forward";
- responses to motions for summary judgment cannot be based upon what might be adduced as evidence at a later stage in the proceeding;
- the record before the motions judge must permit the judge to find the facts necessary to resolve the dispute;
- summary judgment should not be granted where the necessary facts cannot be found, or where it would be unjust to do so; and,
- judges should proceed cautiously because granting summary judgment will preclude a party from presenting evidence at trial.

[38] More recently, the Federal Court of Appeal reiterated these principles in *Saskatchewan (Attorney General) v Witchekan Lake First Nation*, 2023 FCA 105 at para 22 [*Witchekan*].

[39] On their motion for summary judgment, the Plaintiffs bear the high burden of demonstrating that there is no genuine issue for trial (Rule 215(1); *Witchekan* at para 23*; Milano Pizza* at para 34; *CanMar Foods Ltd v TA Foods Ltd*, 2021 FCA 7 at para 27 [*CanMar Foods*]). Although the Defendant agrees that there is no genuine issue for trial, both parties must still put their "best foot forward" to permit the Court to address the issues on this motion.

III. Overview of the Position of the Parties

A. *The Plaintiffs' Position*

[40] The Plaintiffs submit that the evidence is not in dispute and that all Certified Questions should be answered in their favour. The Plaintiffs argue that Health Canada was negligent; it breached the duty of care it owed to Class Members to protect their personal information from disclosure without their consent. The Plaintiffs submit that liability and damages for negligence are not common questions and they do not need to establish damages at this stage, rather, damages for negligence can be assessed on an individual basis at individual issues trials or assessments. The Plaintiffs note that not all Class Members are likely to establish damages for negligence. The Plaintiffs also argue that Health Canada breached their confidence.

[41] The Plaintiffs argue that privacy rights require protection and that the common law tort of breach of confidence should evolve to protect privacy in an analogous manner as the statutory

tort of breach of privacy that exists in some provincial legislation, and in line with recent developments in the UK and jurisprudence related to the *Charter of Rights and Freedoms*, subsection 6(1), Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*]. The Plaintiffs submit that the misuse of confidential information need not be intentional, and that there is no need for them to show class-wide detriment because the breach, on its own, is detrimental. They argue that remedies for breach of confidence are flexible given their equitable foundation and justify an award of aggregate damages and therefore, that they do not need to show proof of actual harm.

[42] The Plaintiffs alternatively submit that if the actual harm to Class Members must be established, there is sufficient evidence on the record to show class wide harm.

B. *The Defendant's Position*

[43] The Defendant agrees that there is no genuine issue for trial and that the common issues can be answered on this motion for summary judgment in favour of the Defendant.

[44] The Defendant submits that Health Canada did not breach any duty of care owed to Class Members. The Defendant adds that the Plaintiffs have not provided evidence of compensable harm or damages caused by the Defendant, which are elements of the cause of action in negligence.

[45] The Defendant also submits that the Plaintiffs have not met the test for breach of confidence, which requires intentional misuse of confidential information to the detriment of the Plaintiffs.

[46] The Defendant submits that the common law tort of breach of confidence cannot be expanded to mimic the statutory torts for breach of privacy that exist in some provinces, as suggested by the Plaintiffs.

[47] The Defendant submits that the certified common questions frame the claim and this motion for summary judgment. The Defendant submits that Questions 7 and 8 require a finding of liability for both negligence and breach of confidence and that the determination of liability cannot be left to individual issues trials or assessments as the Plaintiffs now argue. The Court cannot answer whether the Defendant should pay damages in negligence or breach of confidence unless the Court finds—as a common issue—that the Defendant is liable.

IV. Preliminary Issues

[48] The Plaintiffs sought to file written reply evidence to address issues raised by the Defendant that the Plaintiff characterises as "new". First, to reply to the Defendant's submission that the Plaintiffs must meet the test in *Anns v Merton London Borough Council* (1977), [1978] AC 728 (HL) (adopted in *Cooper v Hobart*, 2001 SCC 79), known as the *Anns/Cooper* test, to establish a new duty of care. Second, to reply to the Defendant's submission that the Plaintiffs must establish both causation and liability for negligence and actual detriment for breach of confidence.

[49] The Defendant opposed the filing of the Plaintiffs' written reply, noting that the *Rules* do not provide for a reply except in special circumstances, and no special circumstances have been established. The Defendant noted that the common law tests for negligence and breach of confidence are not new issues, and the Common Questions frame the motion for summary judgment. The Defendant, however, did not oppose the Plaintiffs' submission of additional authorities.

[50] The Court declined to accept the written reply submissions of the Plaintiffs. The Court noted that the Plaintiffs' brought this motion and must put their best foot forward to address the Common Questions and establish their claims of negligence and breach of confidence. The Court agreed that the Defendant's submissions did not raise new issues. The Court permitted the Plaintiffs ample time for oral reply and to provide the Court with the additional authorities the Plaintiffs relied upon.

[51] With respect to the Plaintiffs' position that the Defendant's submission that the Motion for Summary Judgment be granted in the Defendant's favour amounts to a cross-motion, to which the Plaintiffs had no opportunity to respond, the Court finds that the jurisprudence has established that a cross-motion is not required (*Milano Pizza* at paras 111-112).

V. Negligence

[52] The common questions are:

1. Did Health Canada owe the Class Members a duty of care in its collection, use, retention and disclosure of the Personal Information?
2. If yes, did Health Canada breach that duty of care when it sent the Envelope?

A. *The Plaintiffs' Submissions*

[53] The Plaintiffs note that the test for negligence established in *Mustapha v Culligan Canada Ltd*, 2008 SCC 27, at para 3, [*Mustapha*], requires that they demonstrate that: the Defendant owed them a duty of care; the Defendant's behaviour breached the duty of care; the Plaintiffs sustained damage; and the damage was caused, in fact and in law, by the breach.

[54] The Plaintiffs submit that Health Canada had a duty to protect their personal information. The Plaintiffs rely on the *Privacy Act*, the OPC Report, and Health Canada's 2012 Privacy Risk Mitigation Strategy [2012 PRMSR].

[55] The Plaintiffs submit that Health Canada is subject to the *Privacy Act*, which establishes a statutory duty of care under subsection 8(1). They note that the definition of personal privacy in the *Privacy Act* refers to information about an identifiable individual that is recorded in any form and includes "information relating to medical history". They submit that the name and address on the envelope is a record of their personal information.

[56] The Plaintiffs note that the Privacy Commissioner found that the reference to the MMAP, along with the Class Members' name and address, constitutes personal information under the *Privacy Act*.

[57] The Plaintiffs also point to Health Canada's April 2012 PRMSR, which acknowledges that the MMAP is subject to "the tenets of the *Privacy Act*" and based on universally recognized privacy principles. The Plaintiffs submit that the 2012 PRMSR shows that Health Canada was

aware of the risks arising from breaches of privacy, including the risks associated with sending MMAP information to the wrong person or associating MMAP with the wrong person.

[58] In response to the Defendant's submissions, the Plaintiffs now argue that a novel duty of care should be recognized if the duty does not already exist. The Plaintiffs submit that the application of the *Anns/Cooper* test supports finding a novel duty of care.

[59] The Plaintiffs submit that they were in a relationship of proximity with Health Canada, the risks arising from disclosure of their information were foreseeable, and that there are no policy reasons to negate the duty of care.

[60] The Plaintiffs note that there was continuous communication between Health Canada and MMAP participants, the participants provided the required information, and they were vulnerable due to "debilitating medical conditions". Health Canada held a great deal of personal medical information about the Plaintiffs, and the risks of disclosure of that information were foreseeable.

[61] The Plaintiffs dispute that there are policy reasons to negate the duty of care. They note that the Class Members are a finite group, marihuana is now legal and Health Canada will not be exposed to indeterminate liability.

[62] The Plaintiffs submit that Health Canada breached the duty of care by: failing to meet its statutory duties and its own established policies for the collection, retention, security, and disclosure of personal information of Class Members; failing to establish effective policies to

manage personal information; failing to take reasonable steps to prevent disclosure of personal information; failing to keep personal information secure and confidential; and, for posting non-mailable matters.

[63] The Plaintiffs submit that the 2012 PRMSR shows that Health Canada knew that a breach of its duty of care would cause damage to the Class Members. The Plaintiffs also note that Health Canada's letter advised participants that the changes to the program were necessitated by the "risk of violent home invasion and diversion [of marihuana] to the black market". The Plaintiffs submit that Health Canada's negligence in the mass mail-out perpetuated these same risks.

