Chapter 2

Proportionality in Pleadings Motions: Applying The *Hyrniak* Culture Shift to the Assessment of Novel Claims

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§ 2:1 Introduction
§ 2:2 *Hryniak* and the "Culture Shift"
§ 2:3 Courts' Reluctance to Strike Novel Claims
§ 2:4 Achieving Proportionality in Class Procedure
§ 2:5 The "Intrusion Upon Seclusion" Trilogy
§ 2:6 Conclusion

§ 2:1 Introduction

More than a decade ago, in *Hryniak v. Mauldin*,[1] the Supreme Court of Canada declared the need of a "culture shift" to promote timely and affordable access to the civil justice system, and encouraged the use of the summary judgment process as a more "proportionate" alternative to trial. In practice, however, the complexity of a summary judgment motion often rivals the complexity of a trial, and access to justice is often anything but "timely and affordable".[2]

The natural evolution of *Hryniak*—reflected in a pair of recent appellate authorities—is for courts to apply the principle of proportionality at the pleadings stage, either in the context of a motion to strike

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[Section 2:1]

[1]*Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) [*Hryniak*].

[2]This is particularly true in the authors' home region of Toronto, where the available dates for summary judgment motions are currently being offered more than 16 months into the future. As noted later in the paper, and as observed by the Alberta Court of Appeal, there is a "boundless landscape of scarce judicial resources" (see footnote 1).

(as in *Atlantic Lottery Corp. Inc. v. Babstock*, from the Supreme Court of Canada),[3] or in the context of evaluating the requirement for a class action to "disclose a cause of action" (as in *Owsianik v. Equifax*, from the Ontario Court of Appeal).[4] Although these recent cases do not purport to change the "plain and obvious" test for striking a claim at the pleadings stage,[5] they mark a shift in the interpretation and application of the test, and, in particular, a greater willingness to exercise decision-making power at an early stage of the proceeding. This holds important potential to reduce the litigation bloat that can be caused by "novel" claims.

Traditionally, courts have been reticent to assess the merits of a novel legal argument without the benefit of a full evidentiary record. The noble ideal is that the law should be determined in the context of real facts, rather than on a mere "procedural motion", based only on hypotheticals;[6] the problem is that establishing an evidentiary record is slow and expensive, and it remains so even when summary judgment procedures are utilized. Because complex matters so rarely progress to a decision on a full evidentiary record (this is particularly true of class actions), novel legal arguments can remain "novel" for many years.

"Waiver of tort", discussed below, is a case study of the potential for novel claims to remain perpetually novel if courts decline to analyze them at the pleadings stage. *Babstock* finally resolved this uncertainty after more than a decade of indecision. *Equifax*, also reviewed below, follows the example set in *Babstock* to resolve uncertainty relating to the tort of "intrusion upon seclusion". Both *Babstock* and *Equifax* are significant in recognizing that there is a cost associated with declining to answer legal questions at the pleadings stage, which sometimes outweighs the benefits of deciding legal issues on a full evidentiary record. The principal of proportionality requires courts to be more decisive in evaluating novel claims at the pleadings stage.

§ 2:2 *Hryniak* and the "Culture Shift"

The Supreme Court of Canada's decision in *Hryniak* articulates the need for a "culture shift" in the litigation of claims to achieve affordable and timely access to justice:[1]

> [2] There is recognition that a culture shift is required in order to create

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[3] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) [*Babstock*].

[4] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) [*Equifax*].

[5] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) at para. 14; *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 37.

[6] *Serhan Estate v. Johnson & Johnson*, 2006 CarswellOnt 3705 (Ont. Div. Ct.) [*Serhan Estate*, Divisional Court] at paras. 68 and 107, leave to appeal refused (October 16, 2006), Doc. M33963 (Ont. C.A.).

[Section 2:2]

[1] *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para. 2.

> an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular cases. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.

