JOINT BOOK OF AUTHORITIES OF THE PLAINTIFFS
VOLUME I

Court File No. 00-CV-192059CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

- and –

THE ATTORNEY GENERAL OF CANADA

Defendant

- and –

THE GENERAL SYNOD OF THE ANGLICAN CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE ANGLICAN CHURCH OF CANADA, THE SYNOD OF THE DIOCESE OF ALGOMA, THE SYNOD OF THE DIOCESE OF ATHABASCA, THE SYNOD OF THE DIOCESE OF BRANDON, THE SYNOD OF THE DIOCESE OF BRITISH COLUMBIA, THE SYNOD OF THE DIOCESE OF CALGARY, THE SYNOD OF THE DIOCESE OF CARIBOO, THE INCORPORATED SYNOD OF THE DIOCESE OF HURON, THE SYNOD OF THE DIOCESE OF KEEWATIN, THE DIOCESE OF MOOSONEE, THE SYNOD OF THE DIOCESE OF WESTMINISTER, THE SYNOD OF THE DIOCESE OF QU'APPELLE, THE DIOCESE OF SASKATCHEWAN, THE SYNOD OF THE DIOCESE OF YUKON, THE COMPANY FOR THE PROPAGATION OF THE GOSPEL IN NEW ENGLAND (also known as THE NEW ENGLAND COMPANY), THE PRESBYTERIAN CHURCH IN CANADA, THE TRUSTEE BOARD OF THE PRESBYTERIAN CHURCH IN CANADA, THE FOREIGN MISSION OF THE PRESBYTERIAN CHURCH IN CANADA, BOARD OF HOME MISSIONS AND SOCIAL SERVICES OF THE PRESBYTERIAN CHURCH IN CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE PRESBYTERIAN CHURCH IN CANADA, THE UNITED CHURCH OF CANADA, THE BOARD OF HOME MISSIONS OF THE UNITED CHURCH OF CANADA, THE WOMEN'S MISSIONARY SOCIETY OF THE UNITED CHURCH OF CANADA, THE METHODIST CHURCH OF CANADA, THE MISSIONARY SOCIETY OF THE METHODIST CHURCH OF CANADA (also known as THE METHODIST MISSIONARY SOCIETY OF CANADA), THE CANADIAN CONFERENCE OF CATHOLIC BISHOPS, THE ROMAN CATHOLIC BISHOP OF THE DIOCESE OF

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Third Parties

Proceeding under the *Class Proceedings Act, 1992*

JOINT BOOK OF AUTHORITIES OF THE PLAINTIFFS
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Returnable August 29-31, 2006

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Court File No. 00-CV-192059CP

ONTARIO
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BETWEEN:

CHARLES BAXTER, SR. AND ELIJAH BAXTER

Plaintiffs

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THE ATTORNEY GENERAL OF CANADA

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Indexed as:

Amoco Canada Petroleum Co. v. Propak Systems Ltd.

Between

Amoco Canada Petroleum Company Ltd., the George R. Brown Partnership, Encor Energy Corporation Inc., David W. Feeney, Trustee of the Estate of Eleanor Deering, deceased, Feliciana Corporation, Heather Oil Ltd., Joli Fou Petroleums Ltd., Lacana Petroleum Limited, Ralph S. O'Connor, Mark Resources Inc., Star Oil and Gas Ltd., Union Pacific Resources Inc., Westcoast Petroleum Ltd. and Wintershall Oil of Canada Ltd., respondents/(plaintiffs), and

Propak Systems Ltd., Lynn Tylosky, L. Moore, appellants/(defendants), and

Quantel Engineering (1981) Ltd., V.J. Pamensky Canada Inc., WEG Exportadora S.A., Electromotores WEG S.A. and Gerry Brooks carrying on business as SDL Trucking and Cawa Operating & Consulting Ltd., respondents/(defendants), and

Standard Electric Ltd., Mark Resources Inc., Able Industries Limited, Terrence Dingwall operating as Able Industries, Cawa Operating & Consulting Ltd., Flint Canada Inc. formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc. and Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd., respondents/(third parties), and

ABC Company Ltd., not a party to this appeal/(third party), and

Able Industries Limited, Terrence Dingwall operating as Able Industries or Able Industries Limited, Cawa Operating & Consulting Ltd. and Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., Lovejoy Inc., Engineered Bearings & Drives Ltd. formerly known as Engineered Bearings Co. Ltd. and Quantel Engineering (1981) Ltd., respondents/(fourth parties), and

Able Industries Limited, Standard Electric Ltd., Gerry Brooks, carrying on business as SDL Trucking, Quantel Engineering (1981) Ltd., Flint Canada Inc., formerly known as Flint Engineering & Construction Ltd., V.J. Pamensky Canada Inc. WEG Exportadora S.A., respondents/(fifth parties), and

Propak Systems Ltd., appellant/(fifth party)

[2001] A.J. No. 600
2001 ABCA 110
Docket: 99-18589

Alberta Court of Appeal
Calgary, Alberta
Conrad, Sulatycky and Fruman JJ.A.

Heard: June 12, 2000.
Judgment: filed May 4, 2001.
(55 paras.)

On appeal from the order of Hart J. Dated the 3rd day of September, A.D. 1999. Filed the 23rd day of November, A.D. 1999.

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[Quicklaw note: An Erratum was released by the Court February 6, 2002. The correction has been made to the text and the Erratum is appended to this document.]

REASONS FOR JUDGMENT RESERVED

The judgment of the Court was delivered by

¶ 1 **FRUMAN J.A.**:— The question in this appeal is whether Alberta courts should permit some defendants in complex multi-party litigation to settle, even though the defendants who are left behind might encounter difficulties gathering pre-trial evidence to defend the lawsuit. The answer is yes.

BACKGROUND

¶ 2 On November 1, 1990, a fire occurred at the Eta Lake Gas Processing facility, near Drayton Valley, Alberta. The resulting claims for loss of property and profit allege both negligence and breach of contract for which the plaintiffs seek damages of several million dollars. Given the sizeable stakes, the plaintiffs cast their litigation nets as widely as possible, adding more defendants in successive amended versions of the statement of claim. The defendants in turn endeavoured to minimize their respective risk by maximizing the number of parties potentially responsible for the loss. They issued notices to co-defendants and added third, fourth and fifth parties to this action. With the current tally at eleven groups

of defendants, a schematic diagram of who is suing whom looks like the "triple reverse" from a football play book.

¶ 3 The case has meandered towards trial, with extensive though as yet incomplete discovery and document production. Now, nearly a decade after the fire occurred, ten groups of defendants want out and the plaintiffs want to let them go. They have entered into a type of settlement agreement known as a "Pierringer agreement" named after Pierringer v. Hoger et al., 124 N.W. (2d) 106 (Wis. S.C. 1963), the Wisconsin case in which this type of agreement was first considered. Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a "proportionate share settlement agreement".

¶ 4 If given effect, the settlement agreement in this case would greatly simplify the trial by reducing the number of litigants from twelve groups, represented by twelve different lawyers, to two groups: the plaintiffs, and the appellants, Propak Systems Ltd. together with two of its employees, Lynn Tylosky and L. Moore ("Propak"). The settlement agreement entered into on June 23, 1999 (AB II at 150), stipulates the removal from this suit of the third, fourth and fifth parties and co-defendants (the "settling defendants") as a condition precedent to its main provisions coming into effect. It provides that:

1. The plaintiffs will discontinue their claims against all of the settling defendants (s. 1);
2. The plaintiffs covenant not to sue any of the settling defendants (s. 2);
3. The plaintiffs will amend their pleadings to abandon their claims against Propak, except to the extent of Propak's several share of liability, and will not seek to recover from Propak any amounts for which Propak would be entitled to contribution or indemnity from the settling defendants (s. 3);
4. All of the settling defendants will abandon their indemnity claims and any claims for costs against one another, and against Propak (s. 6);
5. The settling defendants will cooperate with the plaintiffs by making witnesses, documents and expert reports available to them (s. 10); and
6. To the extent required by law and the rulings and guidelines of the Law Society of Alberta, the agreement will be disclosed to the Court of Queen's Bench and to Propak (s. 11).

