IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Davis v. British Columbia Hydro and Power Authority,* 2016 BCSC 1287

Date: 20160712
Docket: S135590
Registry: Vancouver

Between:

Nomi Davis and Jessica Klein

Plaintiffs

And

British Columbia Hydro and Power Authority

Defendant

Brought under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Adair

Reasons for Judgment

Counsel for the Plaintiffs:	David M. Aaron
Counsel for the Defendant:	Marko Vesely and Toby Kruger
Place and Date of Hearing:	Vancouver, B.C. December 7-11, 2015
Place and Date of Judgment:	Vancouver, B.C. July 12, 2016

1. Introduction

[1] This proposed class proceeding concerns meters that the defendant British Columbia Hydro and Power Authority uses to measure electric power consumed by its customers, and, specifically, what are known as "smart meters."

[2] The plaintiffs say that legislation enacted and the regulations made in relation to smart meters (described by the plaintiffs as the "Impugned Provisions"), and the imposition of smart meters on them and proposed class members by BC Hydro (described by the plaintiffs as the "Impugned Conduct"), have resulted in an infringement of their rights under section 7 of the ***Canadian Charter of Rights and Freedoms***.

[3] Section 7 of the ***Charter*** states:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[4] The plaintiffs assert that: the emissions from smart meters cause biological effects in individuals who are exposed to them, and there is "a real issue of potential harm to the human body" arising from exposure to the emissions; the safety of the emissions is a matter of reasonable concern; and the choice to be free from the operation of a smart meter at one's home "is a fundamental personal choice."

Therefore, the plaintiffs say, the Impugned Conduct and the Impugned Provisions amount to a deprivation of both the right to life and the right to security of the person under s. 7 of the ***Charter***.

[5] The plaintiffs apply for certification of the action as a class proceeding under the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50 (the "***CPA***").

[6] The plaintiffs ask to have the certification application addressed on the basis of a proposed second amended notice of civil claim (the "Proposed NCC"), which very substantially recasts the claim as compared with the "Further Amended Notice of Civil Claim" filed March 27, 2014. Therefore, the plaintiffs also seek leave to amend their pleadings and an order adding new individuals as plaintiffs.

[7] BC Hydro says that the plaintiffs' applications must be dismissed.

[8] BC Hydro says that the Proposed NCC fails to disclose any reasonable claim. Therefore, not only should the amendments not be granted, but the plaintiffs have also failed to satisfy the requirement under s. 4(1)(a) of the ***CPA*** that the pleadings disclose a cause of action. This is a sufficient reason to dismiss the certification application. BC Hydro submits further that, even if the plaintiffs were able to plead a reasonable claim, they have nevertheless failed to satisfy the remaining requirements for certification under s. 4(1) of the ***CPA***.

[9] For the reasons that follow, I have concluded that the plaintiffs have failed to satisfy the requirements for certification and the certification application must, accordingly, be dismissed. I have also concluded that the plaintiffs' application to amend their pleadings and add parties as plaintiffs must also be dismissed, but with leave to reapply, based on fresh proposed amendments, provided the plaintiffs do so within 60 days of this judgment.

2. Factual background

[10] In 2010, the Legislature enacted the ***Clean Energy Act***, S.B.C. 2010, c. 22. Pursuant to the ***Clean Energy Act*** and the ***Smart Meters and Smart Grid***

Regulation, B.C. Reg. 368/2010, BC Hydro was required to install and put into operation so-called smart meters and related equipment by the end of 2012. Beginning around the summer of 2011, BC Hydro began the process of replacing "legacy meters" (i.e., non-communicating, single-function electromechanical and digital meters) with multi-function meters that communicate wirelessly through the use of radiofrequency technology. These are the "smart meters" in issue in this action.

[11] The move to smart meters generated controversy and very strong feelings among some BC Hydro customers.

[12] Shortly after BC Hydro announced that it would be replacing legacy meters with smart meters, it began receiving complaints from some customers, who refused to permit a smart meter to be installed or who expressed concerns with smart meters. The concerns expressed covered a wide variety of topics, for example: smart meters would cause a billing or rate increase; smart meters would cause a loss of jobs; political concerns; privacy concerns; and health concerns.

[13] According to Fiona Taylor, BC Hydro's Director of Smart Technology Operations and Restoration, BC Hydro received thousands of copies of a form of objection notice with the heading:

> **SMART METER NO FEE OPT OUT**
> **REGISTRATION NOTICE**

I will refer to this form as the "Objection Notice."

[14] Individuals who were and are very strongly against smart meters have filed affidavits in support of the certification application.

[15] For example, the plaintiff Nomi Davis says that in 2012, she made it clear to BC Hydro that she and her husband refused to accept the installation of a smart meter at their home. She explained that their refusal had been communicated by way of a written notice conspicuously posted next to the legacy meter, which was

mounted on the outside wall of the house. The notice said (among other things) [**bold** in original]:

> **NO TRESPASSING**
>
> **DO NOT INSTALL SMART METER HERE**
>
> THIS IS **NOTICE** OF MY **REFUSAL TO ACCEPT A "SMART METER"** AT THIS **ADDRESS**

[16] Ms. Davis explains that she has a yoga and healing centre that she operates as a business from her home. She says:

> I teach Kundalini Yoga which, among other things, deals explicitly with our energy. I am therefore very concerned about the effects of radiofrequency exposure. In order for me to operate my business with integrity, I do my best to ensure that my clients have the safest, healthiest space in which to do their healing.

[17] Ms. Davis says further that she does not operate cordless phones or a Wi-Fi internet router from her home, and she has found that exposure to such radiofrequency technology gives her headaches. She explains (paras. 6-9 of her Affidavit No. 1) that her refusal to "host" a transmitter that "continuously generates and emits microwave radiofrequencies" is based in part on information published by organizations such as Health Canada, the World Health Organization and the International Agency for Cancer Research concerning a "possible link" between radiofrequency exposure and cancer. She says that she understands these organizations are "in agreement that additional research is warranted to clarify this 'possible link' between radiofrequency exposure and cancer," and that, pending the outcome of this additional research, she chooses to take the precaution of eliminating any "constant, regular, on-site source of radiofrequency emissions."

[18] Ms. Davis describes an encounter on August 22, 2012 with two individuals whom she identifies as representatives of BC Hydro. The encounter resulted in her legacy meter being replaced with a smart meter, over Ms. Davis' objections and based on (according to Ms. Davis) misrepresentations made by BC Hydro's representatives. Ms. Davis describes how a reporter and his associate video-recorded her encounter with BC Hydro's representatives. She says that, after the

smart meter was installed, she began to get headaches and joint aches when she sat in her dining room (the room in the interior of the house which has a wall opposite to the exterior wall on which the smart meter was installed). Ms. Davis says further that the installation and operation of the smart meter "has interfered with my use and enjoyment of Our Home as a living space and retreat space."

[19] Ms. Davis also describes how she has been assisted in this litigation by an organization known as the Citizens for Safe Technology Society (the "CSTS").

[20] Ms. Davis is proposed as one of the representative plaintiffs for Class A (described below).

[21] The plaintiff Jessica Klein explains that she and her husband are BC Hydro customers with respect to the supply of power to their home and organic farm. She explains that there are five BC Hydro meters on the property. Three of the accounts are treated as residential and two as commercial. None of the meters is a smart meter. She says that the meter for one of the commercial accounts is situated "in close proximity to a residential dwelling" on her property. Ms. Klein explains that, although BC Hydro has sought access to her property to replace the existing meters, she and her husband have refused. They have posted Objection Notices at the meters. Ms. Klein says that BC Hydro has "acceded" to the retention of the existing residential meters provided a monthly fee is paid, to which Ms. Klein takes strong objection. However, she has not been given that option for the commercial accounts, to which Ms. Klein also takes objection. Ms. Klein says that she is sensitive to electromagnetic frequencies. She explains that she and her husband limit their exposure to radiofrequency emissions, based on their understanding that such emissions may have an adverse biological effect. Ms. Klein says that, in accordance with her health and lifestyle choices, "I choose not to host, at our Property, a transmitter that continuously generates and emits microwave radiofrequencies into my living and working environment all day and all night, 365 days a year." She says further that "As long as the jury is out with respect to

biological impacts, I choose to take the precaution of declining to have" a smart meter operate on her property.

[22] Ms. Klein has also been assisted in connection with this litigation by the CSTS.

[23] Ms. Klein is proposed as the representative plaintiff for Class B (also described below).

[24] Mr. Marcel Gamache describes how he believes he was tricked and lied to by a BC Hydro installer about the workings of a smart meter when one was installed (despite Mr. Gamache's reservations) on a power pole near his trailer home. He describes a wide variety of symptoms he says he has experienced since the smart meter was installed, and says he has not had a decent night's sleep since the installation. He says that his choice is to live in a "domestic environment free from radiofrequency emissions," and that he keeps his cell phone off except for emergencies. He complains that, after the smart meter was installed at his property, BC Hydro did not offer him the chance to opt out of having a smart meter there.

[25] Mr. Norman Moffat says that in the spring of 2012, he received a letter from BC Hydro informing him of its intention to replace two legacy meters, located on a power pole outside his home, with smart meters. According to Mr. Moffat: "I believe it is my right, rather than a privilege, to decide against hosting an on-site radiofrequency transmitter on my very own property." He explains that, on receipt of the letter, he immediately phoned BC Hydro to voice his objection. Despite that, in April 2012, one of the old meters was replaced with a smart meter. Mr. Moffat says that he then sent an Objection Notice to BC Hydro. In addition, he sent an e-mail communication demanding removal. The e-mail appears to be in a form prepared by the CSTS, as part of the Society's "Smart Meter Action Kit."

[26] Dr. Dharmesh Natha, a medical doctor practicing in White Rock, explains that he suffers from "debilitating symptoms of ill health upon my exposure to radiofrequency emissions." According to Dr. Natha, the meters for his business

office are located in an adjacent business premises. He describes how a BC Hydro representative replaced analogue meters for his business office with smart meters, against his will.

[27] Mr. Jurgen Goering says that, "for health reasons," he chooses that his "domestic environment [be] free from the constant operation of an on-site radiofrequency-emitting transmitter." He says that BC Hydro has "imposed" smart meters at two properties owned by him. He explains that, in 2011, he wrote to BC Hydro objecting to the installation of a smart meter at a recreational property. In the spring of 2012, he affixed a notice to an electrical panel containing hydro meters at a small apartment complex (containing four separate apartments) he owns in Nanaimo. The notice is in the same form as the notice posted by Ms. Davis. He says that, despite the notice, BC Hydro replaced one of the legacy meters with a smart meter. Mr. Goering explains that he then decided "to take additional measures to protect myself against further exposure to radiofrequency radiation" at the apartment complex, and he then constructed a wooden barrier for the three remaining legacy meters. The barrier was secured with padlocks. Mr. Goering then affixed another copy of his notice to the barrier. He claims that the barrier was later forcibly broken by a BC Hydro installer, who then installed a smart meter. Mr. Goering describes this as the "Forced Installation." Mr. Goering told the installer he was trespassing and called the police when the installer would not leave. Mr. Goering was interviewed about the "Forced Installation" for an article in the Nanaimo Daily News.