[64] The Plaintiffs dispute that the use of windowed envelopes was an inadvertent error, noting that Health Canada approved the use of the windowed envelopes with the return address and the Deputy Minister stated that this was not standard practice.

[65] The Plaintiffs submit that the Health Canada's mass mail-out disclosed the Class Members' personal information without their consent, caused them distress, humiliation, anguish, anxiety, fear, and uncertainty as a result of their loss of control over their personal information.

[66] The Plaintiffs note that Common Question 7 asks whether the Defendant is liable to pay damages for the causes of action. The Plaintiffs submit that Health Canada's liability for damages flows from the breach of the duty of care. The Plaintiffs assert that the Court should

order individual trials or assessments to determine the damage awards for negligence for Class Members, as contemplated in the Litigation Plan.

[67] In response to the Defendant's submission that the Plaintiffs must show damages for negligence now, the Plaintiffs note that Common Questions 1 and 2 ask only whether there was a duty and whether it was breached. The Plaintiffs submit that there is no need to establish liability and damages as a common issue and that this would be assessed at individual issues trials. As an example, the Plaintiffs point to *Rumley v British Columbia*, 2001 SCC 69 at para 36 [*Rumley*], where the Supreme Court of Canada noted that injury and causation arising from alleged systemic negligence should be litigated at individual trials. They also point to *Pioneer Corp v Godfrey*, 2019 SCC 42 at para 120 [*Pioneer*], where the Supreme Court of Canada noted several possibilities to determine which class member suffered losses after liability had been determined.

[68] The Plaintiffs acknowledge that at the individual issues trials or assessments, some Class Members may succeed in demonstrating compensable damages and others not.

[69] Alternatively, the Plaintiffs argue that if evidence of class-wide harm is required to show damages for negligence, there is such evidence on the record. The Plaintiffs rely on: the OPC Report, which sets out a summary of complaints; the Robins' affidavit, provided by the Plaintiffs' at the motion for certification in 2014, which sets out a summary of responses to the survey by class counsel; and Health Canada's receipt of complaints following the mail-out. The Plaintiffs also rely on their expert reports, which opined that there was widespread stigma associated with the use of medical marihuana prior to legalization and, to some extent, following legalization.

[70] The Plaintiffs also rely on the affidavits of the three representative plaintiffs, who described their damages as stress, anxiety, and feeling dumfounded.

[71] In response to the Court's question about why no additional or more recent affidavits from the MMAP participants had been filed, the Plaintiffs responded that these were not necessary to address Common Questions 1 and 2, and that if the Court requires evidence of damages, the Court can make an order for special proof or modes of proof.

[72] With respect to damages sought, the Plaintiffs acknowledge that their Notice of Application did not seek damages for the three representative Plaintiffs, but that they sought this relief in their Memorandum of Fact and Law for this Motion. However, the Plaintiffs now submit that the three representatives' claims should be determined at a summary trial or individual assessment. The Plaintiffs also acknowledge that the affidavits of John Doe and Suzie Jones do not support damages for negligence; however, the affidavit of Ms. Kozmenski may do so.

B. *The Defendant's Submissions*

[73] The Defendant submits that the Plaintiffs have failed to establish that Health Canada owed them a duty of care, breached the duty of care, or that they suffered damages caused by the breach of any duty of care. As a result, the Defendant is not liable for negligence.

[74] The Defendant submits that a breach of the *Privacy Act* (which is denied) does not give rise to a cause of action. The Defendant notes that there is no statutory duty of care and no remedy set out in the *Privacy Act* for a breach; which reflects an intentional choice by

Parliament. The remedy under the *Privacy Act* is an investigation and report conducted by the Privacy Commissioner.

[75] The Defendant further submits that there is no recognized common law duty of care owed by the Crown with respect to protection of personal information under the *Privacy Act*.

[76] The Defendant submits that any proposed novel duty of care now advanced by the Plaintiffs would fail the *Anns/Cooper* test because the alleged harm is not reasonably foreseeable and residual policy concerns negate finding of a duty of care.

[77] The Defendant submits that there was no known or reasonably foreseeable harm because: the mail-out was delivered in accordance with the *Canada Post Corporation Act*, RSC 1985, c C-10 and accompanying regulations; the mail-out did not disclose anything about a Class Member's medical condition; it was not reasonably foreseeable that other persons in a Class Members' household would not know about their participation in the MMAP; and, envelopes with similar information had previously been sent to the Class Members.

[78] The Defendant argues that even if the Plaintiffs could prove that harm was reasonably foreseeable, residual policy concerns negate finding a duty of care because such a duty would expose the government to "virtually unlimited" private claims given that it retains a great deal of personal information.

[79] The Defendant further argues that the Plaintiffs have not established any breach of the alleged standard of care. The Defendant submits that Health Canada exercised "the standard of

care that would be expected of an ordinary, reasonable and prudent person in the same circumstances" (citing *Ryan v Victoria*, [1999] 1 SCR 201 at para 28). The Defendant argues that the Plaintiffs mischaracterize the 2012 PRMSR; it does not acknowledge any breach of a standard of care, but rather, demonstrates Health Canada's due diligence to ensure compliance with the *Privacy Act*.

[80] The Defendant disputes the Plaintiffs' submission that the disclosure (i.e., the mail-out) caused harm because a third party who saw the envelope would have discovered the Class Member's participation in MMAP. The Defendant notes that the mail out was necessary to inform participants of important changes to the MMAP; it was not foreseeable that the participants would be harmed; and, the gravity of the alleged harm has not been established.

[81] The Defendant notes that Common Question 7 requires that the Plaintiffs establish liability and damages. The Defendant notes that in the Plaintiffs' Motion for Summary Judgment, they seek a determination of the Common Questions to be followed by individual assessments. However, the Plaintiffs now argue that the Defendants should be held liable as a common issue, with individual assessments for damages to follow. The Defendant submits that this suggests a finding of liability without first finding causation and damages as a common issue.

[82] The Defendant points to *Nelson (City) v Marchi*, 2021 SCC 41 at para 96 [*Nelson*]:

> [96] It is well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss. The causation analysis involves two distinct inquiries (*Mustapha*, at para. 11; *Saadati v. Moorhead*, 2017 SCC 28, [2017] 1 S.C.R. 543,

> at para. 13; *Livent*, at para. 77; A.M. Linden et al., *Canadian Tort Law* (11th ed. 2018), at p. 309-10). First, the defendant's breach must be the factual cause of the plaintiff's loss. Factual causation is generally assessed using the "but for" test (*Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at paras. 8 and 13; *Resurfice Corp. v. Hanke*, 2007 SCC 7, [2007] 1 S.C.R. 333, at paras. 21-22). The plaintiff must show on a balance of probabilities that the harm would not have occurred but for the defendant's negligent act.

[83] The Defendant notes that the Plaintiffs' current position also differs from their position on their motion for certification, where the Plaintiffs proposed that liability be determined as a common issue and the common issues were framed accordingly. The Defendant submits that the Plaintiffs have not provided any evidence of damages on this motion and, as a result, Question 7 must be answered in the negative. The Defendant notes that the jurisprudence relied on by the Plaintiffs to support their request for individual assessments (*Rumley*, *Pioneer*) set out the common questions in a different manner.

[84] The Defendant argues that the certified questions are binding on both parties. The Plaintiffs have the onus to establish causation and damages in order to establish liability, and have failed to do so.

[85] The Defendant notes that a successful claim in negligence requires that the Court be satisfied, on a balance of probabilities, that each element of the cause of action is established for each Class Member. The Defendant submits that the Plaintiffs have failed to establish all four elements of a successful negligence action (i.e., existence of a duty of care, breach of the duty of care owed in the circumstances, and that the Plaintiffs suffered damages that were a result of the breach of the duty of care owed to them). The Defendant points to *Bou Malhab v Diffusion*

Métromédia CMR inc, 2011 SCC 9 at para 53, where the Supreme Court of Canada found that "the possibility of ordering individual recovery of damages does not relieve the plaintiff of the burden of first proving that each member of the group sustained personal injury".