¶ 5 The agreement requires amendments to the statement of claim that would focus the issue for determination at trial solely on Propak's proportionate share of the loss. The previous version of the statement of claim set out diverse claims of alternative liability against various defendants in 28 paragraphs and sub-paragraphs (AB I at P-39). The newly amended statement of claim refers to four specific breaches by Propak relating to its faulty reinstallation of a motor in a refrigeration compressor on the Eta Lake Gas Processing facility (AB II at 145, paras. 29 - 31). It alleges that Propak's failure to properly preload the bolts fastening the coupling to the hub of the motor and its failure to align the motor led to the escape of gas and resulting fire.

¶ 6 The litigation is under case management. On September 3, 1999, the settling defendants brought an application before the case management judge to remove them from the lawsuit. At the same time, the plaintiffs applied to amend the statement of claim.

¶ 7 Propak resisted both applications, arguing that due to potential prejudice it would be made a scapegoat for liability at trial. It noted that because the Alberta Rules of Court, Alta. Reg. 390/68 do not contain an express rule permitting pre-trial discovery against third parties, Propak would lose its pre-trial

procedural rights against the settling defendants if they were released from the lawsuit. Propak contended that this would affect its ability to gather evidence to show that the fire resulted from the settling defendants' actions, and would impede the court's ability to apportion Propak's share of the liability fairly.

THE CASE MANAGEMENT JUDGE'S DECISION

¶ 8 The case management judge granted both applications. He noted that the settlement agreement limits Propak's liability to its own several liability to the plaintiffs. Given Propak's limited exposure, he queried the basis on which Propak's claims for contribution and indemnity from the settling defendants could continue (AB I at 100).

¶ 9 The judge then observed that even if the settling defendants were removed from the suit, leaving the plaintiffs and Propak as the only remaining litigants, the court would nevertheless be compelled to determine the degrees of fault of all contributors to the plaintiffs' damages, whether parties to the action or not. The court would be required to make this assessment for two reasons: in order to isolate Propak's several liability, and because s. 2(1) of the Contributory Negligence Act, R.S.A. 1980, c. C-23 compels the court to do so (AB I at 102). Therefore, even though the settlement agreement sufficed to extinguish all issues of liability among the plaintiffs and settling defendants, and the settling defendants and Propak, removing the settling defendants from the suit could affect the court's ability to apportion fault properly.

¶ 10 The case management judge recognized that removing the settling defendants from the action would cause Propak to lose its rights of discovery and production of documents in respect of those parties. The judge noted that although examinations for discovery were not complete, Propak had the advantage of significant oral examination and discovery of the documents. He was unable to find that "Propak would be in any way prejudiced or disadvantaged by 'losing' the opportunity of further discovery of parties to whom it would no longer be adverse in interest [by virtue of the agreement taking effect]" (AB I at 105). Accordingly, he directed that the third, fourth and fifth party notices and notices to co-defendants be struck, the respective parties be dismissed from the suit, and the amendments to the statement of claim be allowed (AB I at 105-106).

PROPORTIONATE SHARE SETTLEMENT AGREEMENTS

An Introduction

¶ 11 The litigation of large losses in Canada has been characterized by two opposing trends: first, the practice of adding every conceivable party as a defendant or third party in order to spread out the risk of liability, which complicates and slows the litigation process; and second, the use of settlement agreements to help speed litigation and curb legal fees. See Barbara Billingsley, "Margetts v. Timmer Estate: The Continuing Development of Canadian Law Relating to Mary Carter Agreements" (1998) 36 Alta. L. Rev. (No. 4) 1017.

¶ 12 Now past is the day when "settlement agreement" can be understood to refer solely to the final resolution of all outstanding issues between all parties to a lawsuit, effectively bringing the suit to an end. In the last several years, in response to increasingly complex and commensurately dilatory and costly litigation, a new generation of settlement agreements has been cautiously adopted by the litigation bar.

¶ 13 The new settlement agreements, which include such exotically named species as the Mary

Carter agreement and the Pierringer agreement, endeavour to attain a more limited objective: rather than trying to resolve all outstanding issues among all parties, a difficult task in complicated suits, they aim to manage proactively the risk associated with litigation. In short, contracting litigants prefer the certainty of settlement to the uncertainty and expense of a trial and the possibility of an undesirable outcome. This "risk-management" objective is accomplished by settling issues of liability between some but not all of the parties, thereby reducing the number of issues in dispute, simplifying the action, and expediting the suit. Ancillary benefits include a reduction in the financial and opportunity costs associated with complex, protracted litigation, as well as savings of court time and resources.

¶ 14 To the extent that a proportionate share settlement agreement completely removes the settling defendants from the suit, it is like a conventional settlement agreement that brings all outstanding issues between the settling parties to a conclusion. Proportionate share settlement agreements therefore typically include the following elements:

1. The plaintiff receives a payment from the settling defendants in full satisfaction of the plaintiff's claim against them;
2. In return, the settling defendants receive from the plaintiff a promise to discontinue proceedings, effectively removing the settling defendants from the suit;
3. Subsequent amendments to the pleadings formally remove the settling defendants from the suit; and
4. The plaintiff then continues its suit against the non-settling defendants.

¶ 15 There is, however, an added complication that a proportionate share settlement agreement must address. As a result of third party proceedings, settling defendants are almost always subject to claims for contribution and indemnity from non-settling defendants for the amount of the plaintiff's loss alleged to be attributable to the fault of the settling defendants. Before the settling defendants can be released from the suit, some provision must be made to satisfy these claims.

¶ 16 This obstacle is overcome by including an indemnity clause in which the plaintiff covenants to indemnify the settling defendants for any portion of the damages that a court may determine to be attributable to their fault and for which the non-settling defendants would otherwise be liable due to the principle of joint and several liability. Alternatively, the plaintiff may covenant not to pursue the non-settling defendants for that portion of the liability that a court may determine to be attributable to the fault of the settling defendants. It is the latter approach that prevails in the agreement at issue in this suit, but in either case the goal of the proportionate share settlement agreement is to limit the liability of the non-settling party to its several liability.

The Competing Positions

¶ 17 This court recently considered the validity of a "new generation" settlement agreement in Margetts v. Timmer Estate, [1997] 1 W.W.R. 25 (Q.B.), aff'd (1999) 178 D.L.R. (4th) 577 (C.A.). There, the trial court recognized and this court affirmed that a tortfeasor has a legitimate and "undoubted right to contract to minimize his financial exposure to the plaintiffs": at W.W.R. 39.

¶ 18 However, in Margetts, supra, the settlement was in the nature of a Mary Carter agreement, which did not completely remove the settling defendants from the suit. As the settling parties continued to be adversarial in interest, a non-settling party remained entitled to full pre-trial disclosure from them. In Margetts, therefore, the court did not need to reconcile settlement rights with a non-settling defendant's ability to exercise its pre-trial procedural rights in an effort to deflect the plaintiff's

accusation of fault.

¶ 19 In addition to being grounded in fundamental principles of justice and framed in the Alberta Rules of Court, a non-settling defendant's ability to defend against a suit is anchored in the statutory requirement found in s. 2(1) of the Contributory Negligence Act:

> 2(1) When damage or loss has been caused by the fault of 2 or more persons, the court shall determine the degree in which each person was at fault.

¶ 20 The effect of this provision is to compel the court to determine the degrees of fault of all contributors to the plaintiffs' damage, whether or not they currently are or ever have been parties to the action. In effect, this provision acts as a safeguard to establish the proportionate share of each defendant's liability, whether settling or non-settling.