[28] Mr. Tim O'Connor, who is proposed to be added as a named plaintiff, says that, until late October 2012, consumption of power at his home was measured by a legacy meter. He explains that, sometime prior to May 2012, he became aware of BC Hydro's intention to remove that meter and replace it with a smart meter. He then posted a sign on the exterior wall of his home, beside the legacy meter, which stated:

> Smart Meter Free Zone
> Do Not Install Smart Meter Here

[29] Mr. O'Connor says that the sign remains in place. However, the legacy meter is no longer there. He explains that, in August 2012, he installed a cage around the old meter such that the sign and face of the meter were visible and access to the meter was controlled by a locking ring secured by a padlock. Mr. O'Connor says that, on October 27, 2012, he observed that the cage had been broken open and the old meter replaced by a smart meter. He says that he asked BC Hydro to remove the smart meter, but it refused. Mr. O'Connor says that "I choose not to host, at My Home, any device that continuously emits radiofrequency radiation all through the day and night." He explains further how he chooses to take precautions with respect to his exposure to radiofrequency radiation at his home, in particular, unplugging his Wi-Fi router and cordless phone at night. Mr. O'Connor says that he no longer carries a cell phone.

[30] Mr. O'Connor is proposed as one of the representative plaintiffs for Class A.

[31] Sharon Noble is proposed to be added as a named plaintiff in this action and is one of the proposed representative plaintiffs for Class C (described below). She describes herself as a volunteer with an unincorporated group called the "Coalition to Stop Smart Meters" (the "Coalition"). Ms. Noble explains that the Coalition works with the CSTS "in opposing BC Hydro's imposition of radiofrequency-emitting meters on its customers." Ms. Noble says that her "choice is to be free from the operation of" a smart meter in her home. She says that, as of late September 2013, she had "successfully resisted" the installation of a smart meter at her home, which still had a legacy meter. She says that, in the fall of 2013, BC Hydro sent her correspondence inviting her to make an election under the "Meter Choices Program," and informing her that if she failed to communicate a choice by the deadline, she would be deemed to have chosen to pay an opt-out fee to keep the legacy meter. Ms. Noble explains that she did not communicate a choice to BC Hydro by the deadline, and, thereafter, was invoiced for the opt-out fee. Ms. Noble strongly objects to this.

[32] Sharon Schnurr is also proposed to be added as a plaintiff and is one of the proposed representative plaintiffs for Class C. She explains that she is unemployed

and dependent on welfare and disability benefits. Ms. Schnurr lives in a home that she co-owns with her parents, and she says that her choice is to be free of a radiofrequency emitting meter at her home. Ms. Schnurr says that, as of late September 2013, she had "successfully resisted" the installation of a smart meter at her home, where there was a legacy meter. She explains that, during the fall of 2013, she received correspondence from BC Hydro concerning the "Meter Choices Program," inviting her to make an election. She did not communicate an election by the deadline, and began receiving a monthly invoice for an opt-out fee. In late April 2014, Ms. Schnurr contacted BC Hydro and informed it that she would have to accept a smart meter because she could not afford the opt-out fee. She explains that BC Hydro stopped charging her an opt-out fee as of that date. However, Ms. Schnurr says that "against my will," BC Hydro installed and commenced operation of a smart meter at her home in February 2015.

[33] The CSTS also actively took up the cause of those opposing smart meters. Its executive director, Una St. Clair, has sworn an affidavit in support of the certification application.

[34] In September 2011, the CSTS and Ms. St. Clair filed a complaint with the B.C. Human Rights Tribunal (the "BCHRT") against BC Hydro. The complaint was brought in a representative capacity on behalf of (as subsequently amended and re-cast) persons allegedly diagnosed or identified by a medical practitioner as having electro-hypersensitivity who have been advised to avoid wireless technology. The complaint was summarily dismissed in September 2014 (see ***Citizens for Safe Technology Society obo others v. B.C. Hydro and Power Authority (No. 3)***, 2014 BCHRT 211).

[35] In December 2011, Mr. Aaron, acting on behalf of the CSTS and Andrea Collins, filed a complaint under s. 47 of the ***Utilities Commission Act***, R.S.B.C. 1996, c. 473, with the B.C. Utilities Commission (the "BCUC"). That complaint and an application to the BCUC for reconsideration were rejected, and an application for

leave to appeal the reconsideration decision was dismissed by the Court of Appeal (see ***Collins v. British Columbia Utilities Commission***, 2012 BCCA 455).

[36] The CSTS also participated as an intervenor in an application made in July 2012 by FortisBC Inc. to the BCUC in relation to FortisBC's smart meter program. In relation to that participation, the CSTS filed a great deal of material, some of which is attached as exhibits to Ms. St. Clair's Affidavit No. 1. This material included: a report from Dr. Martin Blank, who is stated to be a member of the Department of Physiology and Cellular Biophysics at Columbia University, College of Physicians and Surgeons; a "Commentary on Questions by David M. Aaron Esq." prepared by Karl H. Maret, who describes himself as "the President of the non-profit Dove Health Alliance foundation" and who (in the Commentary) states that he holds the degree of Doctor of Medicine from the University of Toronto; and a lengthy written submission prepared by Mr. Aaron.

[37] The plaintiffs rely on the material from Dr. Blank and Dr. Maret (and others) attached to Ms. St. Clair's affidavit as evidence tendered to show the existence of the material and the existence of health concerns. BC Hydro says that this material is inadmissible for any relevant purpose on this application. I will return to it in my discussion of the certification requirements, in particular, s. 4(1)(c) regarding common issues.

[38] By the summer of 2013, smart meters had been installed for the vast majority of BC Hydro's customers.

[39] On July 18, 2013, the Province announced the introduction of the "Meter Choices Program." Under this program, residential customers who did not already have a smart meter installed on their property as of the date of announcement of the program were provided with opt-out options. (No options were available to residential customers who already had a smart meter installed.) The Province implemented the Meter Choices Program through the enactment of ***Direction No. 4 to the British Columbia Utilities Commission***, B.C. Reg. 203/2013 ("***Direction No. 4***"). ***Direction No. 4*** is one of the Impugned Provisions. The BCUC, pursuant

to ***Direction No. 4***, subsequently approved new tariff items and charges in relation to the Meter Choices Program. These included charges to keep a legacy meter or to have a smart meter with the radio off. All of these are included in the Impugned Provisions and the Impugned Conduct, which the plaintiffs assert breach s. 7 of the ***Charter***.

[40] BC Hydro has filed an affidavit sworn by Mr. Wayne Cross, a professional engineer employed by BC Hydro as a senior manager for the Smart Meter Initiative. Mr. Cross discusses some of the factual matters that would require investigation when considering an individual's exposure to radiofrequency emissions from a smart meter.

[41] According to Mr. Cross, there is no prescribed standard or uniform location for a meter at a residential premises. Mr. Cross explains that BC Hydro does not keep detailed records of where the meter is located for its residential customers.

[42] Mr. Cross describes the wide variety in the location of meters in residential premises (both single family detached homes and multi-unit dwellings such as apartments, condominiums, townhouses and row houses). According to Mr. Cross, in relation to single family homes, the meter can be located: on the exterior of the house (typically closest to where BC Hydro provides service); on a pole away from the house (the pole might be located on the property line or elsewhere on the property); on an out-building (e.g., a garage or shed); or (in some older homes) inside the home. There may be multiple meters for one customer in a single-family home. According to Mr. Cross, multi-unit buildings may have one meter for the entire building, or multiple meters. In smaller apartment buildings, meters are typically grouped together in a utility room in the basement. In taller apartment or condo towers, typically there is a meter centre (or "meter closet") in a hallway on every third floor, which contains the meters for the floor on which the meter centre is located plus the floors immediately above and below. According to Mr. Cross, for a duplex, triplex or fourplex, the meter configuration is often similar to a single-family home, but with all the meters located in one place on the outside of the building.

[43] Ms. Taylor provided information about the potential class size. According to Ms. Taylor, as of June 2015, BC Hydro had about 1.9 million customers. Ms. Taylor explained that, each day, new customers start taking service from BC Hydro and existing customers cease service, so the number is constantly in flux. As of June 3, 2015, BC Hydro had about 1.7 million customer accounts that took residential service, and about 217,000 accounts that took non-residential service.

[44] Ms. Taylor explains that only customers who took residential service were potentially eligible for the Meter Choices Program. As of September 2013, there were 68,078 customers eligible at the beginning of the Program. At the end of the enrollment period in December 2013, 48,242 eligible customers had selected the smart meter option, and 19,836 eligible customers selected or were deemed to have selected the legacy or radio-off meter option. According to Ms. Taylor, since December 2013, the total number of legacy meters and radio-off meters has fallen and continues to fall.

3. The Certification requirements: overview

[45] The ***CPA*** s. 4 provides:

> **Class certification**
>
> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and

> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[46] If the requirements of s. 4(1) are satisfied, the court must certify the proceeding as a class proceeding.

[47] The provisions of the ***CPA*** should be construed generously in order to achieve its objects: judicial economy (by combining similar actions and avoiding unnecessary duplication in fact-finding and legal analysis); access to justice (by spreading litigation costs over a large number of plaintiffs, thereby making economical the prosecution of otherwise unaffordable claims); and behaviour modification (by deterring wrongdoers and potential wrongdoers through disabusing them of the assumption that minor but widespread harm will not result in litigation). See ***Western Canadian Shopping Centres Inc. v. Dutton***, 2001 SCC 46 ("***Dutton***"), at paras. 26-29.

[48] The certification hearing does not involve an assessment of the merits of the claim. Rather, it focuses on the form of the action in order to determine whether the action can appropriately go forward as a class proceeding. See ***Hollick v. Toronto (City)***, 2001 SCC 68, at para. 16, and ***Pro-Sys Consultants Ltd. v. Microsoft***

Corporation, 2013 SCC 57, at para. 102. The ***CPA*** is entirely procedural and does not create any new substantive rights.

[49] The burden is on the plaintiff to show "some basis in fact" for each of the certification requirements, other than the requirement that the pleadings disclose a cause of action: see ***Hollick***, at para. 25 and ***Pro-Sys***, at paras. 99-100. The evidentiary burden is not an onerous one: see ***Hollick***, at paras. 21, 24-25.

[50] Nevertheless, the evidence must meet the usual criteria for admissibility, as a relaxation of the usual rules would not seem consonant with the policy implicit in the ***CPA*** that some judicial scrutiny of certification applications is desirable: see ***Ernewein v. General Motors of Canada Ltd.***, 2005 BCCA 540, at para. 31. In ***Pro-Sys***, Mr. Justice Rothstein (for the court) noted:

> [103] . . . [I]t is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to "a determination of the merits of the proceeding" . . . ; nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.
>
> [104] In any event, in my respectful opinion, there is limited utility in attempting to define "some basis in fact" in the abstract. Each case must be decided on its own facts. There must be sufficient facts to satisfy the applications judge that the conditions for certification have been met to a degree that should allow the matter to proceed on a class basis without foundering at the merits stage by reason of the requirements of s. 4(1) of the *CPA* not having been met.

4. Does the Proposed NCC disclose a cause of action: s. 4(1)(a)

[51] The first requirement for certification is that the plaintiff's pleadings disclose a cause of action. This requirement is assessed on the same standard of proof that applies to a motion to strike or an application to amend a pleading, as set out in ***Hunt v. Carey Canada Inc.***, [1990] 2 S.C.R. 959, at p. 980.

[52] A plaintiff satisfies this requirement unless, assuming all facts pleaded to be true (unless they are patently unreasonable or incapable of proof), it is plain and obvious that the plaintiff's claim cannot succeed or has no reasonable prospect of

success: see ***Pro-Sys***, at para. 63, and ***Operation Dismantle Inc. v. The Queen***, [1985] 1 S.C.R. 441, at p. 455. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial: see ***R. v. Imperial Tobacco Canada Ltd.***, 2011 SCC 42, at para. 21. The fact that the case pleaded is a weak one, or raises a novel point requiring investigation, is not enough to strike it: see ***Wakelam v. Wyeth Consumer Healthcare/Wyeth Soins de Sante Inc.,*** 2014 BCCA 36, at para. 8. However, it is incumbent on the plaintiff to clearly plead the facts upon which she relies in making the claim, since the facts pleaded are the firm basis upon which the possibility of success of the claim must be evaluated: ***Imperial Tobacco***, at para. 22.