C. *Health Canada owed a duty of care to Class Members and breached the duty of care owed in the circumstances*

[86] As the Defendant notes, there is no statutory cause of action for breach of the federal *Privacy Act* as there is in some provinces (e.g., British Columbia, Saskatchewan, Manitoba, and Newfoundland and Labrador). In the absence of a statutory tort, the common law must be relied on (*The Queen (Can) v Saskatchewan Wheat Pool*, 1983 CanLII 21 (SCC) at 211 [*Saskatchewan Wheat Pool*]); in this case, the common law tort of negligence.

[87] The breach of a statutory duty does not automatically establish negligence (*Holland v Saskatchewan*, 2008 SCC 42 at para 9). However, as the Defendant acknowledges, the breach of a statutory duty may be a consideration and provide some evidence of negligence (*Apotex Inc v Syntex Pharmaceuticals International Ltd (FCA)*, 2005 FCA 424 at para 10; *Odhavji Estate v. Woodhouse*, 2003 SCC 69 at para 31).

[88] There is no recognized common law duty of care owed by the Crown with respect to personal information in accordance with the *Privacy Act*. Whether a novel duty of care should be found is informed by the application of the *Anns/Cooper* test. The test was recently restated in *Nelson* at paras 17-18:

> Under the first stage, the court asks whether the harm was a reasonably foreseeable consequence of the defendant's conduct, and whether there is "a relationship of proximity in which the

> failure to take reasonable care might foreseeably cause loss or harm to the plaintiff" (*Rankin's Garage*, at para. 18). Proximity arises in those relationships where the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law upon the defendant" (*Cooper*, at paras. 32 and 34).
>
> If there is sufficient proximity to ground a *prima facie* duty of care, it is necessary to proceed to the second stage of the *Anns/Cooper* test, which asks whether there are residual policy concerns outside the parties' relationship that should negate the *prima facie* duty of care (*Cooper*, at para. 30).
>
> [Emphasis added]

[89] In *Cain v Canada (Health),* 2023 FC 55 [*Cain*], Health Canada sought to protect similar information from disclosure pursuant to the *Access to Information Act*, RSC 1985, c A-1. In *Cain*, Health Canada took the position that this was "highly personal" information that might reveal that an individual uses or produces medical marihuana and that this information should be protected. Health Canada's position suggests that it was in a proximate relationship with those who provided information for the purpose of obtaining authorizations to use and/or produce marihuana and had a responsibility to protect the "highly personal" information.

[90] Although the context is different, it is inconsistent for Health Canada to now take the position that the mail-out, which revealed the name of a MMAP participant and associated them with the MMAP, did not disclose highly personal information that required protection. Although the association between the recipient's name and MMAP did not reveal further details of their medical condition or other personal information, the logical inference is that the recipient was involved in the MMAP, which would lead to other logical inferences about their use of marihuana (even though some recipients were only authorized to grow marihuana).

[91] The Court finds that each MMAP participant was in a relationship of proximity with Health Canada. To participate in the MMAP, the vast majority of participants had to disclose personal information describing that they had one or more of the health conditions identified in the *Regulations*. The forms that participants submitted included their contact information, which was either direct and exclusive contact, or contact through their appointed representative.

[92] The harm from disclosing the association between the participants and MMAP was foreseeable. In the November 2013 letter, Health Canada noted that *"[t]he current practice of allowing individuals to grow marijuana for medical purposes poses risks to the safety and security of Canadians. The high value of marijuana on the illegal market increases the risks of violent home invasion and diversion to the black market.*"

[93] The Deputy Minister's statement acknowledged that "[the] protection of personal information is of fundamental importance to Health Canada".

[94] In addition, in *Cain*, Justice Pentney agreed with the position taken by Health Canada regarding the need to protect personal information and found at paras 107-108:

> Government agencies hold all sorts of information about individuals, and while all information that qualifies as "personal" under the statutory definition merits protection, it must be acknowledged that the disclosure of some particularly sensitive types of personal information can be expected to have particularly devastating consequences. Information about an individual's medical condition(s) must rank very high on any such list: it is among the most intimate information any of us possess, and the decision of whether or when to share it, and how much to disclose, can be a gut-wrenching choice, with significant consequences for the individual, their family, and friends.

> … Health Canada was under an obligation to try to prevent the disclosure of every individual's personal information. Even though it held thousands of records, the obligation was towards each individual.
>
> [Emphasis added]

[95] The 2012 PRMSR also supports finding that the risks associated with the disclosure of personal information related to the MMAP were foreseeable. The PRMSR acknowledged that the MMAP "experienced a significant number of privacy breaches" regarding participants' personal information (including those caused by administrative error). While the nature of the breaches described in the PRMSR differed from the mail-out, it shows that Health Canada was aware of potential harms and was taking action to avoid further incidents.

[96] The Court finds that, based on the particular circumstances (i.e., that participants in the MMAP in 2013 were required to and had provided personal information in order to be authorized to use or grow marihuana and that Health Canada communicated with MMAP participants regularly, coupled with the 2012 PRMSR and the Deputy Minister's statement), a relationship of proximity existed. As a result, the Court finds that Health Canada owed the Class Members a duty of care to protect their personal information.

[97] The Court does not agree with the Defendant that there are broader policy considerations negating finding the duty of care. The Court is not persuaded that recognizing a duty of care in this instance will lead to "unlimited exposure" to claims of a breach of privacy. This novel duty of care is related only to these particular circumstances; i.e., Health Canada required participants to provide personal medical information to establish their eligibility for the MMAP as it existed before the changes made in 2014, stored that information, and conveyed to participants through

an application form that it would communicate only with the participant or their appointed representative. Finding this duty of care will not expose Health Canada to claims other than from the Class Members.

[98] The Court finds that Common Question 1 is answered in the affirmative. Health Canada owed Class Members a duty of care.

[99] The Court also finds that Common Question 2 is answered in the affirmative. Health Canada breached the duty of care owed to Class Members when it sent the mail-out.

[100] This finding is based on Health Canada's obligations under the *Privacy Act*, the 2012 PRMSR, and by the fact that Health Canada had reviewed and approved the details of the mail-out before it was sent.

[101] Health Canada had several opportunities to review and check the details of the mail-out, including the inclusion of MMAP in the return address (which was a departure from previous practice) and the use of the banner page with both the return address and the participants name and address showing through the windowed envelope. Given that Health Canada had previously not indicated "MMAP" in the return address and had developed the PRMSR to identify and mitigate various privacy breaches, it should have been alert to the need to protect the use of the names of participants in association with the MMAP. A reasonable and prudent person in the same circumstances would likely have taken greater precautions to ensure that the mail-out was consistent with Health Canada's obligation to protect the participants' privacy before approving

the use of the windowed envelopes. As noted above, Health Canada was aware of its obligation to protect the personal information of MMAP participants.

[102] Answering Common Questions 1 and 2 in favour of the Plaintiffs is not a finding that the Defendant is liable for negligence; rather, it establishes only that in the present circumstances there was a duty of care and the duty was breached.

[103] To establish liability for negligence, in accordance with Common Question 7, a Class Member must prove that they suffered actual damages that were caused by the breach of the duty of care.

VI. Breach of Confidence

A. *The Plaintiffs' Submissions*

[104] The Plaintiffs submit that Common Questions 3, 4, 5 and 6 should be answered in the affirmative.

[105] The Plaintiffs argue that the tort of breach of confidence should be expanded to recognize the importance of protecting informational privacy and that any breach of informational privacy should be actionable *per se* without proof of actual loss. The Plaintiffs rely on *Charter* jurisprudence, jurisprudence on the statutory torts of breach of privacy, and on the common law tort of intrusion on seclusion.

[106] The Plaintiffs cite passages from several cases in support of their position that the tort of breach of confidence is evolving. They submit that privacy is a hallowed *Charter* value and *Charter* jurisprudence (such as *R v Spencer*, 2014 SCC 43 [*Spencer*]) should inform the development of the common law.

[107] The Plaintiffs also argue that if the common law tort is not expanded as they propose, they have nonetheless satisfied the three-part test for breach of confidence established in *Lac Minerals Ltd v International Corona Resources Ltd*, 1989 CanLII 34 (SCC) [*Lac Minerals*]. They submit that the evidence on the record is sufficient to show class-wide detriment.

[108] The Plaintiffs submit that they have met the *Lac Minerals* test; the Class Members conveyed confidential information to Health Canada; the information was conveyed by the Class Members in confidence; and Health Canada misused the information to the Class Members' detriment.

[109] The Plaintiffs rely on a report by their expert, John Wunderlich, and on the OPC's findings to establish that they conveyed confidential information to Health Canada in confidence.