¶ 21 It therefore becomes apparent that the right to settle, fixing a settling defendant's financial liability to the plaintiff through contract, may have a direct effect on a non-settling defendant's pre-trial rights of discovery and production of documents in order to gather evidence to defend the lawsuit.

The B.C. Ferry Approach

¶ 22 The Canadian cases in which proportionate share settlement agreements have been considered attempt to balance the right to settle against the right to pre-trial disclosure. One approach is represented by the decision of the British Columbia Court of Appeal in British Columbia Ferry Corp. et al. v. T&N plc. et al. (1995), 27 C.C.L.T. (2d) 287. There, the court decided that the non-settling defendants could not maintain a claim for contribution or indemnity against third parties that had settled with the plaintiffs, pursuant to the terms of a proportionate share settlement agreement. However, the court allowed the non-settling defendants to maintain a claim for a declaration to determine the degree to which the plaintiff's damages were attributable to the settling defendants. The court therefore permitted the action for declaratory relief to remain, keeping the settling defendants in the lawsuit for the purely procedural purpose of allowing the non-settling parties access to pre-trial procedural rights.

¶ 23 The court concluded that the non-settling defendants would be prejudiced in establishing the fault of the third parties, and thus in maintaining their own defence, if they did not retain the benefit of full pre-trial procedural rights against the settling parties: at 302. The decision is based on the proposition that it would be "manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action": at 302 (emphasis added).

¶ 24 The difficulty with the B.C. Ferry approach is its emphasis on the potential prejudice a non-settling party might suffer. Indeed, it is likely that a non-settling party will always be able to allege some possible disadvantage when it remains as the sole target for liability after other parties abandon the litigation. That is true whether a partial settlement occurs during the course of litigation or even before an action is launched. The B.C. Ferry approach would seem to permit an action for declaratory relief to be maintained for purely procedural purposes against anyone who settled, whether or not they were ever a named party to the litigation, and even though there were no possibility that they might be liable.

¶ 25 Litigation, including settlement, is all about advantage, and corresponding disadvantage or prejudice. Settlement, after all, is nothing more than a compromise, in which parties gamble by trading prospective rights for certainty. Nor does prejudice run in only one direction. Failure to allow settlement by parties who want an exit ramp from costly and prolonged litigation may give a party who refuses to

settle an even stronger tactical advantage. An unreasonable party can hold the other parties at ransom, virtually dictating the terms of settlement.

¶ 26 It is argued that without complete pre-trial disclosure a court will be unable to properly apportion the loss. This argument cuts both ways. The plaintiff always bears the burden of proof at trial. By agreeing to remove the settling defendants from the suit and focussing only on the non-settling defendant's alleged misdeeds, a plaintiff runs the risk of no recovery at trial, for it may fail to prove any basis on which a trial court could assign liability to the non-settling party. Decisions to settle with some but not all defendants give rise to challenging issues. What use can be made by the non-settling defendant of settling defendants' discoveries? Will adverse inferences be drawn against the plaintiff if it does not call settling defendants as witnesses? A plaintiff may encounter considerable obstacles in its attempt to recover any damages. It by no means follows that as a result of a partial settlement the non-settling defendant will shoulder a greater portion of the liability than it ought.

¶ 27 The B.C. Ferry approach undervalues the importance of settlement. In these days of spiralling litigation costs, increasingly complex cases and scarce judicial resources, settlement is critical to the administration of justice. The Supreme Court of Canada noted the strong public policy reason which encourages settlement in Kelvin Energy v. Lee, [1992] 3 S.C.R. 235 at 259, citing Sparling v. Southam Inc. et al. (1988), 66 O.R. (2d) 225 at 230 (H.C.J.):

> [T]he Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system.
>
> [Emphasis deleted.]

In Gelata v. Alberta (1996), 193 A.R. 67 at 69 (C.A.), this court recognized that "public policy is to encourage compromise, whether it is partial or full".

¶ 28 Indeed, the Court of Queen's Bench of Alberta gives a high priority towards settlement. It has devoted considerable judicial resources to a successful judicial dispute resolution initiative and case management program. Proportionate share settlement agreements are most likely to be used in complex multi-party lawsuits, which are expected to consume more than 25 days of trial time. Such cases are considered to be "very long" trials which are subject to mandatory case management under Court of Queen's Bench of Alberta Civil Practice Note No. 7 - The Very Long Trial (September 1, 1995). Practice Note No. 7 focuses on full or partial settlement. One of its purposes is "to canvass settlement or other disposition of all or as many of the issues as possible" (s. 23). It provides for mandatory settlement conferences, "to settle some or all of the issues in the action" (s. 48). In decisions upholding proportionate share settlement agreements, Alberta trial courts have relied upon the public policy reason which supports settlement: Slaferek v. TCG International Inc. (1997), 46 Alta. L.R. (3d) 279 at 286 (Q.B.); and Wright (Next friend of) v. VIA Rail Canada Inc. (2000), 76 Alta. L.R. (3d) 166 at 175 (Q.B.).

Potential Prejudice

¶ 29 Alberta courts have grappled with the B.C. Ferry approach, attempting to balance the certain benefit of settlement against the potential problem of prejudice. Faced with the difficulty of predicting future prejudice, they have looked to the past, assessing such things as the age and complexity of the action; the number of parties involved; how long the present structure of defendants and third parties has

been in place; at what stage in the proceedings the application was made; whether discoveries have taken place, documents been produced and expert reports exchanged; whether a trial date has been set; delays and the reason for them; and whether the non-settling party has diligently exercised discovery rights. See Slaferek, supra; Viridian Inc. v. Dresser Canada Inc. (1999), 73 Alta. L.R. (3d) 348 at 363 (Q.B.); Vandevelde v. Smith (1999), 243 A.R. 161 (Q.B.); and Wright, supra.

¶ 30 Generally, the longer the action has been in existence and the greater the pre-trial disclosure received by the non-settling defendant, the less likely an Alberta judge will find potential prejudice and the more likely the settlement agreement will be given effect. See Slaferek, supra; and Wright, supra. Indeed, that approach was followed in the present case. The case management judge concluded that because Propak had the advantage of significant oral examination and discovery of documents, it was "clearly better off" than if the settling parties had not been sued or had been formally released by the plaintiffs from the outset, and would not "in any way" be disadvantaged or prejudiced (AB I at 105).

¶ 31 This approach has a number of flaws. First, the analysis tends to be superficial and the conclusions unpersuasive. From a pre-trial disclosure point of view, most parties will be better off at a more advanced stage in the litigation process. But a non-settling party, although better off, could still be disadvantaged if a court were to truncate its pre-trial procedural rights by giving effect to a proportionate share settlement agreement. No matter how dilatory the defendant has been, no matter how interminable its efforts to mine for information, the potential always exists for the next discovery question it asks to be the one that blows the litigation apart. It is difficult for any judge to definitively conclude that there is no potential for prejudice.

¶ 32 A second flaw is that this approach always favours settlement at advanced stages rather than earlier stages of litigation. But public policy dictates otherwise. Early settlement means reduced legal costs and less strain on the court system. In modern, complex litigation, it is the pre-trial skirmishes that consume most of the court's calendar. The surge in the number of cases under case management, and the need for intricate practice notes regulating long trials, such as Practice Note No. 7, confirm this.

¶ 33 A third flaw is that it gives little guidance to judges, and creates uncertainty for litigants. Because courts are looking at potential rather than actual prejudice, they sometimes have a difficult time evaluating the competing positions. In Viridian, supra at 363, for example, the judge noted that he did not "have a clear appreciation of the comparative procedural consequences" and was uncertain whether the negative effects would be of substantial significance. He concluded that "the appropriate response to my uncertainty [...] is to maintain the existing structure of this action".