[53] With respect to amendments to pleadings and the function of pleadings, I wrote in ***Virk v. Brar***, 2011 BCSC 301, at paras. 5-9:

> [5] The basic principles governing the granting of amendments to pleadings are not in dispute. Such amendments should be permitted as are necessary to determine the real question or questions in issue between the parties: see ***Victoria Grey Metro Trust Company v. Fort Gary Trust Company*** (1982), 30 B.C.L.R. (2d) 45 (S.C.), at p. 46.
>
> [6] The court will not allow useless amendments, and an application to amend is considered on the same basis as an application to strike a pleading under Rule 9-5: see ***Victoria Grey***, at pp. 46-47; ***Shaw Cablesystems Ltd. v. Concord Pacific Group Inc.***, 2009 BCSC 203 at para. 8. The court will not give its sanction to amendments which violate the rules that govern pleadings. These include . . . the prohibition against pleadings which disclose no reasonable claim or are otherwise scandalous, frivolous or vexatious or embarrassing (Rule 9-5(1)).
>
> [7] Before turning to the proposed amended notice of civil claim, I wish to make some brief observations about the function of pleadings.
>
> [8] The ultimate function of pleadings is to clearly define the issues of fact and law to be determined by the court. The issues must be defined for each cause of action relied upon by the plaintiff. That process is begun by the plaintiff stating, for each cause, the material facts; that is, those facts necessary for the purpose of formulating a complete cause of action. A statement of claim (now a notice of civil claim) must plead the causes of action in the traditional way so that the defendant may know the case it has to meet, to the end that clear issues of fact and law are presented for the court. See ***Homalco Indian Band v. British Columbia*** (1998), 25 C.P.C. (4th) 107 (B.C.S.C.), at paras. 5 – 11. As noted by Madam Justice Southin, when a plaintiff files "a hopelessly inadequate statement of claim, there is nothing upon which the trial judge can concentrate his or her mind": ***Cotton v. Wellsby*** (1991), 59 B.C.L.R. (2d) 366 (C.A.), at para. 26.

> [9] Thus, pleadings are intended to define and limit the issues in order to promote fairness, judicial economy and exposition of the truth. The rules governing pleadings exist to support and facilitate that end. Defining and limiting the issues must be done so that the court understands the dispute and the parties have fair notice of the case to be met and the remedies to be sought. Pleadings are important because they are the foundation on which the case rests, and they shape the scope of relevance for both discovery and trial.

[54] The provisions in the ***Supreme Court Civil Rules*** governing pleadings are relevant to the plaintiffs' application to amend. Rule 3-1(2) requires that a notice of civil claim must set out "a concise statement of the material facts giving rise to the claim" and "a concise summary of the legal basis for the relief sought" (underlining added). Rule 3-7(1) brings home the point that a material fact is different than evidence and that evidence must not be pleaded. The requirement that the statement of the material facts and the summary of the legal basis be "concise" should emphasize the importance of stating clearly everything that is necessary, but not more.

[55] The plaintiffs cite authorities such as ***Halvorson v. British Columbia (Medical Services Commission)***, 2010 BCCA 267 and ***Watson v. Bank of America Corporation***, 2014 BCSC 532 ("***Watson Certification***"), rev'd in part 2015 BCCA 362 ("***Watson Appeal***"), at paras. 361 and 362, for the proposition that, if the pleadings were found to be deficient, they could be redrafted to address any deficiencies. However, at the hearing, Mr. Aaron confirmed that the Proposed NCC is the case that the plaintiffs wish to proceed with, and they do not have anything else to propose.

[56] The essential question before me is whether, assuming the facts pleaded are true, the plaintiffs have pleaded a cause of action under s. 7 of the ***Charter***. The plaintiffs have the burden under ***CPA*** s. 4(1)(a), and on the application to amend, to demonstrate this.

[57] The Proposed NCC is 32 pages and contains over 200 paragraphs. The facts are pleaded in "Part 1: Statement of Facts," at paras. 1-170, and include facts

pleaded in respect of the named plaintiffs and proposed plaintiffs. "Part 3: Legal Basis" is found at paras. 171-210.

[58] The Proposed NCC contains allegations and seeks relief relying on s. 8 of the ***Charter***. However, the claims based on s. 8 were abandoned at the hearing.

[59] The Proposed NCC begins (at paras. 1-7) with a description of the parties. BC Hydro is alleged to be "a Crown corporation and agent of the Crown operating under" the ***Hydro and Power Authority Act***, R.S.B.C. 1996, c. 212. This is the only allegation of fact asserting that BC Hydro is an agent of the Crown. BC Hydro does not concede that the ***Charter*** applies to it, and whether the ***Charter*** applies to BC Hydro is very much a live issue in the action.

[60] Beginning at para. 8 and through to para. 22, the plaintiffs plead a number of definitions. (Other terms are defined later in the Proposed NCC.) For example, the plaintiffs plead:

> "Smart Meter"
>
> 10. . . . "Smart Meter" (where capitalised) has the meaning ascribed to it by definition under section 17(1) of the *Clean Energy Act* [SBC 2010] CHAPTER 22 and section 2 of the *Smart Meters and Smart Grid Regulation*, B.C. Reg. 368/2010 ("the Smart Meter Regulation").
>
> . . .
>
> 13. Where a Smart Meter does contain a Microwave Device, the operation of the Microwave Device may either be enabled or disabled.
>
> "Radio-off Meter"
>
> 14. . . . "Radio-off Meter" means a Smart Meter that contains a Microwave Device, the operation of which has been disabled.
>
> "RF-Emitting Meter"
>
> 15. . . . "RF-Emitting Meter" means a Smart Meter that contains a Microwave Device, the operation of which has been enabled. This is the kind of meter that is impugned in these proceedings. It is popularly referred to as a "smart meter" and such references are cited herein using the term "smart meter" in quotation marks without capitalization.
>
> "Dwelling"
>
> 16. . . . "Dwelling" means a domestic residence or commercial premises to which a utility provides electrical service.

"Customer"

17. . . . "Customer" means any individual, person, partnership, company or other entity receiving electrical service from an electrical utility at any particular Dwelling.

"Opt-Out Fee"

18. . . . "Opt-Out Fee" means a fee that an electrical utility charges to a Customer in exchange for the utility abiding by the Customer's choice to be free from the installation/operation of an RF-Emitting Meter at a particular Dwelling.

"Failed Installation Fee"

19. . . . "Failed Installation Fee" means a fee related to BC Hydro's attendance at a Dwelling to install an RF-Emitting Meter where installation is not carried out because of either an objection made by a Customer or an obstruction.

"Service Refusal"

20. . . . "Service Refusal" means a refusal by an electrical utility to initiate or continue the supply of electrical service to a Dwelling for reason of a Customer's refusal to:

a) Allow the installation of an RF-Emitting Meter at a Dwelling; or

b) Pay an Opt-Out Fee or Failed Installation Fee.

[61] "Impugned Conduct" and "Impugned Provisions" are key terms. The plaintiffs plead as follows:

"Impugned Conduct"

21. This claim challenges the constitutionality of the following conduct by BC Hydro:

a) Operation of an RF-Emitting Meter at a Dwelling of a Customer who at any time requests that there be no operation of an RF-Emitting Meter at his/her Dwelling;

b) Threatening or effecting a Service Refusal;

c) Exacting payment from a Customer of an Opt-Out Fee in exchange for BC Hydro abiding by the Customer's choice to be free from the installation/operation of an RF-Emitting Meter at a particular Dwelling.

d) Exacting payment from a Customer of a Failed Installation Fee related to BC Hydro's attendance at a Dwelling to install an RF-Emitting Meter where installation is not carried out because of either an objection made by a Customer or an obstruction.

("the Impugned Conduct")

"Impugned Provisions"

22. This claim challenges the constitutional validity of the various legislative and/or administrative acts to the extent that they individually and/or collectively, by purpose or effect, authorize the Impugned Conduct, including:

a) *Clean Energy Act* [SBC 2010] CHAPTER 22, section 17;

b) *Smart Meters and Smart Grid Regulation*, B.C. Reg. 368/2010 ("the Smart Meter Regulation");

c) *Hydro and Power Authority Act*, R.S.B.C. 1996, c. 212, section 20;

d) *Electricity and Gas Inspection Act*, (R.S.C., 1985, c. E-4), section 7;

e) *BC Hydro Electric Tariff* ("the Tariff'), sections 2.3, 4.2 - 4.2.5 and 9.5;

f) BC Regulation 203/2013 ("Direction No. 4") and the amendments to the Tariff, as dictated by Direction No. 4, (i.e. sections 4.2.1, 4.2.2, 4.2.3 & 4.2.4) including the criteria for opt-out eligibility under the Meter Choices Program, the imposition of an Opt-Out Fee, the imposition of a Failed Installation Fee, the definition of a "smart meter" as an RF-Emitting Meter and the establishment of such a meter as BC Hydro's standard meter that must be installed at each Customer's Dwelling.

[62] I note that all of the "Impugned Conduct" is described as in relation to a "Dwelling." While one normally thinks of a dwelling as being a home or a residence, that is not how "Dwelling" has been defined in the Proposed NCC. Rather, it includes commercial premises, as well as residential premises. Given the importance the plaintiffs place on the sanctity of their homes for purposes of their s. 7 claim, that has implications for proposed common issues 4 and 4.5, both of which use the term "Dwelling."

[63] Generally, paragraphs 23-85 of the Proposed NCC plead the facts on which the plaintiffs rely to say that the deprivation of their rights under s. 7 of the ***Charter*** occurred in a manner that is inconsistent with the principles of fundamental justice. For example, the plaintiffs say that in paras. 38-74, they have alleged facts setting out how the law (i.e., the Impugned Provisions) "authorizes BC Hydro to coerce its Customers, under the pain of disconnection, to host components of the utility's network infrastructure" in a manner that is arbitrary and grossly disproportionate.

[64] Mr. Aaron submits that, at paras. 86-123 of the Proposed NCC, the plaintiffs have pleaded basic facts relating to health concerns in relation to smart meters. These are the key facts in relation to the s. 7 claim. Mr. Aaron submits that the plaintiffs have pleaded facts asserting a reasonable basis for concern so as to render the choice to be free from a smart meter a fundamental personal choice within an individual's home, and therefore protected by s. 7 of the ***Charter***.

[65] For example, the plaintiffs plead the following (headings have been omitted):

> 87. Each RF-Emitting Meter emits microwave radiation at a frequency range of 902 Megahertz (MHz) to 928 MHz ("the Emissions"), very close to the frequency range of cell phones.
>
> . . .
>
> 89. Health Canada states that:
>
> a) some of the RF energy emitted by "smart meters" will be absorbed by anyone who is nearby;
>
> b) the amount of energy absorbed depends largely on how close one's body is to a "smart meter"; and
>
> c) RF energy from smart meters results in very low RF exposure levels across the entire body.
>
> 90. Where an RF-Emitting Meter is operating at a Dwelling, the occupants of that Dwelling will be exposed to the Emissions.
>
> 91. At any given Dwelling, the Emissions cause biological effects in individuals who are exposed to them. The extent of those biological effects will increase with:
>
> a) proximity of the individual to the RF-Emitting Meter; and
>
> b) duration of exposure.
>
> 92. The biological effects caused by exposure to RF emissions include:
>
> a) increase in heart rate;
>
> b) weight gain;
>
> c) DNA damage;
>
> d) changes in brain chemistry and electrical activity; and
>
> e) cellular stress response, i.e. the biological reaction of cells to a variety of harmful stimuli (e.g., temperature, toxic ions, pH, alcohol).
>
> 93. RF emissions cause key biological reactions in cells that occur well before the tissue shows a rise in temperature as a result of the RF exposure.