[110] The Plaintiffs point to *Cain*, at paras 103 and 107, regarding the confidential nature of their information. The Plaintiffs submit that the information Health Canada sought to protect in *Cain* is the same information disclosed in the mass mail-out that Health Canada now disputes is a breach of confidence.

[111] The Plaintiffs also rely on *Ari v Insurance Corporation of British Columbia*, 2022 BCSC 1475 [*Ari*], at paras 38-40, where the British Columbia Supreme Court adopted the Supreme Court of Canada's description of the scope of informational privacy in *Spencer*. In *Ari*, the British Columbia Supreme Court found that the right to privacy extends to residential addresses and that a person should have control over the dissemination of that information (at paras 33, 44-46).

[112] The Plaintiffs argue that any use of confidential information other than its permitted use is a breach of confidence. The Plaintiffs note that Class Members did not authorize the disclosure of their personal information or its use for any purpose other than obtaining the requisite licence to grow and/or possess and use marihuana to treat their medical condition. They allege that Health Canada's rush to send out the information about the changes to the MMAP resulted in trading "confidence for expediency", resulting in misuse of confidential information.

[113] The Plaintiffs submit that the Deputy Minister's statement is an acknowledgment of Health Canada's misuse and establishes the breach of confidence. The Plaintiffs dispute that Health Canada's mail-out was an "administrative error", noting that Health Canada approved the misuse of their information.

[114] The Plaintiffs seek to distinguish *Tucci v Peoples Trust Company*, 2020 BCCA 246 at para 113 [*Tucci*] and argue that the British Columbia Court of Appeal's [BCCA] finding—that breach of confidence requires that the misuse of information be intentional—was based on the facts of that case, which involved a privacy breach by a third party. The Plaintiffs suggest that *Tucci* is the only case that states that misuse must be intentional.

[115] The Plaintiffs submit that because the MMAP participants shared information in confidence and Health Canada misused their information, the misuse constitutes common detriment. The Plaintiffs argue that the information was used for an unauthorized purpose without their consent. The Plaintiffs submit that the disclosure of their confidential information meets all the elements for breach of confidence—including detriment—and is actionable *per se* without demonstrating actual proof of loss.

[116] The Plaintiffs submit that it does not matter whether anyone other than the MMAP participant saw the letter; they were "outed" by the mail-out and this is sufficient to constitute detriment, if detriment must be shown.

[117] The Plaintiffs further submit that the Court can grant a wider range of common law and equitable remedies to address a breach of confidence, which permits awarding damages simply for the breach without establishing proof of loss. The Plaintiffs rely on *Lac Minerals* to argue that there is greater remedial flexibility for a breach of confidence given its origins in both equity and common law.

[118] Plaintiffs note that Canadian and international jurisprudence recognize that the concept of detriment is broad and includes emotional or psychological distress (for example, *The Catalyst Capital Group Inc v VimpelCom Ltd*, 2019 ONCA 354, at para 41 [*Catalyst Capital Group*]; *Lysko v Braley*, 2006 CanLII 11846 (ONCA) at paras 18, 20 [*Lysko*]; *Cadbury Schweppes Inc v FBI Foods Ltd*, 1994 CanLII 360 (BCSC), at paras 52-53, 64 [*Cadbury Schweppes*]; *Coco v AN Clark (Engineers) Ltd*, [1969] RPC 41 [*Coco*]; *Attorney General v Guardian Newspapers Ltd (No 2)*, [1988] UKHL 6 (BaiLII) [*Guardian Newspapers*]).

[119] The Plaintiffs submit that in *Lysko*, the Ontario Court of Appeal acknowledged that disclosure could cause detriment (at para 18), and in *Cadbury Schweppes Inc v FBI Foods Ltd*, 1999 CanLII 705 (SCC) [*Cadbury Schweppes SCC*], the Supreme Court of Canada acknowledged that the disclosure of information on its own might be sufficient (at para 53).

[120] The Plaintiffs also rely on several UK cases, including *Sicri v Associated Newspapers Ltd*, [2020] EWHC 3541 (QB), where the court found that "an award may also be made for the commission of the wrong itself, in so far as it impacts on the values protected by the right, provided that the purpose of such an award is compensatory, rather than having deterrent or vindicatory in nature [*sic*]. Such compensation in [*sic*] reflects the loss or diminution of a right to control private information" (at para 138). The Plaintiffs point to *Guardian Newspapers* in support of their argument that it is in the public interest to compensate a breach of personal privacy and confidence even in absence of detriment.

[121] The Plaintiffs acknowledge that there is no Canadian jurisprudence that clearly supports the expansion of the tort of breach of confidence, but submit that this Court should take the initiative to expand the tort to recognize the importance of privacy. The Plaintiffs weave together passages from *Lac Minerals*, *Cadbury Schweppes*, *Jones v Tsige*, 2012 ONCA 32 [*Jones*], *Ari*, and other cases, in support of expanding the tort, including to provide a remedy for breach of confidence without proof of loss. The Plaintiffs submit that aggregate damages should be awarded to Class Members to recognize that their privacy was breached; there is no need for them to provide evidence to show actual loss.

[122] Alternatively, if detriment must be established, the Plaintiffs submit that the Class Members' common experience of disclosure of their personal medical information is sufficient. They add that the emotional distress described by the representative Plaintiffs also establishes common detriment. The also rely on the Robins' affidavit, the OPC Report findings, and the opinions of Dr. Joan Bottorf and Dr. Zachary Walsh regarding the stigma associated with the use of medical marihuana prior to its legalization as evidence of detriment to Class Members.

[123] The Plaintiffs submit that all Class Members should receive a baseline award of aggregate damages to recognize the class-wide detriment. They submit that if individual Class Members can demonstrate damages exceeding the baseline amount, they can seek additional damages at individual trials or assessments.

B. *The Defendant's Submissions*

[124] The Defendant submits that Questions 4, 5 and 6 should all be answered in the negative. The Defendant argues that the Plaintiffs have not established that Health Canada breached the Class Members' confidence.

[125] The Defendant submits that, in essence, the Plaintiffs are asking the Court to find that the tort of breach of confidence should be reinterpreted to fit the Plaintiffs' circumstances and to incorporate aspects of the tort of intrusion upon seclusion, even though the tort was struck from the statement of claim because they did not plead the necessary material facts.

[126] The Defendant acknowledges that the common law has evolved and may continue to evolve, but submits that the common law should not be expanded to minimise the requirements of breach of confidence. The *Lac Minerals* test for breach of confidence governs.

[127] The Defendant submits that the Plaintiffs do not meet the three-part test, which requires the intentional misuse of the information to the detriment of the confider. The Defendant agrees that the information was communicated by the Plaintiffs to Health Canada in confidence but submits that the information was not necessarily confidential and there was no misuse or intent to misuse the information. The Defendant submits that the Plaintiffs provided their addresses so that Health Canada could communicate with them via mail. Health Canada's error was inadvertent; there was no intent to betray the confidence of MMAP participants. The Defendant adds that the Plaintiffs have not proven any resulting detriment.

[128] The Defendant disputes the Plaintiffs' submission that a breach of the *Privacy Act* can establish breach of confidence. The Defendant agrees that the information at issue is the type of information included in the definition of "personal information" in the *Privacy Act*. However, the Defendant disputes that Health Canada breached the *Privacy Act*, despite the OPC's findings.

[129] The Defendant submits that the common law tort of breach of confidence is not actionable *per se*. In *Ari*, relied on by the Plaintiffs, the British Columbia Supreme Court found that the tort of breach of privacy—as provided in the provincial statute—was actionable without proof of actual damages. However, there is no statutory tort of breach of privacy pursuant to the federal *Privacy Act*. Nor is breach of confidence a statutory tort.

[130] The Defendant notes that the first element of the *Lac Minerals* test is that the information conveyed must be confidential. The Defendant submits that although this element is not identified as a common issue, it must be established.

[131] The Defendant submits that whether the information is confidential depends on the circumstances of each Class Member and cannot be determined on a class-wide basis. The Defendant agrees that personal information may be confidential information, but this is not necessarily the case. The Defendant notes that several MMAP participants identified themselves publicly in separate legal proceedings related to the mail-out, were members of public-facing advocacy groups, or corresponded with the program directly without suppressing their names. In addition, some were quite open about their use of medical marihuana. While their information may be personal, it is not necessarily confidential.