¶ 34 A test which institutionalizes this degree of uncertainty is no test at all. By properly drafting a proportionate share settlement agreement, settling parties can ensure that a non-settling defendant is responsible only for its proportionate share of the loss. But a non-settling defendant can always assert some form of potential prejudice, which settling parties cannot avoid by contractual means. Litigants will no doubt be reluctant to spend time evaluating their legal position and displaying their hand in settlement negotiations if there is little ability to predict whether a proportionate share settlement agreement will be given effect by the court.

¶ 35 The fundamental problem with the current approach is that it requires judges to balance two competing interests, but gives judges few tools with which to do so. The Alberta Rules of Court contain no express rule permitting third party discovery and at least to this point, no one has come up with a creative way of achieving equivalent disclosure by practice note, statute or private agreement.

¶ 36 Judges in other jurisdictions do not face the same difficulty. For example, in Ontario New Home

Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 (Sup. Ct. Just.) the court evaluated the non-settling defendant's procedural objections in light of the public policy which encourages settlement, concluding that the procedural complaints could be addressed without "a wholesale rejection of the proposed settlement agreement": at 147. The court made specific orders requiring pre-trial disclosure by the settling parties, as permitted by the Ontario class action statute being considered in that case. See also The Ontario Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 31.10 and British Columbia Supreme Court Civil Rules, B.C. Reg. 221/90, R. 28(1), which permit parties to apply to examine on discovery third parties, who may have information relevant to a material issue in an action.

¶ 37 Alberta judges do not enjoy this type of flexibility. Because they can do little to remedy potential prejudice, the so-called balance they are supposed to achieve is no balance at all: to uphold a settlement agreement, a judge must conclude that there is little or no potential for prejudice. But in reality, curtailing pre-trial disclosure rights will almost always result in possible procedural disadvantage to the non-settling defendant. In most cases the disadvantage does not stem from the fact of settlement, but from the pre-trial disclosure regime which exists in this province. It is therefore more productive to focus on the cause, rather than the potential for prejudice.

¶ 38 Alberta's current pre-trial disclosure regime severely restricts third party discovery rights. This limitation, which affects all litigants equally, should not be equated to prejudice. Nor should it be used to justify jettisoning proportionate share settlement agreements in this province. A better solution is to introduce some form of third party discovery in Alberta, to address the type of procedural complaints levied in this case. The fact that non-settling defendants are confined to a statutory disclosure regime constrained by the Alberta Rules of Court is not a proper basis for refusing to give effect to proportionate share settlement agreements.

¶ 39 It is one thing when the Alberta Rules of Court limit rights of pre-trial disclosure. It is another matter entirely when settling parties deliberately thwart a non-settling party's ability to get at the truth. Courts need not countenance agreements containing express provisions that narrow the procedural rights a non-settling defendant would otherwise have or create other obstacles, for example, prohibiting a settling party from cooperating with a non-settling party, participating in interviews, or voluntarily making documents available.

¶ 40 A proportionate share settlement agreement should be disclosed to the non-settling party: Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright, [1997] 10 W.W.R. 622 (Q.B.), aff'd (1998) 131 Man. R. (2d) 133 (C.A.). To ensure that the trial judge is aware of the circumstances under which the non-settling defendant has operated, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

Summary

¶ 41 In summary, in evaluating proportionate share settlement agreements:

1. A court must keep in mind the strong public policy reason which encourages settlement;
2. The fact that a non-settling defendant has restricted rights of third party disclosure under the Alberta Rules of Court does not justify refusing to give effect to a proportionate share settlement agreement;
3. A court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling

defendant would otherwise have; and

4. A proportionate share settlement agreement should be disclosed to the non-settling party. To further reduce potential prejudice, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

APPLICATION

¶ 42 The case management judge decided that Propak's liability was strictly limited to its own several liability to the plaintiffs and that it faced "no exposure for anything beyond that" as all claims, including claims for contribution and indemnity, had been settled (AB I at 100). That finding was not attacked by Propak on appeal. However, during oral argument the panel asked whether Propak asserted that its third party notices established independent duties which continue to give rise to a claim for indemnification.

¶ 43 Some confusion exists about claims for contribution and claims for indemnity. Although it is common practice for multiple defendants to issue cross-claims against one another seeking "contribution and indemnity" in respect of the plaintiff's loss, a claim for contribution is usually based on s. 2 of the Contributory Negligence Act and s. 3 of the Tort-feasors Act, R.S.A. 1980, c. T-6. The combined effect of these statutory provisions is the creation of joint and several liability, whereby a plaintiff may claim the whole of its loss from any one defendant, and that defendant may in turn claim contribution from the other defendants in proportion to their respective degree of fault. In contrast to the statutory basis for a claim for contribution, a claim for indemnity is grounded in either contract or tort, arising from an independent duty of care that one defendant or third party owed to another.

¶ 44 Proportionate share settlement agreements are relatively straightforward when all defendants are potentially liable to the plaintiff. A settlement is proper so long as the non-settling defendant's liability is strictly limited to the loss it actually caused. The situation is more complicated when the non-settling defendant has issued a third party notice claiming an independent duty that is owed to it, but not to the plaintiff. A settlement cannot extinguish the non-settling defendant's entitlement to indemnification from the third party unless it also extinguishes the non-settling defendant's liability to the plaintiff in respect of claims for which it could seek indemnification from the third party.

¶ 45 Propak was invited to present additional written submissions on these points, but did not avail itself of this opportunity. Having reviewed the settlement agreement, amended statement of claim and pleadings, we see no reason to question the case management judge's determination that Propak faces no exposure beyond its several liability for which it has no remaining right to indemnification.

¶ 46 The case management judge distinguished B.C. Ferry, supra, in which an action for declaratory relief was permitted to remain for purely procedural purposes, on the basis that no claim for declaratory relief had been advanced in this case. While B.C. Ferry should not be applied, the case need not have been distinguished on this basis. In Alberta, claims for declaratory relief are rarely maintained for purely procedural purposes; instead a legal right or interest must be at stake: Brown v. Alberta (1999), 64 Alta. L.R. (3d) 62 at 74 (Q.B.). Whether or not the non-settling party has asked for a declaration setting out its proportionate share of fault, a court is compelled to determine the degree of fault of all contributors to a plaintiff's damages, pursuant to s. 2(1) of the Contributory Negligence Act. The presence, or absence, of a request for declaratory relief adds little to the analytical framework and is not a factor which weighs in the balance.

¶ 47 The case management judge commented that "it would be a rare case [...] in which optimizing a non-settling party's access to discovery and/or production of documents would outweigh the benefits of

a multi-party settlement and a shortened trial" (AB I at 105). He therefore properly considered the strong public policy reason which favours settlement. The judge noted that under the Rules only parties who are adverse in interest have discovery rights and that no such rights would exist with respect to the settling parties, who would be "mere witnesses". He commented that Propak "would have full recourse to all rights of subpoena and production which would apply to any party seeking to call evidence in a civil trial in Alberta" (AB I at 105). He therefore recognized that potential prejudice which arises as a result of the third party disclosure regime in the Alberta Rules of Court is not a proper basis for refusing to give effect to a proportionate share settlement agreement.

¶ 48 The case management judge did not mention disclosure provisions contained in the agreement, although he undoubtedly considered them. In fact, they do not limit Propak's procedural rights. Section 10 requires the settling defendants to cooperate with the plaintiffs, by making witnesses, documents and expert reports available to them, but does not restrict the settling defendants from cooperating with Propak. As Propak has a continuing right to examine the plaintiffs, it will also be entitled to any documents received by the plaintiffs from the settling defendants. Section 11 provides for disclosure of the settlement agreement to both Propak and the Court of Queen's Bench.

¶ 49 Propak has failed to show that the case management judge erred.

OTHER ISSUES

¶ 50 Propak has advanced several other issues in this appeal, which will be dealt with summarily.