A trial is the litigation gold standard for resolving a dispute, but if holding a trial is prohibitively expensive and time consuming, it ceases to be a meaningful option. As observed in *Hryniak*, "when court costs and delays become too great, people look for alternatives or simply give up on justice".[2] To this end, "a proper balance requires simplified and proportionate procedures for adjudication . . ."[3]

Hryniak was decided based on Ontario's *Rules of Civil Procedure*, but it has also been influential on the summary judgment framework in several other provinces, including Alberta,[4] Saskatchewan,[5] Prince Edward Island,[6] Newfoundland,[7] and New Brunswick.[8] In British Columbia, courts have recognized the "spirit of proportionality" encouraged by *Hryniak*,[9] and cited it at times,[10] but they have also distinguished it based on differences in the language of the provinces' respective rules of civil procedure.[11] *Hryniak* has not been as influential in the use of procedures *other* than summary judgment, though there are an increasing number of exceptions:

- In *Creighan v. MacPhee*, from the Prince Edward Island Court of Appeal, *Hyrniak* was cited in upholding an order relating to the production of documents.[12]

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[2] *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para. 25.

[3] *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at para. 27.

[4] *McDonald v. Brookfield Asset Management Inc.*, 2016 ABCA 375 (C.A.) at para. 14, leave to appeal refused *Lanny K. McDonald v. Brookfield Asset Management Inc., et al.*, 2017 CarswellAlta 947 (S.C.C.); *Weir-Jones Technical Services Incorporated v. Purolator*, 2019 ABCA 49 (C.A.) at para. 20.

[5] *Viczko v. Choquette*, 2016 SKCA 52 (C.A.) at paras. 36–42.

[6] *McQuaid v. Government of P.E.I.*, 2017 PECA 21 (C.A.) at paras. 8–11, leave to appeal refused *Wendy Eileen McQuaid v. Government of Prince Edward Island, et al.*, 2018 CarswellPEI 69 (S.C.C.).

[7] *Central Disposal Services Limited v. Pardy's Waste Management and Industrial Services Limited*, 2019 NLCA 15 (C.A.) at para. 7.

[8] *Edmondson v. Edmondson*, 2021 NBQB 53 (Q.B.) at paras. 1 and 26 (reversed *Edmondson et al. v. Edmondson et al.*, 2022 NBCA 4 (N.B. C.A.), leave to appeal refused *Cory J. Edmondson v. Cole Edmondson, et al.*, 2022 CarswellNB 437 (S.C.C.), but affirming *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) principles).

[9] *Ghag v. Ghag*, 2021 BCCA 106 (C.A.) at para. 42.

[10] See e.g. *McLellan v. Shirley*, 2015 BCSC 1930 (S.C.) at para. 41, additional reasons 2016 BCSC 1833 (S.C.).

[11] *The Owners, Strata Plan BCS 1348 v. Travelers Guarantee Company of Canada*, 2014 BCSC 1468 (S.C.) at paras. 57–68.

[12] *Creighan v. MacPhee*, 2018 PECA 1 (C.A.) at paras. 41–42, leave to appeal

- In *Cohen v. Cohen*,[13] an Ontario family law case, *Hryniak* was cited in support of an order to bifurcate issues.[14]
- In *Louis v. Poitras*,[15] a 2021 case from the Ontario Court of Appeal, *Hryniak* was cited in upholding an order to strike jury notices. The Court of Appeal recognized that local conditions (including the COVID-19 pandemic) impacted the ability of courts to deliver "timely civil justice" and that there is a corresponding need to respond proportionately.[16]

Whether or not it is framed as an application of *Hryniak*, courts should not be hesitant to embrace pre-trial procedures that can narrow the issues and constrain the scope of litigation. The greatest potential for this is at the pleadings stage, where evidence is not only unnecessary, but also generally inadmissible.