> 94. There is consensus in the scientific community as to the fact that exposure to the RF emissions causes biological effects. Those biological effects have not been established as being safe to human health.
>
> 95. The interval between exposures is a relevant factor in the potential cumulative biological impact of RF emissions.
>
> . . .
>
> 100. Customers with an RF-Emitting Meter operating at their homes will be incessantly exposed to the Emissions, at the above-referenced intervals, for an indefinite duration.
>
> 101. The duration over which an individual is exposed to RF emissions is a relevant factor in the potential cumulative biological impact of RF emissions.
>
> 102. The biological response to RF emissions is cumulative. The probability of RF emissions causing a biological effect, and the severity of an effect, increases with the duration of exposure.
>
> . . .
>
> 110. BC Hydro's RF-Emitting Meters will subject Customers to chronic RF exposure, day in and day out, at potentially close range, over an indefinite duration, at the above-referenced intervals.
>
> 111. There is a real issue of potential harm to the human body arising from exposure to the Emissions.
>
> 112. Long-term exposure to RF emissions is a concern that carries much weight amongst the scientific and medical community.
>
> . . .
>
> 115. Science hasn't established that the RF emissions or RF-Emitting Meters are safe. On the contrary, there is evidence that RF emissions could be a health risk and, furthermore, there is evidence that RF emissions are a health risk.
>
> 116. Serious and reasonable concerns exist regarding the effects of RF exposure on DNA expression, cellular processes and homeostasis.
>
> 117. Some of the health concerns arise from the fact that RF emissions, at very low levels of exposure, can cause changes in the body that are indicative of cellular damage. These concerns are supported by measured increases in cancer risk that are linked to the radiation.

[66] I note in these paragraphs that a distinction is drawn between "Emissions" (see paras. 90-91, 100, 111), which is a defined term, and "RF emissions" (see, e.g., paras. 92-95, 101-102, 112). I note also that a distinction is drawn between a Dwelling (see paras. 90, 91, e.g.) and customers' "homes" (see para. 100).

[67] The plaintiffs then plead:

> 130. Some individuals choose to eliminate or minimize their exposure to RF emissions in their residential environment or workplace.
>
> 131. The choice to be free from the operation of an RF-Emitting Meter at one's Dwelling is a fundamental personal choice and an act of environmental self-determination.

[68] I note several things in relation to these two paragraphs. First, I note the allegation of some individuals. Not surprisingly, the plaintiffs implicitly acknowledge that other individuals have or may have different points of view and make different choices. Second, the allegation in para. 130 is not connected with anything. For example, the allegation is not connected with health concerns, which are said to be the basis for the plaintiffs' assertions that their rights are being violated by the Impugned Provisions and the Impugned Conduct. Third, a "residential environment or workplace" is not the same as a "Dwelling." Thus, even within the Proposed NCC, there is a lack of clarity in how the plaintiffs plead their s. 7 claim. Finally, the allegation that the "choice to be free . . . is a fundamental personal choice" cannot be an allegation of fact. Rather, it is the legal conclusion that the plaintiffs hope will ultimately be drawn in their s. 7 claim.

[69] Beginning at para. 132, the plaintiffs plead allegations concerning individuals proposed as representative plaintiffs. For example, the plaintiffs plead regarding Ms. Davis as follows:

> 132. Davis and her husband are residential customers of BC Hydro with respect to the supply of power to their home at the above-referenced address.
>
> 133. Davis and her husband choose that their home be free of an RF-Emitting Meter; however, they have been deprived of that choice as a result of BC Hydro's installation of an RF-Emitting Meter at their home.
>
> 134. On August 22, 2012, at the home of Davis, BC Hydro installed an RF-Emitting Meter which has since been operating continuously.
>
> 135. Prior to Direction No. 4 coming into force, Davis requested that the RF-Emitting Meter be removed from her home and BC Hydro did not accede to that request.
>
> 136. On September 25, 2013, Direction No. 4 came into force, with the result that Davis and her husband became ineligible to choose to be free of an RF-Emitting Meter at their home (for reason that an RF-Emitting Meter had already been installed there).

> 137. In reliance on the Impugned Provisions, BC Hydro takes the position that the operation of an RF-Emitting Meter at the Davis home is compulsory, the only other option being Service Refusal.
>
> 138. Davis and her husband require BC Hydro's electrical service, without which they would be deprived of a necessity to their daily life.

[70] I note that no facts are pleaded concerning Ms. Davis's reason for choosing to be free of a smart meter, although her affidavit evidence provides some explanation.

[71] The plaintiffs plead with respect to Sharon Noble:

> 165. Noble is a residential customer of BC Hydro with respect to the supply of power to her home at the above-referenced address.
>
> 166. Noble seeks to freely choose that her home be free of an RF-Emitting Meter; however, BC Hydro has exacted payment of an Opt-Out Fee as a consequence of her making that choice.
>
> 167. As of September 25, 2013, BC Hydro had not installed an RF-Emitting Meter at the home of Noble, with the result that Noble became eligible to choose to be free of an RF- Emitting Meter at her home subject to her payment of an Opt-Out Fee.
>
> 168. Noble paid the Opt-Out Fee.
>
> 169. In reliance on the Impugned Provisions, BC Hydro takes the position that payment of the Opt-Out Fee is compulsory, the only other options being Service Refusal or the installation of an RF-Emitting Meter.
>
> 170. Noble requires BC Hydro's electrical service, without which she would be deprived of a necessity to her daily life.

[72] Again, no facts are pleaded concerning Ms. Noble's reason for seeking to "freely choose" that her home be free of a smart meter.

[73] With respect to relief, and in addition to certification of this action as a class proceeding, the plaintiffs seek the following in "Part 2: Relief Sought":

> 2. A declaration that, to the extent that the Impugned Provisions authorize BC Hydro to engage in the Impugned Conduct, both the Impugned Provisions and the Impugned Conduct unjustifiably infringe s. 7 of the [***Charter***] and are, to that extent, of no force and effect;
>
> 3. That such a declaration be given retroactive effect dating back to BC Hydro's first instance of the Impugned Conduct in the summer of 2011;
>
> 4. An order in the nature of a permanent injunction:

> (a) requiring BC Hydro to forthwith cease and desist from the operation of an RF-Emitting Meter at the Dwelling of any Plaintiff who at any time requests that there be no operation of an RF-Emitting Meter at his/her Dwelling;
>
> (b) prohibiting BC Hydro from charging (or threatening to charge) an Opt-Out Fee to any Customer; and
>
> (c) Prohibiting BC Hydro from engaging (or threatening to engage) in a Service Refusal;
>
> 5. An declaration as to the invalidity of any agreement provided by any Plaintiff under the Meter Choices Program to accept an RF-Emitting Meter or pay an Opt-Out Fee;
>
> . . .
>
> 7. An order of damages in the amount of any Opt-Out Fee and/or Failed Installation Fee collected by BC Hydro;
>
> 8. Further and in any event, pursuant to section 24(1) of the *Charter*, an order for damages in the aggregate for breach of the rights of the Plaintiffs as protected under the *Charter*[.]

[74] In the "Legal Basis" section, the plaintiffs plead:

> 173. Each Plaintiff has been deprived of his or her s. 7 *Charter* rights of liberty and security of the person . . . .

[75] With respect to the right to liberty, the plaintiffs plead further that:

> 176. The s. 7 right to liberty is engaged and infringed by state interference with the right of the individual to a protected sphere of autonomy over fundamental personal choices going to the core of what it means to enjoy individual dignity and independence, including:
>
> a) the determination of one's environmental exposures generated from one's own home;
>
> b) the choice to take precautionary avoidance measures against long-term, sustained exposure to an environmental agent, the safety of which remains a matter of reasonable concern; and
>
> c) the choice to be free of an RF-Emitting Meter situated at one's own home.
>
> 177. The said state interference occurs by way of the Impugned Provisions and the Impugned Conduct that is authorized thereunder, both of which deprive the Plaintiffs of the power and autonomy to make fundamental personal choices about how to live in their own homes.

[76] I note these allegations are in connection with an individual's home, not a Dwelling, and connect the liberty right with a right to control and make decisions

about what goes on in and at one's home. However, proposed common issues 4 and 4.5 are about a Dwelling.

[77] With respect to security of the person, the plaintiffs plead, for example:

> 178. Security of the person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference.
>
> 179. The s. 7 right to security of person is engaged and infringed by state interference with an individual's bodily integrity in the sanctity of his/her own home. The said state interference occurs by the Impugned Provisions which authorize BC Hydro's imposition of an RF-emitting device at one's place of residence, a device that generates sustained emissions of a possibly harmful environmental agent such that those emissions are absorbed into the bodies of anyone nearby, with biological effects.
>
> 180. The s. 7 right to security of person is further engaged and infringed by state interference with the ability of an individual to make and act upon decisions concerning his or her own home and body, to exercise control over matters fundamental to his or her bodily integrity, and by the resultant impairment to his or her human dignity and independence.

[78] Again, I note that these allegations are made, not in respect of a Dwelling, but in relation to "one's own home" and an individual's "residence." Since the proposed common issues use the term Dwelling, they are therefore not grounded in the allegations in the Proposed NCC.

[79] The plaintiffs assert under the heading "Biological effects trigger rights" the following:

> 188. Exposure to the RF emissions causes biological effects. That fact, in itself, triggers a right of autonomy and free choice, regardless of whether the said biological effects have been established as being adverse to human health. One has a right against being physically "touched" by the state in one's own home.
>
> 189. It is a violation of s. 7 (autonomy and personal security) . . . to forcefully situate an RF-Emitting Device at an individual's home where that device generates an environmental agent that is known to have effects on human biology, a fortiori where the safety of such exposure remains a matter of reasonable concern.
>
> 190. The safety of the Emissions remains a matter of reasonable concern.
>
> 191. Given that there is evidence that RF Emissions could be a health risk, the individual choice to be free of an RF-Emitting Meter at home is an intimately personal choice as well as a reasonable choice.

> 192. There exists a reasonable basis for concern about health risk so as to justify a precautionary approach to avoidance of an RF-Emitting Meter at one's Dwelling.
>
> 193. There exists a reasonable basis for concern about health risk so as to give rise to a right of autonomy and free choice as to whether an RF-Emitting Meter is operational from one's own Dwelling.

These are not alleged as facts, but as part of the Legal Basis of the Proposed NCC.

[80] In support of his position that, based on the Proposed NCC, the plaintiffs have pleaded a reasonable claim in respect of the protection under s. 7 of the right to liberty, Mr. Aaron refers to (among other cases): ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844 (the judgment of La Forest J.); ***Blencoe v. British Columbia (Human Rights Commission)***, 2000 SCC 44; and ***R. v. Smith***, 2014 BCCA 322, aff'd 2015 SCC 34.