[132] The Defendant submits that without proof that there was any disclosure of confidential information to Canada Post or other household members, no breach of confidence can be established.

[133] The Defendant also submits that the receipt of the letter with the return address of the MMAP is an "unspecified association" because some participants were only authorized to grow marihuana and had not revealed any personal information about a medical condition to obtain their license (i.e., DPPL). In addition, the Defendant argues that the range of medical conditions that qualified for medical marihuana was so broad that the Class Members' medical information could not be gleaned from their receipt of the envelope.

[134] The Defendant agrees that the Class members' participation in the MMAP was communicated to Health Canada "in circumstances importing an obligation of confidence" (Question 3). However, the Defendant submits that this is not enough to establish liability for breach of confidence.

[135] The Defendant further submits that identifying the MMAP in the return address on the envelope is not misuse of the Plaintiffs confidential information. The Defendant notes that Health Canada did not make any representations about how it would communicate with participants in the MMAP, only that it would communicate either directly with them or through their appointed representative.

[136] The Defendant argues that breach of confidence requires an intentional betrayal of confidence (*Tucci* at para 113) and misuse of information requires more than inadvertence. In this case, there is no evidence that Health Canada intentionally breached the confidence of Class Members.

[137] The Defendant submits that the Plaintiff cannot rely on a gap or ambiguity in the case law to suggest that the intentional tort of breach of confidence no longer requires intentional conduct by the defendant. The Defendant submits that the jurisprudence relied on by the Plaintiffs—to suggest that the requirement for intention is not settled in the law because it was not specifically addressed in that jurisprudence—does not permit the Court to find that intention is not an element of the common law tort. The Defendant notes that in the cases cited by the Plaintiffs (e.g., *Cadbury Schweppes SCC, Lac Minerals*) the conduct at issue was intentional.

[138] The Defendant further notes that even the provincial statutory torts for breach of privacy (for example, British Columbia's *Privacy Act*, RSBC 1996, c 373 [BC Privacy Act]) require willfulness.

[139] The Defendant submits that the Plaintiffs must also demonstrate that the alleged misuse of confidential information was to the detriment of the Class Members and have not done so.

[140] The Defendant notes that detriment is both an element of the cause of action of breach of confidence and a certified question. The Defendant acknowledges that detriment can be broadly interpreted (*Cadbury Schweppes SCC*) but argues that the representative Plaintiffs' description of their shock and dumbfoundedness does not constitute detriment. The Defendant notes that in *Lysko*, the cause of action for breach of confidence was struck because the plaintiff's assertion of anguish and embarrassment was not sufficient to show detriment.

[141] The Defendant submits that the evidence of the three representative Plaintiffs, now relied upon to prove detriment, is untested, unreliable, and insufficient.

[142] The Defendant notes that they had no opportunity to cross-examine Ms. Kozmenski and that their cross-examination of John Doe and Suzie Jones was only in the context of the motion for certification. The representative Plaintiffs were not cross-examined regarding their claims of dumbfoundedness, stress, or anxiety. The Defendant notes that there is no evidence now, 10 years after the mail-out, to prove the speculative concerns of the representative Plaintiffs materialized. The Defendant suggests that the Court may infer that this is because they did not suffer damages.

[143] The Defendant further notes that John Doe and Suzie Jones did not provide any evidence that anyone other than those they had told about their marihuana use had learned about their participation in the MMAP due to the mail-out. The Defendant adds that Ms. Kozmenski did not provide evidence of any causal link between the mail-out and the subsequent events she described.

[144] With respect to the opinions of Dr. Bottorf and Dr. Walsh regarding stigma as a measure of class-wide detriment, the Defendant notes that the evidence about stigma is mixed. The Defendant submits that the Plaintiffs' assertions of mental distress, humiliation, and/or anxiety as a result of the stigma associated with marihuana use at that time would have been influenced by several contextual factors, as acknowledged by the Plaintiffs' experts on cross-examination.

[145] The Defendant also submits that the Robins' affidavit, now relied on by the Plaintiffs to show detriment, is hearsay and is unreliable to establish actual harm or detriment to Class Members.

[146] The Defendant argues that aggregate damages cannot be considered unless the Court finds that a breach of confidence resulted in detriment to the class and this has not been established. The Defendant's submissions on aggregate damages are noted below.

C. *Breach of Confidence Has Not Been Established*

[147] While Questions 3-6 do not exactly replicate the three-part test for breach of confidence established in *Lac Minerals*, the questions address the same basic requirements. Of note, Common Question 5 asks whether misuse of personal information was to the detriment of Class

Members, an element that the Plaintiffs now seek to downplay or eliminate. Question 7 asks whether aggregate damages can be awarded for breach of confidence, which signals that the Plaintiffs must establish all elements of the tort of breach of confidence.

(1) The tort of breach of confidence should not be expanded as proposed by the Plaintiffs

[148] To succeed on the claim for breach of confidence, the Plaintiffs must meet the *Lac Minerals* test. The Court does not agree with the Plaintiffs that the common law tort can or should be expanded as they propose, as this would result in a new tort for privacy claims with lower thresholds than the tort of intrusion upon seclusion and the statutory torts that exist in some provinces.

[149] The Plaintiffs rely on *Jones* in support of their submission that the common law has evolved. They argue that, by analogy, the common law should continue to evolve to recognize the tort of breach of confidence without requiring proof of detriment and to recognize that breach of confidence should be actionable *per se.*

[150] In *Jones*, the issue was whether Ontario law recognized a civil action for invasion of privacy. The Ontario Court of Appeal [ONCA] noted at para 15 that this issue had been debated for 120 years and that other causes of action, including breach of confidence had previously been relied on.

[151] The ONCA reviewed the literature, relevant statutes (including privacy legislation), American and Canadian jurisprudence (including *Charter* jurisprudence). The ONCA noted, at

para 66, that *Charter* jurisprudence "recognizes privacy as a fundamental value in our law and specifically identifies, as worthy of protection, a right to informational privacy that is distinct from personal and territorial privacy".

[152] The ONCA recognized the novel tort of intrusion upon seclusion in Ontario, noting, at para 65, that the recognition of this cause of action was an incremental step in the development of the common law "in a manner consistent with the changing needs of society".

[153] In *Jones,* at para 71, the ONCA set out the elements of the cause of action for intrusion upon seclusion:

> [71] …first, that the defendant's conduct must be intentional, within which I would include reckless; second, that the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and third, that a reasonable person would regard the invasion as highly offensive causing distress, humiliation or anguish. However, proof of harm to a recognized economic interest is not an element of the cause of action. I return below to the question of damages, but state here that I believe it important to emphasize that given the intangible nature of the interest protected, damages for intrusion upon seclusion will ordinarily be measured by a modest conventional sum.
>
> [Emphasis added]

[154] The ONCA emphasized that the tort requires deliberate and significant invasions of personal privacy (at para 72). While proof of loss is not an element, absent proof of actual pecuniary loss, the awards are modest "but sufficient to mark the wrong that has been done" (at para 87).

[155] The Plaintiffs also rely on *Insurance Corporation of BC v Ari*, 2023 BCCA 331 [*Ari BCCA*] in support of their submissions that the law should more fully protect privacy rights, including informational privacy and that aggregate damages are appropriate as a remedy.

[156] In *Ari BCCA*, the BCCA found that the trial judge did not err in considering *Charter* jurisprudence, including *Spencer*, where the Supreme Court of Canada noted that informational privacy includes the right to control use of private information. The BCCA compared the requirements of the statutory tort in the BC Privacy Act with the requirements of the common law tort of intrusion upon seclusion (at paras 101-105). The BCCA noted that the statutory tort requires a wilful violation of privacy without claim of right (as does the common law tort of intrusion upon seclusion), however, the statutory tort does not require that the conduct that invades privacy be highly offensive to a reasonable person or that the plaintiff show that the breach of privacy caused actual damages.

[157] In *Ari BCCA*, the BCCA's findings were based on the statutory tort, which differs from both the common law tort of intrusion upon seclusion and the common law tort of breach of confidence. With respect to the issue of aggregate damages for the statutory tort of breach of privacy, the BCCA noted that British Columbia's *Class Proceedings Act*, RSBC 1996, c 50 [BC Class Proceedings Act] at section 29 provides for aggregate awards where this can "reasonably be determined without proof by individual class members". In the present case, the Plaintiffs ask that aggregate damages be awarded without proof of loss and in addition, offer nothing to assist in a reasonable determination of any such amounts.