§ 2:3 Courts' Reluctance to Strike Novel Claims

The desirability of narrowing claims at the pleadings stage is not a new or novel idea. In *Knight v. Imperial Tobacco Canada Ltd.*, from 2011, the Supreme Court of Canada extolled the benefits of striking claims that are "doomed to fail" at the pleadings stage:[1]

> [19] The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial.
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> [20] This promotes two goods — efficiency in the conduct of the litigation and correct results. Striking out claims that have no reasonable prospect of success promotes litigation efficiency, reducing time and cost. The litigants can focus on serious claims, without devoting days and sometimes weeks of evidence and argument to claims that are in any event hopeless. The same applies to judges and juries, whose attention is focused where it should be — on claims that have a reasonable chance of success. The efficiency gained by weeding out unmeritorious claims in turn contributes to better justice. The more the evidence and arguments are trained on the real issues, the more likely it is that the trial process will successfully come to grips with the parties' respective positions on those issues and the merits of the case.

The issue is that, in practice, courts have been reluctant to pull the

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refused *Alan MacPhee v. Karen Creighan, et al.*, 2018 CarswellPEI 49 (S.C.C.).

[13] *Cohen v. Cohen*, 2019 ONSC 4456 (S.C.J.), additional reasons 2019 ONSC 5957 (S.C.J.).

[14] *Cohen v. Cohen*, 2019 ONSC 4456 (S.C.J.), additional reasons 2019 ONSC 5957 (S.C.J.) at paras. 27–28.

[15] *Louis v. Poitras*, 2021 ONCA 49 (C.A.).

[16] *Louis v. Poitras*, 2021 ONCA 49 (C.A.) at para. 3.

[Section 2:3]

[1] *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) [*Knight*], at paras. 19–20.

trigger and strike claims, and have been unaided by mixed messaging from appellate courts on how liberally this power should be exercised. Even in *Knight*, the Supreme Court of Canada qualified its commentary above by stating that courts ought to exercise caution when using the power to strike: "the approach must be generous and err on the side of permitting a novel but arguable claim to proceed."[2]

The "waiver of tort" saga illustrates the problem with being too tepid in the exercise of the power to strike claims at the pleadings stage. For several years, waiver of tort was held out to be a potentially legitimate cause of action entitling plaintiffs to the disgorgement of profits earned by defendants as a result of wrongdoing—without proof of plaintiff's own loss or injury.[3] Confronted with the cause of action in 2010, in *Aronowicz v. EMTWO Properties Inc.*, the Ontario Court of Appeal observed:[4]

> [80] [. . .] There is considerable controversy over whether it exists as an independent cause of action at all or whether it is 'parasitic' in the sense that it requires proof of an underlying tort and — since a tort requires damage — proof of harm to the plaintiff. [. . .]

For many years afterwards, courts allowed "waiver of tort" claims to proceed past the pleadings stage, *because* of the uncertainty around what it was. In a 2012 case, the Ontario Superior Court permitted the plaintiff's pleading of waiver of tort because it was "premature at the pleading stage to strike the plaintiff's pleadings on this issue".[5] Courts in other provinces also took the position that "waiver of tort" was an arguable claim, open to being decided on the basis of a full record.[6]

The issue reached the Supreme Court of Canada for the first time

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[2] *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42 (S.C.C.) at para. 21.

[3] *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96 (C.A.) [*Aronowicz*]; *Serhan Estate v. Johnson & Johnson*, 2004 CarswellOnt 2809, [2004] O.J. No. 2904 (S.C.J.), affirmed 2006 CarswellOnt 3705 (Ont. Div. Ct.), leave to appeal refused (October 16, 2006), Doc. M33963 (Ont. C.A.), leave to appeal refused 2007 CarswellOnt 2150 (S.C.C.).

[4] *Aronowicz v. EMTWO Properties Inc.*, 2010 ONCA 96 (C.A.) at para. 80.

[5] *Benson Kearley IFG Insurance Brokers v. Logan*, 2012 ONSC 2855 (S.C.J.) at paras. 31–32. See also the Ontario Divisional Court's decision in *Serhan Estate* in which Justice Epstein for the majority opined on the debate—in which the plaintiffs argued that waiver of tort was a distinct cause of action while the defendants submitted that it was parasitic based on whether another tort has been committed—and noted at para. 68, see also para. 124, that: "[. . .] [I]t cannot be said that an action based on waiver of tort is sure to fail. Furthermore, the resolution of the questions the defendants raise about the consequences of identifying waiver of tort as an independent cause of action in circumstances such as exist here, involves matters of policy that should not be determined at the pleadings stage." Note that Justice Chapnik in dissent commented at para. 164, see also para. 233, that while waiver of tort may be novel, the plaintiffs' claim could not be sustained on the facts as pleaded and that it was "*plain and obvious that there [was] no principled basis on which to apply it in this case*."