¶ 51 Although R. 77 requires that a notice to a co-defendant be filed and served within ten days after filing a defence, Propak filed notices to co-defendants more than five years after its statement of defence. Propak sought leave for late filing in the application heard by the case management judge on September 3, 1999. The judge declined to grant leave. Noting that the delay was inordinate, he found the real issue to be whether Propak had advanced a reasonable excuse for the delay. On the evidence before him, he was unable to make such a finding (AB I at 111). Propak appeals this decision.

¶ 52 In light of the decision giving effect to the proportionate share settlement agreement, this issue is academic.

¶ 53 Second, Propak asks that this court "deem [it] released along with [the] other joint tortfeasors" on the basis of its interpretation of the Tort-feasors Act, R.S.A. 1980, c. T-6 (Propak's Factum at 26). Whether the settling defendants and Propak are joint tort-feasors is a question of mixed fact and law, requiring an evidentiary basis and fact finding. Whether a proper interpretation of the Tort-feasors Act supports Propak's release from this action is a question of law. Neither issue was put before the case management judge and no evidence was adduced. It is inappropriate for this court to consider such questions for the first time on appeal.

¶ 54 Finally, Propak asks this court to provide guidance on the procedural and substantive limits they have "as to what response they may make to the restructured lawsuit" (Propak's Factum at 26). As a court of appeal sitting in review, it is not our job to provide this type of guidance. Propak should address its request to the case management judge.

¶ 55 The appeal is dismissed.

FRUMAN J.A.
CONRAD J.A.:— I concur.

SULATYCKY J.A.:— I concur.

* * * * *

ERRATUM

Released: February 6, 2002.

An Errata has been issued for the above reasons for judgment reserved. The correction made is as follows:

On page 12, paragraph 52 of the reasons, the sentence:

> "In any event, a review of the evidence filed in support of Propak's leave application indicates no error in the casee management judge's conclusion."

has been deleted.

Please replace your present page 12 with this new amended version.

FRUMAN J.A.

QL Update: 20010511
cp/i/qljpn

Case Name:

Ayrton v. PRL Financial (Alta.) Ltd.

Between
Jacob Ayrton, As Representative Plaintiff, plaintiff,
and
PRL Financial (Alta.) Ltd., Payroll Loans (Alberta) Ltd., Hornby Loan Broker (Alberta) Inc., Thurlow Capital (Alberta) Inc., David Feller, Praveen Varshney, Sokhie Puar, Patrick Warren and David Ash, defendants

[2005] A.J. No. 466
2005 ABQB 311
Docket: 0301 15879

Alberta Court of Queen's Bench
Judicial District of Calgary
LoVecchio J.

Heard: February 18, 2005.
Judgment: April 22, 2005.
(108 paras.)

Civil procedure — Actions — Joinder of causes of action and consolidation — Parties — Class or representative actions — Certification — Common interests — Members of class — Representative plaintiff — Striking out parties —Corporations and associations law — Corporations — Legal personality — Lifting the corporate veil.

Application by the plaintiff Ayrton for certification of the present action as a class action and for consolidation of two actions. The defendant Ash, the director of the defendant PRL Financial, sought an order to be struck as a party to the action. Ayrton had obtained several payday loans from PRL Financial. In the present action, Ayrton claimed that the cumulative amounts he was required to pay for interest and other administrative charges constituted a criminal rate of interest. He then commenced another action against Hornby, Thurlow arguing that these defendants also charged a criminal rate of interest and violated the Fair Trading Act. Hornby, Thurlow had purchased the assets of PRL. These defendants were also parties to the present action and the same claims were made against them in both actions. The statement of claim in the present action alleged that Ash, as director, authorized or acquiesced in the conduct of PRL and was thus jointly and severally liable.

HELD: Application by Ayrton allowed. Application by Ash dismissed. The action was not struck out as against Ash. The allegations against him were the type that might convince a court to lift the corporate veil. The issue of Ash's personal liability was an issue to be determined at trial. The action could properly proceed as a class action. The defined class, as proposed by Ayrton, consisted of individuals who borrowed money as a payday loan from PRL within a certain time frame and were charged interest and a brokerage fee. This definition provided objective criteria for membership in the class based on borrowing and repayment of a loan, and the class was related to the common issue of whether criminal rates of interest were charged. The claims in this case raised similar issues of fact and law and advanced

the class members' claims in a meaningful way. The issue of whether the brokerage fee charged constituted a criminal rate of interest was a central issue to all members' claims. The fact finding and legal analysis in this case would be shared by the class members. In the context of the entire claim, common issues predominated over individual issues. Ayrton met the requirements to be a representative plaintiff. The two actions were consolidated since they shared the same issued of law and fact. Consolidation would also remove concerns about duplicity. The defendants Hornby, Thurlow were struck from the present action to remove further duplicity.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court Rule 42, Rule 129, Rule 129(d), Rule 129(1)(a), Rule 229

Class Proceedings Act s. 1(e), s. 5, s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 5(2)(a), s. 5(2)(b), s. 5(2)(c), s. 5(2)(d), s. 5(2)(e), s. 5(3), s. 8

Consumer Credit Transactions Act, R.S.A. 1985, c. C-22.5

Criminal Code, R.S.C. 1985, c. C-46 s. 347, s. 347(1), s. 347(1)(a), s. 347(1)(b)

Fair Trading Act, R.S.A. 2000 c. F-2, s. 13(3), s. 98(3)

Judgment Interest Act, R.S.A. 2000, c. J-1

Limitations Act, R.S.A. 2000, c. L-12

Trade Practice Act, R.S.B.C. 1996, c. 457

Counsel:

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Mr. A. Webster Macdonald, Jr., Q.C. and Mr. S.B. Gavin Matthews of Blake, Cassels & Graydon LLP for the Defendants PRL Financial (Alta.) Ltd., Payroll Loans (Alta.) Ltd., and David Ash.

Mr. Todd Lee of Miles Davison LLP for the Defendants Hornby Loan Broker (Alta.) Inc., Thurlow Capital (Alta.) Inc., David Feller, Praveen Varshney, Sokhie Puar, and Patrick Warren.

REASONS FOR JUDGMENT

LOVECCHIO J.:—

Introduction

¶ 1 Jacob Ayrton has on several occasions obtained loans, commonly referred to as "payday loans", from the Defendant companies. Payday loans are generally short-term (being due around the borrower's next scheduled payday) and require the borrower to pay both interest at a stipulated rate and some other administrative charges.

¶ 2 Mr. Ayrton says that the cumulative amounts he was required to pay on these payday loans

constitute a criminal rate of interest. On October 8, 2003, Mr. Ayrton filed a Statement of Claim in this Court against Payroll, PRL and Mr. Ash asking this Court to:

a) declare that the Brokerage Fees charged by the corporate Defendants is interest within the meaning of s. 347 of the Criminal Code [See Note 1 below] and that the agreements made by the corporate Defendants for payday loans are void because they resulted in the receipt of interest at a criminal rate contrary to s. 347 of the Criminal Code;

Note 1: R.S.C. 1985, c. C-46

b) declare that the agreements made by the corporate Defendants for payday loans failed to comply with the Fair Trading Act [See Note 2 below] and are void;

Note 2: R.S.A. 2000, c. F-2

c) order an accounting of all monies received by the Defendants, or one or any of them, and order repayment or damages of all monies received by the Defendants;

d) award statutory damages from the Defendants, or one or any of them, in the amount equal to the lessor of $500 or 5% of the maximum outstanding balance of the Payday Loan and financial charges as provided by s. 98(3) of the Fair Trading Act;

e) award punitive and/or exemplary damages;

f) award interest on all amounts found to be owing pursuant to the Judgment Interest Act. [See Note 3 below]

Note 3: R.S.A. 2000, c. J-1

¶ 3 The Statement of Claim was filed by Mr. Ayrton as a Representative Plaintiff in a proposed class proceeding.

¶ 4 The Defendants do not agree with these assertions and do not accept that this is an appropriate case for certification as a class proceeding.