[158] In *Tucci*, the BCCA found that the motions judge had contemplated aggregate damages but worded the common issue regarding aggregate damages in a confusing manner. The BCCA revised the common issue to clarify. The Court explained, at para 121, that compensatory damages require proof of loss whereas aggregate damages acknowledge a legal wrong and do not require proof of loss. However, as also noted in *Ari BCCA*, the BC Class Proceedings Act requires that aggregate damages can be reasonably determined.

[159] Although the Plaintiffs submit that breach of confidence is akin to the tort of intrusion upon seclusion, that tort is an intentional tort that requires the conduct to be highly offensive, although it does not require proof of actual damages. The Plaintiffs argue that breach of confidence should not be an intentional tort and that misuse on its own should be sufficient to justify a remedy, in particular, aggregate damages to acknowledge the "legal wrong", and that there should be no need to prove actual loss.

[160] The Plaintiffs' extensive arguments to expand the common law tort to remove the requirement for intention and to remove the requirement that the misuse of confidential information be to the detriment of the confider would essentially lead to the recognition of a new tort with lower thresholds than those required to establish intrusion upon seclusion or the provincial statutory-based privacy torts.

[161] The Plaintiffs want the Court to expand the breach of confidence tort to avoid the requirements of the tort of intrusion upon seclusion, i.e., to find that misuse of personal information does not require intention, that all misuse of personal information constitutes detriment, that the misuse or disclosure of the information need not be offensive, and that proof

of damages is not required. The Plaintiffs also propose that aggregate damages be available to recognize that detriment can arise from the misuse of personal information without actual proof of loss. The Plaintiffs' wish list is far more than an incremental step in the development of common law torts.

[162] The Plaintiffs' references to the *Charter* in support of their submissions that the common law should expand to reflect the same values is acknowledged, but the tort of intrusion upon seclusion has evolved to reflect the *Charter* values of privacy. The Court is not diminishing the need to respect privacy. However, the elements of the tort of breach of confidence were set out in *Lac Minerals* and remain unchanged.

(2) The Plaintiffs have not established that Health Canada breached their confidence

[163] The Plaintiffs have not satisfied all of the elements of the tort of breach of confidence. They have not established that the misuse of their confidential information was intentional and have not established that the misuse of the information was to their detriment.

(a) *The Plaintiffs conveyed confidential information to Health Canada in confidence*

[164] Whether the information provided by the Class Members to Health Canada was "confidential" (the first part of the *Lac Minerals* test) is disputed by the Defendant. However, while some Plaintiffs may have been open about their use of medical marihuana, there may have been others who were not or who chose to control with whom they shared this information (for example, the representative Plaintiffs). The Defendant's assertion that the information contained

in the mail-out may not be confidential depending on the particular Class Member differs from Canada's position in *Cain*. In *Cain*, at para 103, the Court found that "there are many legitimate reasons why a person may not wish others to know that they are using medical marihuana because of a medical condition, and Health Canada was rightly concerned about protecting the information it held about such matters". Health Canada should not now take an inconsistent position regarding the same type of information conveyed to them by MMAP participants.

[165] The Court finds that in the present circumstances, the information was confidential and was communicated in confidence. With respect to the first two elements of the *Lac Minerals* test and Common Question 3, the Court finds that the Class Members communicated confidential information to Health Canada in confidence.

(b) *Health Canada misused the confidential information*

[166] Common Question 4 asks whether Health Canada misused the Class Members' personal information in its collection, use, retention or disclosure of the personal information.

[167] The use of windowed envelopes, revealing the full names and addresses of MMAP participants in conjunction with the MMAP return address, was misuse of the Class Members' confidential information. The misuse, or disclosure of information, is analogous to the disclosure that Health Canada sought to prevent in *Cain*.

[168] The forms that MMAP applicants completed stated that Health Canada would communicate only with the participant directly or through an appointed representative, except for communication with the police "in response to a request in the context of an investigation". This

conveys Health Canada's process and the participants' expectation that their information would be kept confidential.

[169] Health Canada's standard practice of using envelopes that did not identify MMAP in the return address was not followed. MMAP participants did not consent to the use of their name and address in association with MMAP.

[170] The Defendant's submission that the mail-out did not reveal any specific personal information, such as a medical condition or the use/production of marihuana, is not persuasive. It is reasonable to assume that any person viewing the envelope would associate the Class Member with the MMAP, either as a user or producer of medical marihuana.

[171] The fact that some Class Members were more open about their medical conditions and their participation in MMAP and/or that the mail-out may not have been seen by anyone other than the Class Member does not negate that there was misuse of the information.

[172] Even if disclosure of the personal information was not experienced by all Class Members, in the circumstances, the use of the personal information by Health Canada constituted misuse of that information.

(c) *The Plaintiffs have not established that the misuse of the confidential information was intentional or that it caused them detriment*

[173] Misuse of confidential information on its own does not establish breach of confidence. The *Lac Minerals* test, and subsequent jurisprudence applying the test, requires that the misuse

be to the detriment of the confider and that the misuse and resulting breach of confidence be intentional. The jurisprudence relied on by the Plaintiffs does not support their submission that intention and proof of damage or detriment are not required to establish a breach of confidence.

[174] The Plaintiffs' reliance on the development of the law of intrusion upon seclusion (discussed above), which reflects *Charter* jurisprudence highlighting the importance of informational privacy, does not support expanding the tort of breach of confidence to eliminate the elements of intention or detriment.

[175] In *Tucci*, the BCCA noted that "[t]he tort of breach of confidence is, in my view, well-defined as an intentional tort. The gravamen of the civil wrong is the betrayal of a confidence" (at para 113).

[176] Although the Plaintiffs acknowledge the BCCA's finding, the Plaintiffs submit that no other jurisprudence has found that misuse of information must be intentional. However, the Court notes that no other jurisprudence has been cited that finds that misuse of confidential information need not be intentional.

[177] In the present case, the misuse of the Class Members confidential information was not accidental. Health Canada approved the use of see-through envelopes and the return address, and authorised the mail-out. As found above, Health Canada breached the duty of care owed to safeguard the Class Members' information. However, the misuse of the Class Members' information was not intentional; Health Canada did not intend to misuse confidential information and did not intend to betray the confidence of MMAP participants or to cause them any harm.

[178] Common Question 5 asks whether the misuse of the confidential information was to the detriment of Class Members.

[179] Common Question 6 asks whether Health Canada breached the confidence of Class Members in its collection, retention or disclosure of the personal information. Question 6 incorporates the elements of the tort of breach of confidence, including detriment.

[180] The Plaintiffs have not provided sufficient evidence to establish that the misuse of their personal information was to the detriment of Class Members.

[181] The jurisprudence relied on by the Plaintiffs does not support their argument that detriment need not be proven to establish the tort of breach of confidence. In *Catalyst Capital Group* the Court stated, "… the jurisprudence is clear that a claimant must prove detriment to establish liability for breach of confidence… *Lysko* accepted that *Cadbury Schweppes* adopted a broad definition of detriment but confirmed the requirement" (at para 41). In *Lysko,* at para 20, the ONCA struck the claim of breach of confidence, finding that the assertion of personal anguish, humiliation and embarrassment did not show detriment. The UK jurisprudence and the jurisprudence regarding a statutory breach of privacy that does not require proof of harm (e.g. *Ari* and *Ari BCCA*) also relied on by the Plaintiffs is similarly unhelpful.

[182] Contrary to the Plaintiffs' submissions, in *Cadbury Schweppes* the Supreme Court of Canada did not conclude that disclosure of confidential information on its own constituted detriment, as the issue did not need to be decided. The Supreme Court of Canada noted that the nature and extent of any detriment would have to be established for any monetary award to be

granted. Nor did the Supreme Court of Canada find that disclosure itself "might" be sufficient to constitute detriment. Rather, *Cadbury Schweppes* reiterated the *Lac Minerals* test, including the element of detriment.

[183] In *Lac Minerals*, at pages 638-639, Justice La Forest elaborated on the three elements of the test:

> If, as we saw, each of the three elements of the above-cited test are made out, a claim for breach of confidence will succeed. The receipt of confidential information in circumstances of confidence establishes a duty not to use that information for any purpose other than that for which it was conveyed. If the information is used for such a purpose, and detriment to the confider results, the confider will be entitled to a remedy.
>
> [Emphasis added]

[184] The Plaintiff relies on Justice La Forest's comment, at page 656, that there is greater remedial flexibility for breach of confidence to argue that a remedy in damages for breach of confidence is appropriate without proof of actual damages. However, *Lac Minerals* and the subsequent jurisprudence do not abandon the requirement for detriment; if there is no evidence of detriment, no remedy would be necessary.