[6] See, for example, *Koubi v. Mazda Canada Inc.*, 2012 BCCA 310 (C.A.), leave to appeal refused 2013 CarswellBC 37 (S.C.C.), in which Justice Neilson for the British

in 2013 (one year before *Hryniak*), in the context of a class action, *Pro-Sys Consultants Ltd. v. Microsoft Corp*.[7] The Court observed the tensions in the jurisprudence with respect to waiver of tort, and agreed that it was not "plain and obvious" that a claim based in waiver of tort would fail.[8] The Court declined to resolve any of the legal uncertainty, holding that "this appeal is not the proper place to resolve the details of the law of waiver of tort, nor the particular circumstances in which it can be pleaded".[9]

Uncertainty over whether "waiver of tort" was a viable cause of action remained unresolved for the next *seven years*, until the issue came before the Supreme Court of Canada again, in *Babstock*, and the cause of action was finally assessed on its merits and rejected.[10] Even though waiver of tort had been pleaded routinely in the preceding years, particularly in class actions, the claims were not getting to a stage where they could be assessed with the benefit of a full evidentiary record. *Babstock* itself was an appeal from a motion to strike.

So what changed between *Pro-Sys* and *Babstock*? According to Justice Brown, writing for the majority, one of the things that had changed was *Hryniak* (decided one year after *Pro-Sys*).[11] Justice Brown cited *Hryniak* for the proposition that "where possible . . . courts should resolve legal disputes promptly, rather than referring them to a full trial . . . This includes resolving questions of law by striking claims that have no reasonable chance of success".[12] It might be observed that "no reasonable chance of success" is the same test that the Supreme Court had already endorsed in *Knight* (before *Pro-Sys*), and so was not really a change at all.

The key difference from *Pro-Sys* to *Babstock* is a willingness to decide issues of "policy" without the benefit of a full evidentiary record. In *Pro-Sys*, the Court agreed with the reasoning in *Serhan Estate v. Johnson & Johnson* (an Ontario Divisional Court decision), that assessing the novel waiver of tort claim involved "matters of

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Columbia Court of Appeal held at para. 30, that in Ontario, waiver of tort has been certified as a potential cause of action without a great deal of analysis and largely "on the basis [that] the uncertainty surrounding the doctrine precludes a finding it is plain and obvious that it is not an independent cause of action." After noting that British Columbia has adopted a somewhat more cautious approach to adopting the doctrine, the Court went on to affirm at para. 39, that the chambers judge in the certification decision made no error in finding that the plaintiff had an arguable case that waiver of tort may provide an independent cause of action to support claims of recovery without demonstrating individual harm or damages.

[7] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) [*Pro-Sys*].

[8] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 97.

[9] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 97.

[10] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) [*Babstock*] at para. 33.

[11] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) at para. 18.

[12] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) at para. 18.

policy that should not be determined at the pleading stage".[13] But *Serhan* itself cited no authority or any other compelling argument in support of this proposition, seemingly regarding it as a truism. Justice Brown's reasons in *Babstock* assert the opposite proposition, that in fact "it is not uncommon for courts to resolve complex questions of law and policy" on a pleadings motion:[14]

> [19] Of course, it is not determinative on a motion to strike that the law has not yet recognized the particular claim. The law is not static, and novel claims that might represent an incremental development in the law should be allowed to proceed to trial. That said, a claim will not survive an application to strike simply because it is novel. It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial". If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy." [citations omitted]