[81] In ***Godbout***, the plaintiff challenged the enforceability of a municipal by-law that required municipal employees to live within the municipality. Mr. Justice La Forest was in the minority, the majority preferring to decide the issues based on the ***Quebec Charter***, rather than under s. 7 of the ***Charter***. However, in a passage that is frequently quoted, La Forest J. wrote, at para. 66 [underlining added]:

> [66] The foregoing discussion serves simply to reiterate my general view that the right to liberty enshrined in s. 7 of the *Charter* protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference. I must emphasize here that, as the tenor of my comments in *B. (R.)* should indicate, I do not by any means regard this sphere of autonomy as being so wide as to encompass any and all decisions that individuals might make in conducting their affairs. Indeed, such a view would run contrary to the basic idea, expressed both at the outset of these reasons and in my reasons in *B. (R.)*, that individuals cannot, in any organized society, be guaranteed an unbridled freedom to do whatever they please. Moreover, I do not even consider that the sphere of autonomy includes within its scope every matter that might, however vaguely, be described as "private". Rather, as I see it, the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence. . . .

Mr. Justice La Forest described choosing where to establish one's home as falling "within that narrow class of decisions deserving of constitutional protection" (at para. 68).

[82] ***Blencoe*** also discussed the nature of the liberty interest protected by s. 7. Bastarache J. (for the majority) wrote, at para. 49 [underlining added]:

> [49] The liberty interest protected by s. 7 of the *Charter* is no longer restricted to mere freedom from physical restraint. Members of this Court have found that "liberty" is engaged where state compulsions or prohibitions affect important and fundamental life choices. This applies for example where persons are compelled to appear at a particular time and place for fingerprinting (*Beare*, supra); to produce documents or testify (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission*), [1990] 1 S.C.R. 425); and not to loiter in particular areas (*R. v. Heywood*, [1994] 3 S.C.R. 761). In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. In *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, La Forest J., with whom L'Heureux-Dubé, Gonthier and McLachlin JJ. agreed, emphasized that the liberty interest protected by s. 7 must be interpreted broadly and in accordance with the principles and values underlying the *Charter* as a whole and that it protects an individual's personal autonomy:
>
> > . . . liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.

[83] In ***R. v. Smith***, Garson J.A. wrote (for the Court), at para. 96:

> [96] In my opinion, decisions concerning how one manages serious health problems go to the core of what it means to live with dignity, independence and autonomy as contemplated in cases like *Morgentaler*, *Parker*, and *Adams*. Where the state interferes with an individual's capacity to make decisions concerning the management of those health problems by threat of criminal sanction, the state is depriving that individual of the power to make fundamental personal choices and the liberty interest is engaged. Whether that infringement accords with the principles of fundamental justice and can therefore be justified is another question. The trial judge did not err in concluding that the liberty interest was engaged by, first, the threat of incarceration and, second, by state interference with decisions of fundamental personal importance.

[84] The plaintiffs' position is that, by analogy with these cases, they have pleaded sufficient facts (in particular, the facts alleged in paras. 86-123 relating to biological

effects and health risks) so that, based on those facts, the matter of whether to reject or accept a smart meter can properly be characterized as fundamentally or inherently personal such that it implicates basic choices going to the core of what it means to enjoy individual dignity and independence (as described by La Forest J.). Further, the plaintiffs assert that, based on the facts pleaded, the choice to reject a smart meter qualifies as an important and fundamental life choice, and falls within the "narrow class of decisions deserving of constitutional protection." Therefore, based on the facts alleged (which must be accepted as true), the "Impugned Conduct" and the "Impugned Provisions" amount to a breach of the plaintiffs' rights to liberty and security of the person protected by s. 7 of the ***Charter***, and the plaintiffs have, accordingly, pleaded a claim that is not bound to fail.

[85] In support of his submission that the plaintiffs have also pleaded a reasonable claim in respect of protection of security of the person under s. 7, Mr. Aaron cites ***Carter v. Canada (Attorney General)***, 2015 SCC 5. ***Carter*** is the well-known case dealing with the challenge to the ***Criminal Code*** provisions prohibiting physician-assisted dying, which ultimately were struck down. The Court wrote, at para. 64 [underlining added]:

> [64] . . . Security of the person encompasses "a notion of personal autonomy involving . . . control over one's bodily integrity free from state interference" [citations omitted] and it is engaged by state interference with an individual's physical or psychological integrity, including any state action that causes physical or serious psychological suffering [citations omitted].

[86] Mr. Aaron submits that the plaintiffs have pleaded sufficient facts (in particular, in paras. 86-123 and 130-131) to establish a reasonable basis for concern and the reasonableness of an individual's choice to be free from the operation of a smart meter at the individual's Dwelling. In Mr. Aaron's submission, the pleaded facts that a concern exists, and about a loss of control in the individual's home are sufficient to state a reasonable claim under s. 7 of the ***Charter***, and it is not plain and obvious the claim is bound to fail. Therefore, the plaintiffs have satisfied the requirement under s. 4(1)(a) of the ***CPA***, and their application to amend should be granted.

[87] In his submissions on behalf of BC Hydro, Mr. Vesely argues simply that it is plain and obvious that the Proposed NCC fails to disclose a cause of action.

[88] Mr. Vesely notes that the plaintiffs do not allege that emissions from smart meters (i.e., "Emissions" in the Proposed NCC) in fact cause any adverse health effects, and the plaintiffs do not allege any actual harm. He says that the law is well-settled that the mere allegation that state action (or inaction) has increased the risk to the lives or security of the person of the state's citizens is insufficient to support a breach of s. 7 of the ***Charter***. Therefore, in his submission, the plaintiffs have failed to state any reasonable cause of action.

[89] In support of his position that merely pleading a risk is insufficient, Mr. Vesely cites ***Operation Dismantle***. There, Wilson J. wrote, at pp. 488-489:

> The concept of "right" as used in the *Charter* must also, I believe, recognize and take account of the political reality of the modern state. Action by the state or, conversely, inaction by the state will frequently have the effect of decreasing or increasing the risk to the lives or security of its citizens. It may be argued, for example, that the failure of government to limit significantly the speed of traffic on the highways threatens our right to life and security in that it increases the risk of highway accidents. Such conduct, however, would not, in my view, fall within the scope of the right protected by s. 7 of the *Charter*.

[90] Mr. Vesely also cites ***Trang v. Alberta (Edmonton Remand Centre)***, 2007 ABCA 263, where Slater J.A. (for the court) said, at paras. 28-29:

> [28] An initial question is whether "mere risk" can result in a *Charter* breach. The risks arising from ordinary life are generally dealt with by the law of tort, with all of its built-in limitations. For example, there is no tort of negligence unless there is damage. In tort "mere risk" and even "greater risk" usually do not justify a remedy. If these respondents have not suffered any damage, they would have no tort claim, but they claim they are still entitled to pursue a higher constitutional claim. It goes without saying that s. 7 of the *Charter* was not designed to replace or supplement the law of torts, the law of product liability, or the rules regarding the manufacturing standards for passenger vehicles. . . .
>
> [29] The respondents rely on cases that hold that increased risk to a person's health can amount to an infringement of security of the person: ***R. v. Malmo-Levine***, 2003 SCC 74, [2003] 3 S.C.R. 571 at para. 89; ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 at pp. 60, 82, 92; ***R. v. Parker*** (2000), 49 O.R. (3d) 481, 188 D.L.R. (4th) 385 (C.A.) at paras. 145, 157. These cases

> all involve statutorily imposed restrictions on the availability of health care, coupled with a possibility of criminal conviction if the restriction was disobeyed. The passing comment in ***Malmo-Levine*** that is relied on specifically mentions the risk of imprisonment as being the trigger to the potential breach. These cases do not stand for a general proposition that every state action that imposes a greater risk of personal injury on a citizen is a breach of s. 7.

[91] Mr. Vesely submits that the application of these cases here is straightforward, since there is not even an allegation that the risk to health has been increased by the "Impugned Conduct." In his submission, the plaintiffs' allegation (in paras. 192 and 193) of a "reasonable basis for concern about health risk" and assertion of a choice to be free from that risk are one step further removed from allegations that were found in ***Operation Dismantle*** and ***Trang*** to be inadequate to ground a ***Charter*** breach.

[92] Mr. Vesely argues further that Mr. Justice La Forest's judgment in ***Godbout*** does not assist the plaintiffs. In Mr. Vesely's submission, Mr. Justice La Forest, in para. 66 of the judgment, was describing limits of the s. 7 right to liberty. Mr. Vesely argues that the plaintiffs have failed to plead facts that would engage what La Forest J. described as the "narrow class" of inherently personal matters that are deserving of protection under s. 7.

[93] The result, in Mr. Vesely's submission, is that no claim for a breach of s. 7 can lie on the pleaded facts. In other words, the plaintiffs' claim, as pleaded in the Proposed NCC, is bound to fail. The application to amend should be dismissed, and the certification application should also be dismissed on the grounds that the plaintiffs have failed to meet the requirement under s. 4(1)(a) of the ***CPA***.

[94] Some might find the parallels drawn by the plaintiffs between their complaints about smart meters and the issues that were before the court in ***Carter*** to be far-fetched, or even ridiculous or offensive. However, the certification application is not a test of the merits of the claims. The only issue under s. 4(1)(a) of the ***CPA*** is whether, assuming the facts alleged are true, the Proposed NCC discloses a cause of action.

[95] I have concluded that, based in particular on facts pleaded in paras. 86-123, it is not plain and obvious that the plaintiffs' claim based on the liberty interest protected by s. 7 of the ***Charter*** is bound to fail.

[96] However, I have reached a different conclusion concerning the claim based on the right to security of the person protected by s. 7. The cases (including ***Carter*** and ***Blencoe***) show that right is engaged by state interference with an individual's physical or psychological integrity, including state action that causes physical or serious psychological suffering. The plaintiffs have failed to plead material facts of the nature required in order to plead such a cause of action. Indeed, no material facts at all of that sort are pleaded in relation to either the named or proposed plaintiffs.

[97] Because I have concluded that there is a cause of action pleaded in respect of the liberty interest protected by s. 7 of the ***Charter***, I will go on to consider the ancillary pleading issues raised by Mr. Vesely.

[98] First, I address the plaintiffs' claim for damages, including under s. 24 of the ***Charter***. I agree with Mr. Vesely that, on the authorities, absent conduct that is clearly wrong, taken in bad faith, or an abuse of power, the court will not award damages for harm suffered as a result of the enactment or application of a law that is subsequently declared to be unconstitutional. See ***Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick***, 2002 SCC 13, at paras. 78-79. The plaintiffs have not alleged that any of the "Impugned Conduct" was carried out by BC Hydro in bad faith, or was an abuse of power, or was otherwise clearly wrong. There are, therefore, no facts pleaded to support the relief claimed in paras. 7 and 8 of Part 2 of the Proposed NCC. Those amendments cannot be allowed.

[99] Second, the plaintiffs originally sought to add Ashif Halani as a named plaintiff. Based on his affidavit, Mr. Halani is an officer of a company that is a non-residential customer of BC Hydro. Mr. Halani personally is not alleged to be a customer of BC Hydro. The Proposed NCC discloses no cause of action by Mr.

Halani in his personal capacity. The application to add Mr. Halani as a plaintiff is dismissed and all proposed amendments relating to Mr. Halani are also refused.

[100] Finally, in my opinion, the Proposed NCC, as drafted, fails to comply with the Rules governing pleadings (discussed above). It simply cannot be described as either a concise statement of the material facts or a concise summary of the legal basis for the relief sought. Moreover, the Proposed NCC may tell a story and forcefully argue points of view, but, in my opinion, it fails to fulfill the function of a pleading (as described in ***Virk v. Brar***). In addition, based on the submissions during the hearing of the certification application, the Proposed NCC contains claims (for example, under s. 8 of the ***Charter***) that the plaintiffs are abandoning, and would have to be further amended in any event.