[185] The Plaintiffs' reliance on *Lysko* is based on a distortion of the findings. In *Lysko*, the ONCA struck the cause of action for breach of confidence, finding (without considering the other elements) that the plaintiff had not pleaded sufficient facts to support the detriment. The ONCA reiterated that the plaintiff must show detriment or loss as a result of the breach and acknowledged that the concept of detriment may be broad, but found that the personal anguish

and embarrassment pleaded by the plaintiff was not sufficient (at para 19-20). The ONCA added at para 20:

> [20] …The pleading also fails to disclose the kind of emotional or psychological distress that would result from the disclosure of intimate information referred to in *Cadbury*. I agree with the motions judge that on this ground alone, the cause of action for breach of confidence must be struck out. That said, I should not be taken as holding that the appellant pleaded the other requirements for breach of confidence, such as the requirement that the party to whom it was communicated misused the confidential information.

[186] No Canadian jurisprudence that departs from the test in *Lac Minerals* has been brought to the Court's attention. Given that the Court is bound by the test in *Lac Minerals*, some reliable evidence of class-wide detriment is required.

[187] The objective of awarding damages for breach of confidence is to "put the confider in as good a position as it would have been in but for the breach". Although the Court has flexibility to provide an appropriate remedy (*Cadbury Schweppes SCC* at para 61), an award of aggregate damages is not appropriate without proof of actual loss.

[188] As noted in *Cadbury Schweppes SCC*, detriment is a broad concept and is "large enough for example to include the emotional or psychological distress that would result from the disclosure of intimate information" (*Cadbury Schweppes* at para 53, citing *Argyll (Duchess) v Argyll (Duke)*, [1967] Ch 302). However, the Plaintiffs' description falls far short of evidence of emotional or psychological distress as described in *Cadbury Schweppes*. The evidence of the representative Plaintiffs dating back to 2014 and 2016 refers to vague and speculative concerns,

including stress and anxiety and feeling dumbfounded. Nothing more recent or specific has been provided to prove class-wide detriment.

[189] The Plaintiffs alternatively submit—in the event that the Court does not agree to expand the tort and lessen the evidentiary burden established in *Lac Minerals*—that the OPC Report and the Robins' affidavit are sufficient to show the detriment. However, the OPC's summary of complaints and the Robins' affidavit are unreliable hearsay. The affidavits of the three representative Plaintiffs were not subjected to cross-examination with respect to the harm they described, which was speculative and vague. The concerns about stigma associated with the use of marihuana for medical and recreational purposes does not provide evidence of class-wide detriment. As the Defendant notes, stigma depends on several contextual factors and would not be the same for all.

[190] The Plaintiffs' submission that the Robins' affidavit can be admitted as a principled exception to the hearsay rule is rejected. As the Defendant notes, the Plaintiffs tendered the Robins' affidavit to establish some basis in fact for the causes of action in the context of their motion for certification. In *John Doe 2015*, Justice Rennie concluded, at para 11, that the Robins' affidavit was not tendered for the truth of its contents and was not "at this stage of the proceeding" [i.e. certification] hearsay. Justice Rennie noted that the evidence was tendered to show the fact that the statements were made. He added, at para 13, "[t]he plaintiffs are not, in my view, attempting to establish that injury or embarrassment occurred, but rather that a group of claim members exist who claim to have suffered the damages and will testify to that effect. Whether these allegations are established at trial rests with the trial judge who will hear the evidence of the witnesses in direct and cross-examination" [emphasis added]. The allegations

summarised in the Robins' affidavit have not been established, and despite that 10 years have elapsed, the Class Members have not provided additional affidavits attesting to the consequences of the mail-out.

[191] The Plaintiffs cannot rely on the summary of complaints noted in the OPC Report. The summary notes speculative concerns about career and employment, reputation, and safety. The OPC's recounting of the complaints is hearsay. Again, after 10 years, more specific evidence of whether any of the concerns materialized would be required to show detriment.

[192] The Plaintiffs have not met their burden to demonstrate that the misuse of the information was to the detriment of Class Members. Questions 5 and 6 are answered in the negative.

VII. Liability and Damages

[193] Questions 7 and 8 ask whether the Defendant is liable to pay damages incurred for the causes of action and whether damages can be assessed in the aggregate.

A. *The Plaintiffs' Submissions*

[194] The Plaintiffs submit that the Defendant is liable to pay damages for both negligence and breach of confidence.

[195] The Plaintiffs dispute the Defendant's interpretation of Question 7. The Plaintiffs argue that they are not required to establish liability and damages for negligence as a common issue. They submit that there is a distinction between "liability" and being "liable", but do not explain

the distinction. The Plaintiffs argue that if Questions 1 and 2 are answered in the affirmative, then the liability of the Defendant for negligence follows.

[196] Similarly, the Plaintiffs submit that if Questions 3-6 are answered in the affirmative, the liability of the Defendant for breach of confidence follows and aggregate damages should be awarded. The Plaintiffs dispute that they are required to address class-wide harm as a common issue.

[197] With respect to Question 8, the Plaintiffs clarify that they seek individual assessments of their damages for negligence and seek an assessment of aggregate damages for breach of confidence (with individual assessments of amounts established exceeding the baseline) and that the award of aggregate damages would be in addition to any amounts awarded for negligence.

[198] As noted above, the Plaintiffs rely on *Ari* to argue, by analogy, that if aggregate awards are appropriate for breach of the statutory tort of breach of privacy in the absence of proof of harm, aggregate awards should be appropriate for breach of confidence. They argue that the flexible remedies for breach of confidence support an award of aggregate damages to recognize their stress and anxiety from the loss of control over their information. The Plaintiffs submit that an aggregate award would eliminate the need for individual assessments for most of the Class Members.

[199] The Plaintiffs initially proposed an award of aggregate damages of $2,000 per Class Member for general damages for breach of confidence. The Plaintiffs now acknowledge that the

range for aggregate damages is broad and within the court's discretion. They now suggest that the amount should be in the range of $500-2000. The Plaintiffs could not address the Court's questions regarding the criteria or methodology that should guide the determination of a baseline amount in the event that aggregate damages were awarded. The Plaintiffs acknowledged that the jurisprudence is limited and suggested that aggregate damages awarded for intrusion upon seclusion and/or the statutory torts of breach of privacy would provide guidance.

B. *The Defendant's Submissions*

[200] The Defendant submits that there can be no damages awarded without first finding liability; there must be compensable harm and causation to establish negligence and there must be evidence of detriment to establish breach of confidence and class wide harm to justify any award of aggregate damages.

[201] The Defendant submits that although the *Rules* permit the Court to make any order for the assessment of monetary relief, including aggregate assessments, this is only an option when liability or damages can be awarded on an aggregate basis.

[202] The Defendant submits that the Common Questions contemplated that liability be determined as a common issue, and the Plaintiffs cannot now argue that this should be deferred to individual issues trials or assessments because they cannot establish damages on a class-wide basis.

[203] The Defendant submits that the evidence of the representative Plaintiffs does not establish that they suffered damages. The Defendant notes the Plaintiffs' claims of being dumbfounded, but points to *Mustapha*, where the Supreme Court of Canada stated, at para 9, that damage for mental anguish is only compensable where the injury is " serious and prolonged and rise above the ordinary annoyances, anxieties and fears that people living in society routinely, if sometimes reluctantly, accept". The Defendant submits that there is no such evidence.

[204] With respect to the appropriate amount for any award of aggregate damages, the Defendant submits that the Plaintiffs' proposal of $2000 per Class Member is not in line with the modest awards in other breach of confidence or privacy cases. The Defendant submits that much of the jurisprudence cited by the Plaintiffs noting awards of aggregate damages for breach of confidence, intrusion upon seclusion, or breach of privacy were for individual claimants.

[205] The Defendant submits that *Beckett v Aetna Inc*, Case No. 2:17-CV-3864-JS [*Beckett*], a US case relied on by the Plaintiffs, which resulted in an aggregate award with a baseline amount equivalent to $1100 Canadian, is not a guide. The Defendant notes that in the US case, there was detailed evidence from 30 representative plaintiffs about the damages they suffered from the disclosure of their personal medical related information, unlike the representative Plaintiffs or other Class Members who have not provided evidence of the harms actually suffered.