The notion that important policy questions should not be decided on a mere "procedural motion" has rhetorical appeal, but does not withstand scrutiny. It is understandable that the court wants to understand the practical impact of any changes to the law, and thus only wants to make law-changing decisions on the basis of real world facts; but for all intents and purposes, the facts as alleged in pleadings *are* real world facts. The difference is in whether the facts have been proven by evidence or are presumed to be true, and it is not clear why that distinction should prevent the court from deciding important policy issues. The Supreme Court of Canada grappled with this question more directly in a decision that shortly preceded *Babcock*, *Nevsun Resources Ltd. v. Araya*:[15]

> [145] Any confusion over whether a novel question of law can be answered on a motion to strike should be put to bed: it can. If a court would not recognize a novel claim when the facts as pleaded are taken to be true — that is, in the most favourable factual context possible in the litigation process — the claim is plainly doomed to fail. As Justice Karakatsanis explained for this Court in *Hryniak v. Mauldin*, judges can and should resolve legal disputes promptly to facilitate rather than frustrate access to justice. Answering novel questions of law on a motion to strike is one way they can do so. But there also are some questions that the court could answer on a motion to strike, but ought not to. They include, for example, questions related to the interpretation of the Canadian Charter of Rights and Freedoms, or questions where the facts are unlikely, if not implausible. Deciding a question of law without proof of

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[13] *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 97 citing *Serhan Estate v. Johnson & Johnson*, 2006 CarswellOnt 3705 (Ont. Div. Ct.) [*Serhan Estate*, Divisional Court] at para. 68, leave to appeal refused (October 16, 2006), Doc. M33963 (Ont. C.A.).

[14] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) at para. 19.

[15] *Babcock, Nevsun Resources Ltd. v. Araya*, 2020 SCC 5 (S.C.C.) at para. 145.

> the facts in such circumstances risks distorting the law for an ultimately fruitless purpose. [citations omitted]

In other words, there are very limited circumstances in which it may be useful to require that the pleaded facts be proven by evidence, before deciding a novel legal question, and perhaps even fewer circumstances in which it is *proportional* to require that the facts be proven by evidence. The costs of insisting that the parties furnish the court with an evidentiary record are readily apparent, and exemplified by the waiver of tort saga. As Justice Brown recognized in *Babstock*, the decade-plus long failure to address the viability of the waiver of tort cause of action had perpetuated an "undesirable state of uncertainty", with significant ramifications that were particularly apparent in the class actions context, "where such claims have been commonly advanced but never fully tried".[16]

§ 2:4 Achieving Proportionality in Class Procedure

The principle of proportionality, as outlined in *Hryniak*, has a complicated relationship to class proceedings. On the one hand, the magnitude of the claims, and the number of people affected, means that the litigation procedures employed can afford to be relatively slow and expensive, without being "disproportionate". On the other hand, however, class proceedings are so inherently complex that the time and expense of litigating them to trial (or even to summary judgment) remains prohibitive, even having regard for the size of the claims and the number of people affected.

Class proceedings provide a procedural toolkit for narrowing issues, with the aim of ultimately *reducing* the litigation that would be necessary if claims were advanced to trial as individual actions.[1] Determining the viability of a legal claim at the pleadings stage aligns well with the objectives of class proceedings (particularly the objective of judicial economy); punting the determination to a trial (that is unlikely to ever happen) does not.

Early class proceeding decisions dealing with the certification requirements, including *Hollick* and *Rumley*, emphasized the flexibility of class procedures to embrace claims, and reflected optimism about the efficiencies that would be achieved. But this enthusiasm appears to have been tempered by the lived-in experience of how unwieldy a class proceeding can become if it is not appropriately constrained at the certification stage. Recent certification decisions have placed more emphasis on the role of certification as a "meaningful screening device" and on the role of certification motion judges as

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[16] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 (S.C.C.) at para. 21.

[Section 2:4]

[1] See *Hollick v. Metropolitan Toronto (Municipality)*, (*sub nom.* Hollick v. Toronto (City)) 2001 SCC 68 (S.C.C.) [*Hollick*], at para. 15; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 27–29.