[101] I therefore dismiss the plaintiffs' application for leave to amend the notice of civil claim to the form of the Proposed NCC and to add plaintiffs. However, the plaintiffs (if they wish) have leave to apply to amend the notice of civil claim (to a form consistent with these Reasons) and add parties, providing they do so within 60 days of the date of these Reasons.

5. Identifiable class and class description: s. 4(1)(b)

[102] The next requirement that must be met for certification is that there is an identifiable class of two or more persons.

[103] Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. The definition should state objective criteria by which members of the class can be identified. While the criteria for class membership should bear a rational relationship to the common issues, the criteria should not depend on the outcome of the litigation. See ***Dutton***, at para. 38.

[104] In ***Watson Certification***, Bauman C.J.S.C. (as he then was) summarized the requirements under s. 4(1)(b) as follows, at paras. 63-64:

> [63] . . . [T]he plaintiff must provide some basis in fact for the existence of an identifiable class of two or more persons. The class must be clearly defined at the outset of the litigation as doing so identifies the individuals entitled to notice under the CPA, entitled to relief if the case succeeds, and bound by judgment unless they opt-out [citations omitted].
>
> [64] To meet this requirement, the plaintiff must define the class with reference to objective criteria. Similarly, while the definition should be rationally related to the alleged common issues, the membership of the class must not hinge on the outcome of the litigation. Further, the class must not be defined too broadly or too narrowly in relation to the common issues. Ultimately, it is not necessary for the plaintiff to identify every class member, but it must be possible to determine whether or not a specific individual is a member of the class [citations omitted].

[105] In ***Hollick***, Chief Justice McLachlin commented on the task of defining the scope of the class appropriately, at paras. 20-21:

> 20 . . .[I]mplicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. . . . It falls to the putative representative to show that the class is defined sufficiently narrowly.
>
> 21 The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: [citations omitted].

[106] The proposed class descriptions are as follows:

> Class A: any individual residential customer of BC Hydro who has not been offered an opportunity to opt out of having a smart meter installed at the residential premises at which BC Hydro supplies electricity to that customer;
>
> Class B: any individual customer of BC Hydro to whom BC Hydro supplies electricity at a non-residential premises; and
>
> Class C: any individual customer of BC Hydro who has been offered an opportunity to pay BC Hydro a fee for that customer's ability to either retain their analogue "Legacy Meter" or receive a "Radio-off Meter" (instead of

having a smart meter installed at the premises at which BC Hydro supplies electricity to that customer).

[107] Mr. Aaron explains that the proposed classes are essentially the groups created by ***Direction No. 4***. He says that the criteria in the proposed class descriptions distinguish between individuals who are customers of BC Hydro and have been denied the opportunity to choose to be free (what Mr. Aaron terms the "Free Choice") from the operation of a smart meter either at their Dwelling or at non-residential premises (Classes A and B), and individuals who have been offered the opportunity to choose but only in exchange for payment of a fee (Class C).

[108] Mr. Aaron explains that, on behalf of the respective classes, the claims assert that the denial of Free Choice (or requirement to pay) constitutes a ***Charter*** violation. The relief sought on behalf of each class entails either the provision of that very Free Choice which was denied, or removing the requirement to pay for it. Therefore, in his submission, there is a rational connection as between the criteria for class membership, the claims advanced on behalf of the class, the issues arising out of those claims (i.e. the question of whether either the denial of Free Choice or the requirement to pay is unconstitutional) and the relief sought on behalf of the class.

[109] In Mr. Aaron's submission the proposed class definitions are not unnecessarily broad in the sense that they include individuals who do not object to smart meters and have no claims. The reason, in Mr. Aaron's submission, is that, whether an individual wants a smart meter or not, the individual is still subject to the mandatory imposition of that meter (or the requirement to pay Opt-Out Fees). He argues that the common question is whether that mandatory imposition (or requirement to pay) is constitutional – in other words, whether each individual has a right under s. 7 of the ***Charter*** to choose to be free of a smart meter – and that question does not turn on whether or not the individual has no objection to a smart meter. The question is common to all of BC Hydro's individual customers, whatever any individual's position might be on smart meters.

[110] In Mr. Aaron's submission, members of each class can be identified by objective criteria, because the identifying elements of each class correspond to the categories under the Meter Choices Program (i.e., ***Direction No. 4***), and the plaintiffs have shown "some basis in fact" for the existence of an identifiable class of two or more persons.

[111] On behalf of BC Hydro, Mr. Vesely submits that the proposed classes are vastly overbroad. He points out that, on the evidence filed, only the smallest fraction of BC Hydro's customers ever objected to the installation of a smart meter or have any interest in the resolution of the proposed common issues. Mr. Vesely argues that Mr. Aaron's submission that all individual customers have an interest in knowing whether they have a constitutional right to choose a smart meter ignores the reality that, on the evidence, the vast majority of the putative class are not seeking a "choice" and would have no interest in the resolution of the common issues. They are content to keep their smart meter; they are not paying an Opt-Out Fee; they face no prospect of a service disconnection; and they have no interest in the underlying debate concerning the alleged health risks associated with RF emissions.

[112] Mr. Vesely submits that the small minority within the proposed class who have voiced concern are themselves a disparate group who have asserted differing (and often inconsistent) complaints with respect to smart meters that arise from their unique concerns and circumstances. He says that it is important to recall that the proposed common issues all relate to the alleged health risks associated with smart meters. The evidence shows that many of those who have objected to having a smart meter have no concern whatsoever with the alleged health risks associated with smart meters. Thus, even this small minority within the proposed class would be overbroad.

[113] In addition, in Mr. Vesely's submission, there are irreconcilable conflicts among putative class members. He argues that, on the evidence submitted, three distinct conflicts arise.

[114] First, there are many individuals who would fall within the proposed class who support the smart meter initiative and oppose in principle what they describe as the "groundless hysteria" surrounding RF emissions and smart meters, and the relief that is being sought in this action. In Mr. Vesely's submission, this problem cannot be solved simply by giving such individuals a choice to keep their own smart meter or telling them (if the action is certified) they can opt out. Fundamentally, within the class as described, there is a group of individuals (those involved with the CSTS, for example) whose very strong desire is that the key proposed common issues (about health concerns and free choice) be answered "yes," and there is another group of individuals whose very strong desire is that those common issues be answered "no." Such a conflict is unacceptable and means the plaintiffs have failed to describe an acceptable class. On this point, Mr. Vesely cites ***Asp v. Boughton Law Corporation***, 2014 BCSC 1124, at paras. 49 and 51.

[115] In Mr. Vesely's submission, the second conflict arises from the fact that, on the evidence submitted, objections to smart meters have been based on different grounds of complaint, many of which are inconsistent with the plaintiffs' claims. These other grounds of complaint include the amount of personal information collected by smart meters, the alleged risk of fire, the potential for time-of-use billing, loss of union jobs for manual meter readers, and the belief that the whole smart meter initiative is a waste of money.

[116] The final conflict, in Mr. Vesely's submission, arises from the fact that, if the plaintiffs obtained the relief sought in this action, the incremental cost of the benefits received by some members of the class would be borne by other members of the class. BC Hydro would incur incremental costs as a result of increasing the number of legacy meters and radio-off meters on the BC Hydro system. As a public utility with rates set on a cost-of-service basis, if BC Hydro was not able to recover such incremental costs from those customers who choose the alternative meter option, this would result in higher rates for BC Hydro's remaining customers. In Mr. Vesely's submission, this conflict strikes at the heart of the plaintiffs' claims. If the plaintiffs are successful in any aspect of their claims, other customers of BC Hydro will face

higher rates because of the resulting incremental costs. Mr. Vesely argues that this fact puts the members of putative classes in an irreconcilable conflict of interest.

[117] I conclude that the proposed class descriptions identify two or more persons, and state objective criteria that do not depend on the outcome of the litigation. However, in my opinion, the proposed class definitions, as drafted, are unacceptable given the fluidity of BC Hydro's customer base. For example, they would include as class members individuals who are not currently BC Hydro customers (or even residents of B.C.), but who, at some point in the future, become customers. Thus, as drafted, the proposed class descriptions do not clearly identify either the individuals entitled to notice under the ***CPA***, or entitled to relief if the action succeeds, or bound by any judgment (unless they opt out). However, this is a problem that, if the other requirements for certification were met, could, perhaps, be addressed by redrafting (for example, by fixing a time period).

[118] In my view, the potential for conflicts among proposed class members, such as those described by Mr. Vesely, is more appropriately considered in the context of whether the claims of the class members raise common issues – the requirement under s. 4(1)(c) of the ***CPA*** – rather that in the context of the class description. See, for example, the discussion in ***Watson Certification***, at paras. 65-67, citing both ***Dutton*** and ***Vivendi Canada Inc. v. Dell'Aniello***, 2014 SCC 1, at para. 45 ("success for one member must not result in failure for another"). In ***Watson Certification***, even though the defendants argued that there would be "winners" and "losers" among the class members, making the case unsuitable for certification, that argument was advanced in relation to ***CPA*** s. 4(1)(c). The defendants in ***Watson Certification*** did not challenge the proposed class descriptions: see para. 219.

[119] Accordingly, I conclude that, provided the proposed class descriptions were redrafted to address the problems I have described above, the plaintiffs could meet the requirements of s. 4(1)(b).

6. Common issues: s. 4(1)(c)

[120] Section 4(1)(c) of the ***CPA*** requires the plaintiff to provide some basis in fact for concluding that at least some of the issues raised by the claims are either "common but not necessarily identical issues of fact" or "common but not necessarily identical issues of law that arise from common but not necessarily identical issues of fact."

[121] In ***Dutton***, Chief Justice McLachlin explained (at para. 39) that the underlying question when analyzing commonality is "whether allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis." In ***Pro-Sys***, Mr. Justice Rothstein conveniently summarized the other holdings of ***Dutton*** regarding commonality as follows (see ***Pro-Sys***, at para. 108, citing ***Dutton***, at paras. 39-40):

> (1) The commonality question should be approached purposively.
>
> (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
>
> (3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
>
> (4) It [is] not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
>
> (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[122] With respect to the statement that "success for one class member must mean success for all," Chief Justice Bauman noted in ***Watson Certification***, at para. 67:

> [67] The Court recently clarified the final point and held that "success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another" (*Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45). Further, questions may be common even if the answers to those questions vary from class member to class member (*Vivendi* at paras. 45-46). . . .

[123] See also the discussion in ***Watson Appeal***, at paras. 145 and following. Madam Justice Saunders observed, at para. 152:

> . . . [C]ommonality requires that the members of the class all have the same qualitative stake in the answer to the question, although the degree of importance to each member need not be the same. In other words, they cannot pull in opposite directions on the issue.

[124] In ***Rumley v. British Columbia***, 2001 SCC 69, at para. 29, Chief Justice McLachlin acknowledged the potential danger of framing a common issue too broadly:

> [29] There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. . . . It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[125] Common issues need not predominate over individual issues or be determinative of each claimant's claim. For common issues to be certifiable, they need only be issues of fact or law that move the litigation forward. See ***Fairhurst v. Anglo American PLC***, 2014 BCSC 2270, at para. 48.

[126] The proposed common issues (as modified at the hearing) are as follows:

> **A. Issues of fact common to all classes**
>
> 1. Do the Emissions [defined in para. 87 of the Proposed NCC as "microwave radiation at a frequency range of 902 Megahertz (MHz) to 928 MHz"] cause biological effects in individuals who are exposed to them?
>
> 2. Is there a real issue of potential harm to the human body arising from exposure to the Emissions?
>
> 3. Does the safety of the Emissions remain a matter of reasonable concern?
>
> 4. Is the choice to be free from the operation of an RF-Emitting Meter at one's Dwelling a fundamental personal choice?
>
> 4.5 Does there exists a reasonable basis for concern about health risk so as to give rise to a right of autonomy and free choice as to whether an RF-Emitting Meter is operational from one's own Dwelling?