Case Management

¶ 5 On May 26, 2004, I was appointed by the Associate Chief Justice as the Case Manager of this proceeding and, as will be detailed below, another similar proceeding.

The Parties to these Proceedings, the Payroll Loan Procedure and the Proceedings to Date

¶ 6 The following brief chronology will help to explain the parties involved in this action, their relationship to each other, the nature of the loans and the proceedings to date.

¶ 7 In March of 2003, Mr. Ayrton obtained a payday loan from Payroll Loans at one of their retail outlets. Payroll brokered the loan for a lender, PRL Financial. David Ash is the sole director of Payroll and PRL.

¶ 8 In October, 2003, Hornby Loan Broker purchased the assets of Payroll. Hornby carried on business in the same retail outlets that had been used by Payroll.

¶ 9 In February of 2004, and on later dates, Mr. Ayrton obtained payday loans from Hornby. Hornby had brokered these loans for a lender, Thurlow Capital. The directors of Hornby are David Feller and Praveen Varshney. The directors of Thurlow are Sokhie Puar and Patrick Warren.

¶ 10 In order to obtain the loans with the Defendant companies, Mr Ayrton was required to sign two standard form agreements. One form was a Broker Fee Agreement with the broker of the loan. Both Payroll and Hornby's Broker Fee Agreements required Mr. Ayrton to pay a brokerage fee of approximately 20% of the loan. For example, Mr. Ayrton was charged a brokerage fee of $95 on a loan of $500.

¶ 11 The other form that Mr. Ayrton was required to sign was a loan agreement with the companies actually extending credit, either PRL or Thurlow. The loan agreement disclosed the rate of interest on the loans. Both PRL and Thurlow charged interest at the rate of 1.13 % per week, or approximately 59% per annum. For example, Mr. Ayrton was charged $11.32 in interest for a two-week loan of $500.

¶ 12 As already noted, Mr. Ayrton filed a Statement of Claim in this Court against Payroll, PRL, and Mr. Ash on October 8, 2003. Mr. Ayrton filed the Statement of Claim as the Representative Plaintiff in a proposed representative action under Rule 42 of the Alberta Rules of Court.

¶ 13 On April 19, 2004, Mr. Ayrton filed an Amended Statement of Claim in this Court. The Amended Statement of Claim adds the Defendants Hornby, Thurlow, and their respective Directors, to the Statement of Claim. The Amended Statement of Claim alleges that these corporate Defendants, authorized by their respective Directors, also charged a criminal rate of interest and violated the Fair Trading Act. This claim will be referred to as Action #1.

¶ 14 On August 10, 2004, Mr. Ayrton filed a new Statement of Claim in this Court against Hornby, Thurlow and their respective directors, as a Representative Plaintiff in a proposed class proceeding under the Class Proceedings Act. [See Note 4 below] The Statement of Claim echoes the allegations made against these Defendants in the Amended Statement of Claim of April 19, 2004. This second claim will be referred to as Action #2.

Note 4: R.S.A. 2003, c. C-16.5

These Applications

¶ 15 As part of the Case Management process, I heard three applications on February 18, 2005. They were:

(1) Mr. Ash applied to be struck from the claim under Rule 129 of the Alberta Rules of Court, the alleged basis being the Statement of Claim does not disclose any cause of action against him;
(2) Mr. Ayrton applied to have the two proceedings certified as class proceedings; and
(3) Mr. Ayrton applied under Rule 229 of the Alberta Rules of Court to consolidate this action with the other proceeding.

Decision

¶ 16 For the reasons which follow:

(1) the Defendant Ash will not be struck from the Statement of Claim;
(2) these proceedings will be certified as a class proceeding with Mr. Ayrton as the Representative Plaintiff; and
(3) Action #1 and Action #2 will be consolidated and, as an ancillary matter to the consolidation, the Defendants Hornby, Thurlow, and their respective Directors will be struck from Action #1.
(1) The Application to Strike the Defendant Mr. Ash

Discussion

¶ 17 Rule 129 (1)(a) of the Alberta Rules of Court allows a court to strike pleadings in an action if the pleadings do not disclose a cause of action. This rule is in place to relieve parties from litigation which is needless or doomed to fail. The principles governing an application to strike a statement of claim for failure to disclose a cause of action are relatively settled. In brief, the Court must assume that the allegations of fact made by the Plaintiff are true. The Court then determines whether those facts disclose a cause of action in law. The burden of proof to have pleadings struck rests on the Applicant, and it will only be done in the clearest of cases. [See Note 5 below]

Note 5: Tottrup v. Alberta (Minister of Environment) (2000), 81 Alta. L.R. (3d) 27, 2000 ABCA 121.

¶ 18 So, the question that arises in this Application is whether, assuming all of the facts set out in the Statement of Claim are true, it is plain and obvious that no cause of action is disclosed against the Defendant Mr. Ash?

¶ 19 The starting point for this analysis is the Statement of Claim itself. Paragraphs 43 and 44 of the Statement of Claim are relevant. They read:

43. Further, the conduct of the Defendants, or one or any of them, is intentional and deliberate and is undertaken by the Defendants, or one or any of them, to exploit the economic vulnerability and necessitous circumstances of the representative Plaintiff and other Class members ...
44. The individual Defendant Ash authorized or assented or acquiesced or participated

> or omitted to do anything for the purposes of aiding or abetting the acts or omissions set forth above and is jointly and severally liable with the corporate Defendant PRL Corporations to the representative Plaintiff and other Class members ...

¶ 20 Counsel for Mr. Ash argues that the allegations in these pleadings, even if proven to be true, do not form a cause of action against him personally. He argues a rule which every first year law student is taught: namely, the Court should not pierce the corporate veil. Stated another way, a corporation is a separate legal identity, distinct from its directors and shareholders, with rights and liabilities of its own. As a result, a corporate veil is created whereby the acts of directors are seen as the acts of the corporation, and any liability arising from those acts attaches to the corporation, and not to the directors personally. [See Note 6 below]

Note 6: Salomon v. Salomon, [1895-99] All E.R. Rep. 33 (H.L.)

¶ 21 Counsel for Mr. Aryton, having been a first year law student at one time, acknowledges the existence of the rule. But he adds, the rule is not absolute. So, while the rule affords protection to directors for legitimate corporate purposes, the corporate veil may be lifted and liability may attach to a director in certain circumstances.

¶ 22 Courts have commented on the circumstances in which the corporate veil will be lifted. These circumstances include: where there are findings of fraud or deceit against a director, [See Note 7 below] where a director's actions are tortious in and of themselves, [See Note 8 below] where there is evidence that the director(s) either a) formed the corporation for the purpose of doing a wrongful act, or, b) directed that the corporation do a wrongful thing after it was formed [See Note 9 below] and where doing so (that is to say recognizing the corporate veil) would result in a decision "too flagrantly opposed to justice". [See Note 10 below]

Note 7: Montreal Trust Co. of Canada Inc. v. ScotiaMcLeod Inc. (1995), 129 D.L.R. (4th) 711 (Ont. C.A.) at 720.

Note 8: Blacklaws v. Morrow (2000), (2001) 84 Alta. L.R. (3d) 270, 2000 ABCA 175 at 284.

Note 9: Rainham Chemical Works, Ltd. and others v. Belvedere Fish Guano Co., Ltd., [1921] All E.R. Rep. 48 at 52.

Note 10: Kosmopoulos v. Constitution Insurance Co. of Canada, [1987] 1 S.C.R. 2 at 10.

¶ 23 In two recent cases, courts have specifically considered the issue of striking pleadings from a statement of claim when the directors of corporations allegedly involved in illegal payday loan operations were personally named as defendants in the action. The two cases were Tschritter v. Rentcash Inc., [See Note 11 below] and Bellows v. Quickcash Ltd.. [See Note 12 below]

Note 11: [2004] A.J. No. 900, 2004 ABQB 590.