"gatekeepers" who prevent unmeritorious claims from passing through.[2]

In *Setogutchi v. Uber*, Justice Rooke of the Alberta Court of King's Bench denied certification of the plaintiff's claims in a data breach case where there was evidence that none of the class members suffered any compensable loss:[3]

> [35] As Uber argues, in essence, and I find, in this era there is a need to weed out claims that run afoul of the "plain and obvious assessment" of *Hunt v. T & N plc* ([1990] 2 S.C.R. 959 (S.C.C.), at para. 980), where there is no real substantial (non *de minimus*) or meritorious basis for the claim, and especially, post-*Hryniak*, where "the role of certification [is] a 'meaningful screening device' and the Court has a concomitant 'gatekeeper function' . . .". This function is important to stop the arguments of "full debate" of possibilities where there is no apparent substance.

The Alberta Court of Appeal (in a decision revisited below) largely upheld Justice Rooke's judgment and particularly affirmed the role of certification as a meaningful screening device.[4]

Justice Gascon, writing for the Federal Court in *Jensen v. Samsung Electronics Co. Ltd.*, noted that meaningful screening at the certification stage also provides important protection to defendants:[5]

> [62] I pause to underline that the overarching objectives of judicial economy and access to justice governing class proceedings cannot be considered from the sole perspective of the plaintiffs . . . The certification process is also there to prevent defendants, even deep-pocketed corporate defendants, from facing groundless suits and being forced to invest significant resources to contest large-scale, time-consuming actions that have no chance of success or do not have the minimal evidentiary foundation required."

§ 2:5 The "Intrusion Upon Seclusion" Trilogy

An emerging category of class actions involves class members whose personal information has been compromised in a database breach. Plaintiffs in these cases have invoked the tort of "inclusion upon seclusion" to claim symbolic or moral damages from institutional defendants who failed to securely safeguard their data from third party attacks.[1] The tort of inclusion upon seclusion was recognized by

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[2] *Hollick v. Metropolitan Toronto (Municipality)*, (*sub nom.* Hollick v. Toronto (City)) 2001 SCC 68 (S.C.C.) at paras. 15–16.

[3] *Setogutchi v. Uber*, 2021 ABQB 18 (Q.B.), affirmed 2023 ABCA 45 (C.A.) [*Setoguchi*].

[4] *Setoguchi v. Uber BV*, 2023 ABCA 45 (C.A.) [*Setogutchi*, ABCA] at para. 27.

[5] *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185 (F.C.) at para. 62, affirmed 2023 FCA 89 (F.C.A.) [*Jensen*].

[Section 2:5]

[1] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 49.

the Ontario Court of Appeal in *Jones v. Tsige*,[2] as requiring that the defendant *intentionally* (including recklessly) invaded the plaintiff's private affairs or concerns, without lawful justification, and that such invasion was regarded as highly offensive, causing distress, humiliation, or anguish.[3]

Several courts allowed "intrusion upon seclusion" claims to proceed past the certification stage in database breach cases, despite uncertainty as to whether the tort would capture the conduct of institutional defendants who failed to sufficiently secure customers' data (rather than the hackers themselves who deliberately stole the data).[4] As with the waiver of tort saga, this uncertainty persisted for several years, with a decision on the issue repeatedly postponed until trials that never came.

In a trilogy of cases released in June 2022, led by *Equifax*, the Ontario Court of Appeal resolved the uncertainty of whether "inclusion upon seclusion" applied to institutional defendants in database breach cases.[5] The Court of Appeal interpreted *Babstock* as a "helpful demonstration" of how the "plain and obvious" test applied to novel causes of action.[6] In particular, *Babstock* demonstrates that the viability of novel claims *can* be determined at the pleadings stage, unless for some reason the issue is not amenable to determination based exclusively on the facts as pleaded.[7] As relates to the database breach cases, "There is no reason to think evidence adduced at the trial would have any effect on the determination of whether, as a matter of law, the tort could apply to Database Defendants whose failure to

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[2] *Jones v. Tsige*, 2012 ONCA 32 (C.A.) [*Jones*]; the tort is also statutorily available in British Columbia, Manitoba, Saskatchewan, and Newfoundland and Labrador (where it is also part of the common law): *Privacy Act,* RSBC 1996, c. 373, s. 1; *Privacy Act,* CCSM, c. P125, s. 2; *Privacy Act,* RSS 1978, c. P-24, s. 2; *Privacy Act,* RSNL 1990, c. P-22, s. 3;

[3] *Jones v. Tsige*, 2012 ONCA 32 (C.A.) at para. 71.