B. Issues of law common to Class A: Ineligible residential customers represented by Davis/O'Connor

5(a). Is s. 7 of the Charter unjustifiably infringed by BC Hydro's operation of an RF-Emitting Device at the home of a Customer in the absence of having provided that Customer with the choice to be free from the operation of an RF-Emitting Meter at his/her home?

5(b). Is s. 7 of the Charter unjustifiably infringed by the law that authorizes BC Hydro's conduct in that regard?

C. Issues of law common to Class B: Ineligible general service customers represented by Klein

6(a). Is s. 7 of the *Charter* unjustifiably infringed by BC Hydro's operation of an RF-Emitting Device at the premises of a "general service" Customer in the absence of having provided that Customer with the choice to be free from the operation of an RF-Emitting Meter at his/her home?

6(b). Is s. 7 of the *Charter* unjustifiably infringed by the law that authorizes BC Hydro's conduct in that regard?

D. Issues of law common to Class C: Eligible customers represented by Schnurr/Noble

7(a). Is s. 7 of the *Charter* unjustifiably infringed by BC Hydro exacting payment from a Customer of an Opt-Out Fee?

7(b). Is s. 7 of the *Charter* unjustifiably infringed by the law that authorizes BC Hydro's conduct in that regard?

7(c). Should the Court order damages in the amount of any Opt-out Fee collected by BC Hydro?

8(a). Where a Customer has agreed (or been deemed to agree) to accept an RF-Emitting Meter or pay an Opt-Out Fee under the Meter Choices Program, is that agreement valid?

8(b). Is s. 7 of the *Charter* unjustifiably infringed by the law that holds a Customer to any such agreement?

E. Issues of law common to two or more classes

9(a). Is s. 7 of the *Charter* unjustifiably infringed by BC Hydro threatening or effecting a Service Refusal?

9(b). Is s. 7 of the *Charter* unjustifiably infringed by the law that authorizes BC Hydro's conduct in that regard?

10(a). Is s. 7 the *Charter* unjustifiably infringed by BC Hydro exacting payment from a Customer of a Failed Installation Fee?

10(b). Is s. 7 of the *Charter* unjustifiably infringed by the law that authorizes BC Hydro's conduct in that regard?

10(c). Should the Court order damages in the amount of any Failed Installation Fee collected by BC Hydro?

11. Should any declaration of a *Charter* infringement be given retroactive effect?

> 12. Should the Court issue, pursuant to section 24(1) of the *Charter*, an order for damages in the aggregate for breach of *Charter* rights?
>
> 13. Should the Court order special costs against BC Hydro, pursuant to section 37(2)(c) of the *Class Proceedings Act*, [RSBC 1996]?

[127] In the plaintiffs' written submissions, Mr. Aaron described proposed issue 4.5 (which has its origins in para. 193 of the Proposed NCC) as a "broader issue" in respect of which proposed issues 1-4 could be seen as sub-issues. Mr. Aaron described proposed issue 4.5 as the "central issue," which, in his submission, is common to every class member's claim, regardless of circumstances.

[128] I will focus on proposed common issues 1 to 4.5. These are the common issues of fact on which the remaining "common issues of law" depend.

[129] In my opinion, the drafting of some of these issues is problematic. For example, what does "exposed" mean in proposed common issue 1? Is an individual in a condo tower where the meter centre is on a different floor "exposed" for purposes of this issue? Proposed common issue 1 is related to the allegations in para. 91 of the Proposed NCC, which refer to a Dwelling, although the focus of the plaintiffs' s. 7 claim is personal choice in one's home. However, the proposed common issue (as drafted) has no limits. Proposed common issue 2 asks about a "real issue," but it is unclear what "real" is intended to mean. Is the intention to distinguish "real" from "theoretical"? Or do the plaintiffs mean "real" in the sense of significant or substantial? Proposed common issue 3 asks whether safety of Emissions "remain" a matter of "reasonable concern." Such drafting assumes that the issue of safety has already been proved to be a matter of "reasonable concern." However, not only is this issue not proposed as a common issue, it is not even alleged as a fact in the Proposed Amended NCC. "Reasonable" is also problematic. On what basis is "reasonable" going to be assessed? Will a subjective standard be applied, or an objective standard, or some combination?

[130] I also note that there is no proposed common issue about whether the ***Charter*** applies to BC Hydro. The plaintiffs cannot assume that this has been

admitted (which it has not been) or determined in their favour. If the ***Charter*** does not apply to BC Hydro, the plaintiffs have no case, regardless of anything else.

[131] Perhaps the drafting problems I have mentioned could be addressed in a satisfactory way, although the common issues had already been revised and nothing further was proposed at the hearing.

[132] However, there is a much more fundamental problem for the plaintiffs. In my opinion, they have failed to meet their evidentiary burden with respect to their proposed common issues, particularly their common issues of fact. There is no admissible evidence that these issues could be resolved on a class-wide basis.

[133] In two recent cases, ***Charlton v. Abbott Laboratories, Ltd.***, 2015 BCCA 26 and ***Miller v. Merck Frosst Canada Ltd.***, 2015 BCCA 353, the Court of Appeal has provided helpful guidance on the question of what showing "some basis in fact" means in relation to proposed common issues, especially proposed common issues about general causation. (Problems with proof of specific causation are often raised at the preferable procedure stage of the analysis, as part of the argument that proving general causation will accomplish little or nothing.) As drafted, proposed common issues 1 and 2 clearly raise general causation issues.

[134] In ***Charlton***, Willcock J.A. wrote [underlining added]:

> [84] Where the applicants seek to address questions of causation on a class-wide basis and where causation is said to give rise to the commonality of interests, there must be some evidence of a methodology that will enable them to prove causation on a class-wide basis. The evidence at the certification hearing must support the conclusion that certification of the common issue will advance the claim as pleaded. Where the proposed common issue is causation, there must be some evidence that issue may be resolved on a class-wide basis. Seeking evidence of a methodology of addressing causation for the class serves the objective of class proceedings and the Act must be applied with a purposive approach.
>
> . . .
>
> [93] Where there is some evidence by which general causation may be proven, that is sufficient; the evidence ought not to be weighed at certification. . . .
>
> . . .

> [97] . . . In the case before us, the question is whether it can be said there was some evidence of a method of establishing general causation before the certification judge.
>
> . . .
>
> [111] The question that ought to have been asked at the certification hearing in relation to both types of claims, is not whether the resolution of the general causation question will advance the class claims, but rather, whether there is a reasonable prospect of doing so.
>
> [112] The evidence before the certification judge was that the question whether sibutramine causes or contributes to heart attacks, strokes, and arrhythmia on a class-wide basis is incapable of resolution. There was no evidence of a methodology for establishing that the class as a whole, as opposed to those who were wrongly prescribed sibutramine despite a history of disease, was affected or put at risk by its use of sibutramine. The appellants say the trial judge did not properly exercise his gatekeeping function; he is said to have erred by failing to consider whether the class had adduced some evidence of a method of proving the claim. I agree with that submission.
>
> [113] This cannot be said to be a case like *Stanway*, <u>where the increased risk of a certain result to the class as a whole can be quantified</u>. . . . this is not a case where the experts disagree on the extent of the risk, but rather, a case <u>where the experts are uncertain whether there is a risk to the class as a whole and cannot describe a methodology for addressing that question</u>. . . .

[135] In ***Miller***, Savage J.A. wrote [<u>underlining</u> added]:

> [27] Before *Microsoft* [i.e., ***Pro-Sys***], there was uncertainty over whether plaintiffs needed to establish a methodology for proving a common issue, or simply to meet the "some basis in fact" threshold. That question was answered in *Microsoft*: <u>for a claim to be certified, there must be a "methodology" through which the common issue may plausibly be proven at trial.</u>
>
> . . .
>
> [33] In my opinion, however, "methodology" in this context is not, and should not be, confused with a prescribed scientific or economic methodology. Instead, <u>it refers to whether there is any plausible way in which the plaintiff can legally establish the general causation issue embedded in his or her claim.</u> . . .
>
> [34] The methodology requirement must also be considered in light of the policy objectives of class actions: the object is to promote fair and efficient resolution of the common issues. If there is no way that the common issues could realistically be established in a class action proceeding, then these goals would not be achieved and a class action should not be certified. It is that concept which underpins the methodology requirement described in *Microsoft*.
>
> . . .

> [38] . . . [T]o overcome the certification hurdle, plaintiffs are required to show how their common issue could be established at a common issues trial, remembering that the threshold, at this stage, is not an onerous one.
>
> . . .
>
> [45] This case differs from *Charlton*. The mechanism of finasteride and its potential for causing sexual dysfunction is established and admitted [in this case]. It is simply the persistent effects that are contested. Everyone in the class experienced some sort of sexual dysfunction, rather than having simply ingested the same medication with no common effect, which was the case in *Charlton*.
>
> [46] The Supreme Court did not say in *Microsoft* that what is required is evidence of a specific type of "methodology". Instead, it required a way to test the alleged common issue at trial. That is what is needed to fulfill the "methodology" requirement. In *Stanway* it was satisfied by the existence of a robust study which established general causation. There was a realistic way to prove the common issue at trial. That is what matters.

[136] Mr. Aaron submits that the material listed in Schedule B to the plaintiffs' written submissions is evidence that discloses some basis in fact of a methodology, "by way of expert evidence and scientific reports," to determine the reasonableness of (1) the health concern and (2) the choice to be free of the operation of a smart meter at one's home. Accordingly, in Mr. Aaron's submission, the plaintiffs have met their evidentiary burden in respect of s. 4(1)(c) of the ***CPA***. He argues (based on Mr. Justice Savage's comment in ***Miller***, at para. 49) that the plaintiffs are not required at this stage to meet a "gold standard" in terms of proof.

[137] Schedule B lists:

(a) Exhibits "A" to "C" attached to Affidavit No. 3 of Delia Aaron (Mr. Aaron's legal assistant), which include an instruction letter from Mr. Aaron to Dr. Martin Blank and a report from Dr. Blank;

(b) Exhibits "M" to "S" attached to Ms. St. Clair's Affidavit No. 1, which include the reports authored by Dr. Blank and Dr. Maret (referred to above) as well as the written submissions prepared by Mr. Aaron in relation to the FortisBC application to the BCUC;

(c) paras. 7-9 from Ms. Davis' Affidavit No. 1 (referred to above);

(d) Exhibits “J” to “Z” attached to Ms. Noble’s Affidavit No. 1, Exhibit “E” to her Affidavit No. 2 and Exhibits “A” and “B” to her Affidavit No. 3. These materials include various articles published in the media, press releases, opinion pieces from non-witnesses and other similar publications. Ms. Nobel explains that she collected many of these items in the course of her work with the Coalition.

[138] Mr. Aaron says that he does not rely on any of this material to prove the truth or reliability of anything asserted. Rather, in Mr. Aaron’s submission, it is admissible to show the existence of material that raises alarms about the (potential) health effects of radiofrequency emissions and smart meters. In Mr. Aaron’s submission, for purposes of the certification application, it is enough for the plaintiffs to show that material such as Dr. Blank’s report (and the other material referenced), discussing health concerns in relation to radiofrequency emissions, exists, and the existence of such material demonstrates some basis in fact of a methodology both to prove whether there is a reasonable basis for concern about health risks, and to prove proposed common issues 1-4.5 on a class-wide basis. Therefore, in Mr. Aaron’s submission, the plaintiffs have satisfied their evidentiary burden in relation to s. 4(1)(c) with respect to the key common issues.