Note 12: [2004] N.J. No. 352, 2004 NLSCTD 191.

¶ 24 In Tschritter, the Plaintiff commenced an action against the corporation, The Cash Store, and its sole officer and director. The Plaintiff also named the corporate shareholder of the Cash Store, Rent Cash, as a defendant as well as the past and current directors of Rent Cash. The Plaintiff claimed that the fees charged on loans amounted to an annual interest rate of over 1000%, which is well in excess of the allowable rate of interest under the Criminal Code.

¶ 25 The defendants argued that the action should not proceed against all of them as to do so would lift the corporate veil and no facts were pled to establish personal liability against them.

¶ 26 My brother Hawco J. observed that the statement of claim contained the following allegations: the Cash Store contravened s. 347(1) of the Criminal Code; the purpose of The Cash Store was to lend money at a criminal interest rate; and that the directors of Rent Cash had authorized the company to commit the criminal act. He relied on the following statement from Rainham to confirm that these allegations disclose a cause of action against the individual directors:

> If a company is formed for the express purpose of doing a wrongful act, or if, when formed, those in control expressly direct that a wrongful thing be done, the individuals as well as the company are responsible for the consequences. [See Note 13 below]

Note 13: Tschritter, note 11 at para. 17.

As a result, Justice Hawco did not strike the individual defendants from the claim and the directors' personal liability was left for the trial judge to determine.

¶ 27 In Bellows, the Plaintiff filed a claim against a payday loan corporation called Quik Cash, and its officers and directors, alleging the defendants charged and collected interest on loans at a criminal rate of interest. The defendant officers and directors applied to strike the claim against them, saying the claim lacked sufficient facts to disclose a cause of action against them personally. They also argued there is no personal liability at law for directors and officers arising out of the actions of the corporation.

¶ 28 The Court pointed to a number of cases which held that controlling minds may be personally liable when they have directed that a wrongful thing be done, or used the corporate structure for clearly improper conduct and declined to strike the pleadings.

¶ 29 Counsel for Mr. Ash submits that Tschritter and Bellows are distinguishable from this case. He submits that the Statement of Claim in this action does not allege the corporation was incorporated for an illegal purpose, nor does it allege that Mr. Ash knew the corporations' actions were wrong, or that Mr. Ash benefited from the corporations' acts. He also submits that in the recent Supreme Court decision, Transport North American Express Inc. v. New Solutions Financial Corp., [See Note 14 below] the Court held that a finding that a corporation contravened s. 347 of the Criminal Code was not evidence that the company in question had been established for a criminal purpose.

Note 14: [2004] 1 S.C.R. 249, 2004 SCC 7.

¶ 30 Counsel for Mr. Ayrton submits that the Statement of Claim in this case is strikingly similar to those in the Tschritter and Bellows actions and submits the law does not require a corporation to be established for an illegal purpose, or to have as its sole purpose an illegal act, in order to find a director personally liable; it is sufficient if, once formed, the director expressly directs a wrongful thing be done.

¶ 31 Counsel for Mr. Ayrton then submits the Statement of Claim makes just this type of allegation against Mr. Ash in paragraph 43, which alleges that "the conduct of the Defendants, or any one of them, was intentional and deliberate", meaning that Mr. Ash allegedly intended the criminal conduct. Furthermore, paragraph 44 of the claim also specifically alleges that Mr. Ash "authorized or assented or acquiesced or participated or omitted to do anything for the purposes of aiding or abetting the acts or omissions set forth above".

¶ 32 The allegations of fact in this case, assuming they are proven, are the type that might convince a court to lift the corporate veil. The issue of Mr. Ash's personal liability is an issue to be determined at trial and the pleadings against Mr. Ash will not be struck.

(2) The Application to Certify these Proceedings as a Class Proceeding

Discussion

¶ 33 There are three main policy objectives behind class proceedings: access to justice; judicial economy; and behaviour modification. A class proceeding may offer litigants better access to justice by distributing the costs of litigation across a large number of class members, making litigation more economical. Judicial economy is achieved by having cases with similar fact-finding and legal analysis done in one action rather than being duplicated in many actions. Finally, a class proceeding helps to deter actual and potential wrongdoers by making them accountable to the public.

¶ 34 In a certification application, the Court is interested in whether the action is well suited to being tried as a class proceeding. The Court is not testing the merits of the application.

¶ 35 The Class Proceedings Act (the "Act") came into force in April of 2004. While these proceedings were instituted prior to the Act coming into force, the parties have agreed that I should apply the Act in this Application.

¶ 36 In order to have these proceedings certified as a class proceeding, and to recognize the person seeking to bring the class action as a representative plaintiff, the Court must be satisfied that the requirements in s. 5 of the Act are met. Section 5 reads:

5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class of 2 or more persons;
(c) the claims of the prospective class members raise a common issue, whether

or not the common issue predominates over issues affecting only individual prospective class members;

(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

(e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,

(i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other prospective 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 may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:

(a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;

(b) whether a significant number of the prospective class members 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.

(3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

Position of the Parties

¶ 37 Mr. Ayrton submits these proceedings should be certified as they meet all the requirements of s. 5.

¶ 38 The Defendants PRL, Payroll, and David Ash oppose certification. The main thrust of their argument is that there are too many individual circumstances that the Court will have to take into consideration, and that these individual circumstances may result in different determinations of the alleged illegalities and remedies for the class members. They also argue that Mr. Ayrton was knowledgeable about the nature of the later loans that he entered into, which may situate him differently from other class members, and so he is not an appropriate representative plaintiff.

¶ 39 The Defendants Hornby, Thurlow, David Feller, Praveen Varshney, Sokhie Puar and Patrick Warren, substantially agree with the submissions of PRL, Payroll and Mr. Ash. They part ways

regarding whether Mr. Ayrton is an appropriate representative plaintiff, with the Hornby and Thurlow group of Defendants approving of Mr. Ayrton as a representative plaintiff if these proceedings are certified.

¶ 40 In light of the requirements of s. 5 and the position taken by the parties, there are three main issues which must be addressed. First - Is the class definition proposed by Mr. Ayrton too broad? Second - Do the questions of fact or law common to the prospective class members predominate over questions affecting only individual prospective class members - or vice versa? Third - Is Mr. Ayrton a suitable representative plaintiff? I will consider each in turn.

Class Definition

¶ 41 The Defendants argue that the proposed class definition is too broad and includes class members who are not commonly situated so the proposed class members will be facing different legal issues, resulting in an incohesive and unworkable class.

¶ 42 The Defendants point to two types of differences between potential class members and argue that these differences will likely mean that success for one will not be success for all.

¶ 43 The first difference between the proposed class members is that some of them have likely defaulted on their loans with the Defendants. The Defendants estimate that a high percentage (69%) of their customers have defaulted on their loans on at least one occasion. When a customer defaults, the Defendant companies enter into different agreements with the customers depending on the customer's circumstances.

¶ 44 In some cases, loan extensions are given for a few days and no additional fees are levied on top of the fees already agreed to. In other cases, arrangements are made with customers whereby customers pay the loan in equal instalments of a 6 to 12 month period without additional fees being charged. There are also cases where the Defendant companies have accepted settlements with customers for only a partial recovery of the original loan.

¶ 45 As a result of these types of differences, the Defendants argue that a different analysis will need to be done in order to answer questions about whether the brokerage fee was interest, the transaction was unconscionable, or there was an unjust enrichment. Therefore, each claim of the proposed class members will be fact-specific and depend on the individual circumstances of the customers. The Defendants argue this is especially true because the class members seek equitable remedies, and the granting of those remedies will also depend on the level of sophistication, knowledge and motivation of the individuals seeking loans.