[4] *John Doe v. R.*, 2015 FC 916 (F.C.) at para. 40, reversed in part *R. v. John Doe*, 2016 FCA 191 (F.C.A.); *Kaplan v. Casino Rama*, 2019 ONSC 2025 (S.C.J.) at para. 29, additional reasons 2019 ONSC 3310 (S.C.J.); *Agnew-Americano v. Equifax*, 2019 ONSC 7110 (S.C.J.) at para. 195, reversed 2021 ONSC 4112 (Div. Ct.), affirmed 2022 ONCA 813 (C.A.); *Tucci v. Peoples Trust Company*, 2017 BCSC 1525 (S.C.) at para. 152, reversed in part 2020 BCCA 246 (C.A.); *Bennett v. Lenovo (Canada) Inc.*, 2017 ONSC 1082 (S.C.J.) at para. 23; the dissent of Justice Sachs in the Divisional Court decision of *Owsianik v. Equifax Canada*, 2021 ONSC 4112 (Div. Ct.) at para. 51, affirmed 2022 ONCA 813 (C.A.).

[5] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.); *Obodo v. Trans Union of Canada, Inc.*, 2022 ONCA 814 (C.A.); *Winder v. Marriott International, Inc.*, 2022 ONCA 815 (C.A.) [*Winder*]. The plaintiff has sought leave to appeal to the Supreme Court of Canada in each of these cases.

[6] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.), leave to appeal refused *Owsianik v. Equifax*, 2023 CarswellOnt 3753 (S.C.C.); *Obodo v. Trans Union of Canada, Inc.*, 2022 ONCA 814 (C.A.), leave to appeal refused *Obodo v. Trans Union of Canada*, 2023 CarswellOnt 5300 (S.C.C.); *Winder v. Marriott International, Inc.*, 2022 ONCA 815 (C. A.)[Winder], leave to appeal refused *Winder v. Marriott International Inc.*, 2023 CarswellOnt 8076 (S.C.C.).

[7] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 40.

properly protect the data permits independent hackers to access the data". The Court of Appeal also specifically recognized that nothing prevented them from deciding a "complex, policy-laden" issue based on the facts as pleaded:[8]

> [42] I take the majority in *Babstock* to recognize that when the validity of a claim turns exclusively on the resolution of a legal question, the court may on a pleadings motion, even if the answer to the legal question is complex, policy-laden and open to some debate, determine the law and apply the law as determined to the facts as pleaded to decide whether "the claim is plainly doomed to fail and should be struck."

Unless there are exceptional circumstances requiring an evidentiary record, deciding claims on a pleadings motion serves the goals of judicial efficiency, access to justice, and certainty in the law. The Court in *Equifax* also acknowledged that uncertainty in the law can be disproportionately unfair to defendants of class actions:[9]

> [49] Not only did allowing these cases to proceed to trial result in uncertainty, that uncertainty arguably resulted in unfairness to Database Defendants. The certification of intrusion upon seclusion claims without a determination that the claim was viable in law gave a plaintiff an advantage in certification proceedings. Because damages for intrusion upon seclusion do not require proof of any actual pecuniary loss, but are instead awarded on a "symbolic" or "moral" basis, damages are well suited to an award on a class-wide basis. The nature of the damages to be awarded offered support for the plaintiff's argument that a class proceeding was the preferable proceeding for the resolution of common issues. Consequently, the presence of an intrusion upon seclusion claim, despite the uncertainty as to its legal viability, gave plaintiffs a leg up in the certification process and, as a result, in any settlement negotiations. [citations omitted]

Equifax concludes its analysis by offering four justifications for dismissing claims for intrusion upon seclusion against institutional defendants in database breach cases: 1) the question could be decided on the pleadings alone, with undisputed facts and no prospect of new evidence being led at trial to impact the answer to the question of law; 2) there was no unfairness to either party in deciding the merits of the legal question at the pleadings stage; 3) the issue was fully briefed and argued on the pleadings motion; and 4) the institutional considerations articulated in *Babstock* favoured deciding the legal question on the merits.[10] The three cases in the trilogy each posited slightly different ways in which the database defendants could be liable under the tort of intrusion upon seclusion; the Court determined in each case that the tort could not apply because the defendant did not commit the required *intentional* conduct of intrusion that is

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[8] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 42.