[206] The Defendant notes that *Severs v Hyp3R Inc*, 2021 BCSC 2261 cited by the Plaintiffs as guidance for the Court in assessing aggregate damages, addressed different torts, such as a statutory breach of privacy and the common law tort of intrusion upon seclusion (both which require intention but not actual proof of loss).

[207] Regarding any pre- or post-judgment interest, the Defendant submits that the Court should be guided by section 31 of the *Crown Liability and Proceedings Act*, RSC 1985, c C-50 and, in any event, Common Question 10 should be answered in the negative because the Plaintiffs have failed to establish liability and aggregate damages.

C. *Question 7 cannot be answered with respect to the cause of action in negligence*

[208] The conflicting interpretations of the Common Questions raises unnecessary confusion. The Common Questions refer to the causes of action in negligence and breach of confidence; therefore, the elements of these causes of action must be addressed. Answering the common questions without reference to the larger issue of whether the Plaintiffs have established their causes of action in negligence and breach of confidence does not advance the litigation.

[209] The Plaintiffs cannot succeed on their cause of action in negligence by relying only on the answers to Questions 1 and 2 without regard to Question 7. Contrary to the Plaintiffs' submission that they are not required to establish liability and damages as a common issue, Question 7 requires that they do so.

[210] The relief sought by the Plaintiffs in their Statement of Claim, including damages is noted above at para 19. However, the Plaintiffs have not provided any evidence related to the damages they claim.

[211] The Plaintiffs' submission that the Defendant's position on this motion took them by surprise (as they did not think it was necessary to adjudicate damages as a common issue for

either negligence or breach of confidence) is not persuasive given the wording of the Common Questions, in particular Question 7, which asks whether the Defendant is liable for the causes of action.

[212] The Plaintiffs suggestion that they could bring a motion to amend the certified questions and would then gather evidence of class-wide damages caused by the breach of the duty of care and breach of confidence defeats the benefits of a motion for summary judgment to determine questions on the basis of the facts and the law in a summary process. The Plaintiffs' proposal also ignores the history of this litigation, including the Defendant's repeated submissions that negligence requires evidence of damages. It also ignores the principles that the Plaintiffs must put their best foot forward on a motion for summary judgment and that the Court does not rely on what may be adduced as evidence at a later stage (*Milano Pizza* at paras 33-40).

[213] As noted by the Defendant, there is no motion before the Court to amend the Common Questions. The Plaintiffs should not retreat from the common questions now.

[214] The Court finds that the Plaintiffs' proposal would defeat the purpose of their motion for summary judgment. Although the Defendant submits that the Court should not amend or remove the certified questions, it is apparent that the questions regarding damages for the two causes of action (negligence and breach of confidence) should have been separated or worded differently. The Court finds that a better approach, consistent with the jurisprudence on motions for summary judgment, is to recognize that to secure a just and expedient outcome, individual trials or assessments will be required to determine the Defendant's liability in negligence and Class Members' damages, if any. This appears to have been contemplated in the Litigation Plan.

Common Questions 1 and 2 will advance Class Members' litigation if they pursue their claims for damages for negligence. The Plaintiffs have acknowledged that not all Class Members will do so as not all will be able to do establish any damages.

[215] The Court can only answer Questions 1 and 2 regarding the first two elements of negligence. The process for individual issues assessments or trials will be determined via case management.

D. *Question 8 – Class Members' Damages Cannot be Assessed in the Aggregate*

[216] Common Question 8 asks whether the Class Members' damages can be assessed in the aggregate pursuant to Rule 334.28(1).

[217] Breach of confidence has not been established, including because the Plaintiffs have not established class wide detriment. Aggregate or other damages for breach of confidence need not be determined.

[218] Even if the Court had found that the tort of breach of confidence had been proven on a balance of probabilities, aggregate damages would not be appropriate. As found above, the Plaintiffs did not provide sufficient evidence of class-wide damages. They pointed to the OPC Report, the Robins affidavit, their experts' opinions on the stigma experienced by users of marihuana, and the affidavits of the three representative Plaintiffs. As noted above, this evidence would not have been sufficient to support an award of aggregate damages. After over 10 years, better evidence from Class Members about the harm or loss they suffered as a result of the mail-out should have been tendered, if it exists.

[219] As an observation, the Plaintiffs' proposed amount of $2000 per Class Member as a baseline has no foundation. The jurisprudence supports very modest amounts for aggregate damages for negligence, intrusion upon seclusion, and breach of privacy pursuant to the respective provincial statutes. In addition, for class proceedings in several provinces, the applicable provincial statutes require that the aggregate amounts can be "reasonably determined".

VIII. Conclusion

[220] The Motion for Summary Judgment is granted.

[221] In *Witchekan*, The Court of Appeal emphasized (at para 35) that *Hryniak* signalled a departure from the previous approach to summary judgment, noting that "the standard for granting summary judgment now requires that the judge have sufficient confidence in the state of the record that he or she is prepared to exercise judicial discretion to resolve the dispute". In the present case, the record permits the Court to answer the common questions, with the exception of the Defendant's liability for negligence.

[222] Some questions are answered in favour of the Plaintiffs; others are answered in favour of the Defendant. Question 7 is answered in favour of the Defendant with respect to the alleged breach of confidence. Question 7 cannot be answered with respect to the Defendant's liability for negligence; individual assessments will be required. The process governing the individual assessments will be determined in the case management process.

[223] The Court finds that it will advance the litigation to grant summary judgment and to answer the Common Questions as follows:

> **Q 1:** Did Health Canada owe the Class Members a duty of care in its collection, use, retention and disclosure of the Personal Information?
>
> **A**: Yes.
>
> **Q 2:** If yes, did Health Canada breach that duty of care when it sent the Envelope?
>
> **A**: Yes.
>
> **Q 3:** Did the Class Members communicate the Personal Information to Health Canada?
>
> **A:** Yes.
>
> **Q 4:** If yes, did Health Canada misuse the Personal Information in its collection, use, retention or disclosure of the Personal Information?
>
> **A**: Yes
>
> **Q 5:** If yes, was such misuse of the Personal Information to the detriment of the Class Members?
>
> **A:** No.
>
> **Q 6:** If yes, did Health Canada breach the confidence of the Class Members in its collection, retention or disclosure of the Personal Information?
>
> **A:** No.
>
> **Q 7:** Is the Defendant liable to pay damages incurred by the Class Members for the causes of action?
>
> **A:** With respect to negligence, Question 7 cannot be answered. Although Questions 1 and 2 are answered in the affirmative, damages for negligence can only be determined on an individual basis where the Class Member establishes that they suffered damages that were caused by Health Canada's breach of the duty of care. Whether any Class Members will do so remains to be seen. The process for such claims can be determined via case management.

> **A:** With respect to the cause of action for breach of confidence, No.
>
> **Q 8:** Can the Class Members' damages be assessed in the aggregate pursuant to Rule 334.28(1)?
>
> **A:** No.
>
> **Q 9:** Does Health Canada's conduct justify an award of punitive damages?
>
> **A:** No. The Plaintiffs and Defendants agree that an award of punitive damages is not appropriate in this case.
>
> **Q 10:** Are the Class Members entitled to pre- and post-judgment interest pursuant to the *Crown Liability and Proceedings Act*, RSC c C-50?
>
> **A:** This cannot be answered at this time.

[224] With respect to the Class Size, the Defendant confirms that it is 41, 453 after the opt-outs.

[225] As the Defendant noted, a small percentage of Class Members did not provide any personal medical information and obtained only licences to produce marihuana for others. Whether this group should remain in the Class should be addressed post-judgment

JUDGMENT in file T-1931-13

THIS COURT'S JUDGMENT is that:

1. The Plaintiff's motion for summary judgment is granted.
2. The Common Questions are answered as noted above.
3. The Plaintiffs have not established a breach of confidence by Health Canada.
4. The Plaintiffs have established that Health Canada owed them a duty of care and that the duty owed in the circumstances was breached; however, the Plaintiffs have not established that the Defendant is liable for any damages caused to the Class Members. The Plaintiff's claims for negligence may be pursued by individual trials or assessments. The Process will be determined by case management following the issuance of this Judgment.
5. No costs are ordered.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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