[139] On behalf of BC Hydro, Mr. Vesely objects to the admissibility of this material, on the grounds that it constitutes unsworn evidence from individuals who are not witnesses. Merely attaching a report or a document as an exhibit to an affidavit from another, non-expert witness does not make the report or document admissible as opinion evidence. In support of his position, Mr. Vesely cites ***Ernewein*** and ***Pro-Sys Consultants Ltd. v. Microsoft Corporation***, 2008 BCSC 1263.

[140] Mr. Vesely objects further to the reports of Dr. Blank because they lack impartiality and therefore fail to meet the basic requirement for threshold admissibility. Moreover, although, in relation to his report dated September 9, 2014, Dr. Blank was given instructions by Mr. Aaron concerning an expert’s duty to the court and the certification required from the expert under Rule 11-2 of the ***Supreme***

Court Civil Rules, he gave no such certification. No explanation – apart from the submission that the report was not being relied on as an expert report or as opinion evidence, but just for its existence – was given for Dr. Blank's failure in this regard. The absence of the certification required under Rule 11-2 can be fatal to the admissibility of an expert's report: see ***Pichugin v. Stoian***, 2014 BCSC 2061, at para. 18.

[141] In Mr. Vesely's submission, the only admissible evidence concerning a way of testing proposed common issues No. 1 to 4.5 – or, in other words, a methodology – comes from Dr. Benjamin Cotts, BC Hydro's expert.

[142] Dr. Cotts prepared two reports (a main report attached to his Affidavit No. 1 and a supplementary report attached to his Affidavit No. 2). The purpose of Dr. Cotts' evidence is to discuss the characteristics of radiofrequency ("RF") transmission from smart meters, and to place the RF exposure of humans from smart meters into the context of other RF sources encountered in modern society through the process of an RF exposure assessment. As described by Dr. Cotts, an RF exposure assessment is an evaluation of the potential RF field exposure to humans and includes all sources, both natural and anthropogenic. Anthropogenic RF sources include cell phones, cordless phones, baby monitors, AM and FM radio, smart meters, microwave ovens, television, cell towers and weather radar. Lightning, the Earth itself and other humans are all examples of natural RF sources. According to Dr. Cotts, in the assessment, it is important to include all RF sources, because any potential effects of RF fields on humans will be based on the total exposure from all sources, not the incremental exposure to a single source. Dr. Cotts explains that evaluating the incremental RF exposure to a single source would be "akin to evaluating a person's cholesterol level based only on an increase in cholesterol from eating avocadoes instead of considering the person's entire diet (e.g., avocadoes along with bacon, french fries, and other foods)."

[143] Dr. Cotts discussed factors that can affect an individual's RF exposure. He explained that exposure will be higher near to a source than farther away, and in an

urban setting (with various sources all around) the levels of RF will generally be higher than in a rural setting (with relatively fewer sources). Another environmental factor that can affect RF exposure is whether a barrier (such as a building wall) exists between an RF source and the individual. Thickness and nature of the materials (e.g., concrete, drywall, plywood etc.) are also factors. Levels of RF are higher during daytime hours than at nighttime, and field levels are generally lower inside a home. Dr. Cotts illustrated some of the difficulties in attempting to carry out an exposure assessment on a class-wide basis by analyzing three case studies: a rural farmhouse, a suburban duplex and an urban high-rise. He analyzed the degree to which RF exposure levels from a smart meter could vary based on changing only three variables: the wall material between the smart meter and the individual; the distance between the smart meter and the individual; and the duty cycle under which the smart meter is operating. According to Dr. Cotts, the level of variation was enormous. For example, in the case of the suburban duplex, Dr. Cotts concluded that the contribution of the smart meter to the total RF exposure varies by a factor of nearly 350 million.

[144] Dr. Cotts concluded that attempts to generalize the exposure of a class of people to smart meters results in either: (i) an exorbitant number (millions upon millions) of exposure scenarios, all of which must be assessed; or (ii) an unacceptably large variation in RF exposure levels (many orders of magnitude) even for a very narrowly defined subset of operational and environmental factors. In Dr. Cotts' opinion, in the absence of information such as wall construction of a structure, distance from the smart meter and duty cycle of the smart meter, the contribution of a smart meter to an RF exposure cannot accurately be made. On the other hand, in Dr. Cotts' opinion, with information about an individual smart meter installation, including about variables such as wall construction of a structure, distance from the smart meter, and duty cycle of the smart meter, modeling a person's RF exposure is a straight-forward engineering calculation, with accuracy just slightly less than would be obtained by measurement.

[145] Dr. Cotts' evidence is unchallenged. Based on it, I conclude that there is no way to test the key proposed common issues – Issues 1 to 4.5 – at a trial. I agree with Mr. Vesely that the material on which the plaintiffs rely is inadmissible to show there is a methodology through which proposed common issues 1 to 4.5 may plausibly be proven on a class-wide basis.

[146] The plaintiffs cannot rely on the material – such as Dr. Blank's opinions and the other documents – attached as exhibits to affidavits sworn by others as admissible evidence of the reliability of the facts and views stated. That, in my opinion, is what the plaintiffs are seeking to do, despite Mr. Aaron's protestations to the contrary. In my opinion, the material tendered by the plaintiffs is no different in quality from the material placed before the court by the plaintiff in ***Ernewein***. It is not admissible evidence to show what the plaintiffs must show for purposes of certification. This is not a matter of requiring the plaintiffs here to meet an evidentiary "gold standard" on the certification application. Rather, as the authorities make clear, the plaintiffs have the obligation to establish by admissible evidence that there is a methodology through which the common issue or issues can plausibly be proven at trial. They have failed to do so.

[147] In contrast to ***Miller*** (where the mechanism of the drug and the potential for causing sexual dysfunction were admitted), the plaintiffs have not tendered any admissible evidence to show that there is a way to test the key proposed common issues at trial, or a way that the plaintiffs can establish general causation. Rather, there is nothing to contradict Dr. Cotts' evidence. Based on that evidence, proposed common issues 1-3 cannot be determined on a class-wide basis, and they cannot be certified. Since proposed common issues 4 and 4.5 depend on the outcome of proposed common issues 1-3, common issues 4 and 4.5 cannot be certified either.

[148] Proposed common issues 5 to 12 are described as "issues of law." They depend on the outcome of the proposed common "issues of fact" described in issues 1 to 4.5. They cannot "move the litigation forward" on their own, and so cannot be

certified. Moreover, as no reasonable claim for damages under s. 24 of the ***Charter*** has been pleaded, proposed common issue 12 could not be certified in any event.

[149] Finally, proposed common issue 13 cannot be certified, even if other issues were acceptable for certification. It assumes a particular outcome in the action, namely, that the plaintiffs will be successful on the merits. However, that result is hardly guaranteed. The plaintiffs' action may be dismissed.

[150] Finally, the conflicts within the classes, which Mr. Vesely described in relation to whether there was an identifiable class, are relevant to the proposed common issues. The plaintiffs and those who have supported the CSTS and the Coalition believe passionately in their position. However, for others, that position simply represents the triumph of groundless hysteria over good science, and holds the prospect that BC Hydro's remaining customers will have to pay higher rates. Success for one group would result in failure for the other.

7. Preferable procedure: s. 4(1)(d)

[151] Since I have concluded there are no common issues that can be certified, it follows that the certification application must be dismissed. Therefore, it is unnecessary for me to address whether a class proceeding would be the "preferable procedure" for the fair and efficient resolution of common issues. However, I will make a few brief comments.

[152] First, in my opinion, Dr. Cotts' unchallenged evidence shows that questions of fact that could only be determined on an individual basis completely overwhelm any questions that might be common, making a class proceeding unworkable.

[153] Second, the nature of the claim is important. ***Nanaimo Immigrant Settlement Society v. British Columbia***, 2001 BCCA 75, is an example where a claim under the ***Charter*** was certified as a class proceeding. The plaintiffs rely on it to support their argument that they satisfy the preferable procedure requirement under s. 4(1) of the ***CPA***, and certification should not be refused simply because they claim a remedy under s. 7 of the ***Charter***.

[154] However, I agree with Mr. Vesely's submissions that the heart of the relief sought by the plaintiffs is a declaration that the "Impugned Provisions" and the "Impugned Conduct" unjustifiably infringe s. 7 of the ***Charter*** and injunctive relief consequent on that declaration. Thus, this case is distinguishable from ***Nanaimo Immigrant Settlement Society***, where the main objective was to secure a monetary judgment. Typically, ***Charter*** rights are litigated in the context of individual actions (rather than class proceedings). ***Carter*** provides an example. Dr. Cotts' evidence would appear to support the conclusion that an RF exposure assessment can readily be made for an individual, so that, while a class proceeding is unworkable, an individual action may not be. In those circumstances, I consider invoking the procedural machinery associated with a certified class action to be unnecessary, and potentially incompatible with both judicial economy and access to justice. The administration of a class proceeding would, in my view, create much greater difficulties than those likely to be experienced if relief were sought in an individual action.

[155] Moreover, based on the record, the plaintiffs have the financial support of the CSTS and the Coalition, both of whom appear to be very strongly committed – ideologically and otherwise – to the plaintiffs' cause. As a result, the economic barriers that might otherwise exist to access to justice are not significant factors here. Given the history of the fight against smart meters, including the proceedings before the BCUC and the BCHRT, I am not persuaded that refusing certification would mean the end of the plaintiffs' fight.

[156] Third, behaviour modification is often a significant factor in the preferability analysis. However, its role here is unclear. On the plaintiffs' own pleadings, BC Hydro was simply complying with the law, and Her Majesty the Queen in Right of the Province is not a party to the action.

8. Representative plaintiffs and litigation plan: s. 4(1)(e)

[157] Mr. Vesely argues that the plaintiffs have failed to show that they would fairly and adequately represent the interests of the class. Mr. Vesely was careful to say

that BC Hydro's submissions in that respect are not directed against the proposed representative plaintiffs personally, but rather against the role played by the CSTS and the Coalition in this litigation. In his submissions, Mr. Vesely was sharply critical of the conduct of both organizations in relation to this case, and described them as having made "inappropriate, irresponsible and inaccurate public statements throughout the conduct of this litigation in an attempt to draw further support for their cause, all while not answerable to the court as a representative plaintiff would be." Mr. Vesely repeats his submissions concerning the serious conflicts between the interests of the plaintiffs and other members of the proposed class, and also attacks the adequacy of the plaintiffs' litigation plan.

[158] However, since, in my opinion, the action has failed to meet other requirements under s. 4(1) and therefore cannot be certified, I do not consider it necessary to address these arguments.

9. Summary and disposition

[159] In summary, the certification application is dismissed. Although I have concluded that the Proposed NCC pleads a cause of action based on the liberty interest protected by s. 7 of the ***Charter***, and that the proposed class description could probably be redrafted in an acceptable way, I have concluded that the plaintiffs have failed to meet the requirement under ***CPA*** s. 4(1)(c) regarding certifiable common issues. This is fatal to the certification application.

[160] The plaintiffs' application to amend the notice of civil claim and to add parties as plaintiffs is also dismissed. However, the plaintiffs (if they wish) have leave to apply to amend the notice of civil claim (to a form consistent with these Reasons) and add parties, providing they do so within 60 days of the date of these Reasons.

"The Honourable Madam Justice Adair"