[9] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 49.

[10] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 50.

fundamental to a finding of liability.[11] To extend the notion of intrusion to such defendants for what is, effectively, their negligent storage of data, would not rise to an "incremental change in the law"; rather, it would be a "giant step in a very different direction."[12]

§ 2:6 Conclusion

Babstock and *Equifax* mark a significant and positive change in the approach of courts towards pleadings motions, particularly in cases involving novel claims. The significant takeaway is that courts need not be shy in confronting "complex questions of law and policy" on a pleadings motion, and indeed there are very good reasons for the court to decide these issues at the earliest possible stage of litigation, rather than waiting for a trial record. The "culture shift" heralded by *Hryniak* almost a decade ago requires the court to take advantage of opportunities to resolve issues more quickly and efficiently, particularly in circumstances where the next best alternative is prohibitively slow and expensive. The practical reality, particularly in class actions, is that there will likely never be a trial or summary judgment motion, and if the viability of a novel claim is not determined at the pleadings stage, then it will never determined at all. There may, in exceptional cases, be a good reason to insist on an evidentiary record, but in most cases it simply is not necessary, and very rarely would the benefits be proportionate to the costs.

The commentary of the Ontario Court of Appeal in *Equifax* has already been received positively in at least one other province, as an extrapolation of *Babstock*. The Alberta Court of Appeal's decision in *Setugotchi*, referenced above for its commentary on class action certification criteria, also involved the assertion of a novel claim. The plaintiff, whose information was disclosed as a result of hacking of the Uber databases, advanced a theory of "first loss"—that liability arises from the mere unauthorized disclosure of information that purportedly has inherent value.[1] The plaintiff admitted the novelty of this argument for the purposes of the negligence claims, which required proof of loss as an element of the cause of action. Following *Equifax* and *Babstock*, the Alberta Court of Appeal concluded:[2]

> [46] Aside from creating or perpetuating legal uncertainty, failing to determine a question of law at the pleadings stage, when appropriate to do so, is antithetical to the call in *Hryniak v Mauldin*, 2014 SCC 7 for affordable, timely and just resolution of disputes. In the boundless landscape of scarce judicial resources, there is nothing to be gained by certifying suspect novel claims, the validity of which will only be determined at

[11] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at para. 57; *Winder v. Marriott International, Inc.*, 2022 ONCA 815 (C.A.) at para. 21.

[12] *Owsianik v. Equifax*, 2022 ONCA 813 (C.A.) at paras. 60–63.

[Section 2:6]

[1] *Setoguchi v. Uber BV*, 2023 ABCA 45 (C.A.) at paras. 3, 37,

[2] *Setoguchi v. Uber BV*, 2023 ABCA 45 (C.A.) at para. 46.

a merits trial that may never occur. As noted by Stratas JA in *Coote v Lawyers' Professional Indemnity Company*, 2013 FCA 143 at para 13: "[d]evoting resources to one case for no good reason deprives the others for no good reason", cited in *Mohr v National Hockey League*, 2022 FCA 145 at para 50.

In *Babstock*, *Equifax* and *Setugotchi*, the outcomes were defendant-friendly (finding that the novel claims were not legally viable), but there is nothing inherently defendant-biased about determining the viability of novel claims on a pleadings motion. Plaintiffs have the luxury of pleading the best possible facts on which to argue their claim, and if they are justified in their position, then they also stand to benefit from obtaining a decision at the pleadings stage. Legal certainty benefits everyone (except perhaps the lawyers).