¶ 46 The second difference that the Defendants raise is that the class members are subject to different legislation. Mr. Ayrton, as the proposed Representative Plaintiff, has requested that the Court certify as a class all individuals who borrowed money from the Defendants from January 1, 1997 to date.

¶ 47 The Defendants point out that the Limitations Act [See Note 15 below] bars a claimant from commencing an action once two years have passed from the time the claimant first knew or ought to have known about the existence of the claim. Therefore, a number of the proposed class members may be statutorily barred from participating in the action.

Note 15: R.S.A. 2000, c. L-12

¶ 48 The Defendants also point out that Mr. Ayrton seeks to rely on remedies under the Fair Trading Act retroactive to January 1, 1997, but that the Fair Trading Act only applies to consumer transactions arising after September 1, 1999.

¶ 49 Mr. Ayrton responds that the class is commonly situated because there is one overarching issue to this case which unites them all. The overarching issue is whether the Defendants entered into agreements by which they sought to charge interest at a criminal rate. The determination of whether an agreement violates s. 347(1)(a) of the Criminal Code is based on the time the transaction is entered into - so the fact that a customer may have received an extension on repayment is irrelevant to the question of whether the brokerage fee constitutes interest at a criminal rate.

¶ 50 As for the differences in legislation, Mr. Ayrton argues that the predecessor legislation to the Fair Trading Act, the Consumer Credit Transactions Act, [See Note 16 below] incorporated similar provisions regarding the disclosure of interest costs, so should not be a bar to certifying the class.

Note 16: R.S.A. 1985, c. C-22.5.

¶ 51 The other legislation in issue, the Limitations Act, may not be a bar based on public policy reasons as ultimately the constitutional doctrine of paramountcy may prevent the Defendants from relying on a provincial statute to shelter them from the consequences of their misconduct in an action based on a Criminal Code violation. In any event, Mr. Ayrton argues that the determination of this matter is for the common issues judge to determine at trial.

¶ 52 In the end, the identifiable class requirement is an inquiry into whether the members of the class can be identified by objective criteria and, while the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. [See Note 17 below] But ease of identification through objective criteria should not become the agent to make the class unnecessarily broad. 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. [See Note 18 below]

Note 17: Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 38.

Note 18: Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68, at para. 21.

¶ 53 The defined class, as proposed in the certification motion, is individuals who borrowed money as a payday loan from the Defendant companies subsequent to October 15th, 2001 (which Ayrton seeks to amend to January 1, 1997), were charged interest fees and a brokerage fee, and repaid the original loan amount, plus fees and interest on or after the due date.

¶ 54 This definition provides objective criteria for membership in the class based on the borrowing

and repayment of a loan, and the class is related to the common issue of whether criminal rates of interest were charged. A person will know they are a member of the class if they obtained and repaid the original loan amount, plus fees, from the Defendant companies during the period specified. Individuals who had all or part of their original loan forgiven will be excluded by definition.

¶ 55 The issues raised by the Defendants' regarding the Limitations Act will have to be addressed, but for me to decide that issue would be delving into the merits of the case, and the authorities are clear that the certification stage is not meant for that purpose. That is an issue for the common issue judge to determine. The inclusion of individuals whose claims may ultimately be found to be statute barred is not a barrier to proper identification of the members of the class, nor does it expand the class unnecessarily.

¶ 56 The other issue raised by Defendants, regarding individual circumstances that may affect remedies, is best addressed under the next section on common issues. At this stage, the identifiable class requirement is met if there is "some rational relationship between the class and common issues". [See Note 19 below]

Note 19: Hollick, note 18, at para. 20.

¶ 57 In my view, there is a rational relationship between the class - persons who borrowed and repaid their loans in full from the Defendants, and the common issues - whether those loan agreements were unlawful, and if so, what remedies may be available to them. Similarly, the fact that some class members may ultimately be denied a remedy due to their individual circumstances does not mean that the class is overbroad and should not be certified.

Do Common or Individual Issues Dominate?

¶ 58 In the Certification Motion, Mr. Ayrton proposes sixteen common issues between the class members and Defendants. In his brief, Mr. Ayrton organized the issues into four categories: criminal interest rate issues; restitution issues; Fair Trading Act issues; and punitive damages issues.

¶ 59 Briefly, the issues in each of these categories are as follows:

1. Criminal Interest Rate Issues

   Were the fees charged by the Defendants interest for the purposes of s. 347(1) of the Criminal Code? If the fees are characterized as interest, then a) are the loan agreements in contravention of s. 347(1)(a) of the Criminal Code, and b) did the collection of the fees under the agreements result in the receipt of interest at a criminal rate, contrary to s. 347(1)(b) of the Criminal Code?

2. Restitution Issues

   If the Defendants received interest at a criminal rate, then have they been unjustly enriched by the retention of that criminal interest? If so, are the Defendants liable to account to the class members?

3. Fair Trading Act Issues

Irrespective of the criminal rate issues - are the Defendants liable under the Fair Trading Act for failing to disclose the total cost of credit to the class members on the loan agreements? Did the Defendants also fail to comply with the Fair Trading Act by receiving wage assignments from the class members? If the Defendants failed to comply with the Fair Trading Act, are statutory and exemplary damages owed to the class members?

4. Punitive Damages Issues

If the Defendants are found to have received interest at a criminal rate, or to have breached the Fair Trading Act, does this conduct justify an award of punitive damages? If so, what is the amount to be awarded?

¶ 60 The Defendants concede that there is one common issue to the class members in the first category - whether the brokerage fee constitutes interest under s. 347 the Criminal Code - but submit this issue will not materially advance the class members' claims in any meaningful way. The resolution of the interest rate issue will only be a preliminary hurdle for the class members, but the other issues in this category will need to be resolved on an individual basis because of the individual variance in many of the loan agreements.

¶ 61 The Defendants relied heavily on the Transport case for their argument. The case concerned two corporations who entered into a credit agreement for $500,000. There were a number of fees and charges in the agreement in addition to a 4% per month interest rate.

¶ 62 The various payments, when totalled, resulted in a criminal rate of interest as defined in s. 347 of the Criminal Code. When the payments became too onerous, the borrower applied to the court for a declaration that the agreement contained an illegally high rate of interest and should not be enforced.

¶ 63 The Supreme Court of Canada upheld a decision by the lower court that applied the doctrine of "notional severance" to the agreement, allowing the offending interest rate to be read down so that the contract provided for the maximum legal rate of interest. The Court directed courts to use judicial discretion when deciding on the remedies available in cases arising under s. 347 of the Criminal Code:

> There is a broad consensus that the traditional rule that contracts in violation of statutory enactments are void ab initio is not the approach courts should necessarily take in cases of statutory illegality involving s. 347 of the Code. Instead, judicial discretion should be employed in cases in which s. 347 has been violated in order to provide remedies that are tailored to the contractual contest involved. ...
> A spectrum of remedies is available to judges in dealing with contracts that violate s. 347 of the Code. The remedial discretion this spectrum affords is necessary to cope with the various contexts in which s. 347 illegality can arise. At one end of the spectrum are contracts so objectionable that their illegality will taint the entire contract. For example, exploitative loan-sharking arrangements and contracts that have a criminal object should be declared void ab initio. At the other end of the spectrum are contracts that, although they do contravene a statutory enactment, are otherwise unobjectionable. Contracts of this nature will often attract the application of the doctrine of severance. ... In each case, the determination of where along the spectrum a given case lies, and the remedial consequences flowing therefrom, will hinge on a careful consideration of the specific contractual context and the illegality involved. [See Note 20 below]

Note 20: Transport, note 14, at paras. 4 and 6.

¶ 64 The Supreme Court of Canada ultimately held that notional severance was appropriate in the case because the agreement was a commercial transaction entered into by experienced and independently advised commercial parties. There was nothing inherently illegal about the parties intentions to enter into the contract. The Supreme Court of Canada outlined the following approach to determine if an otherwise illegal agreement should be partially enforced rather than being declared void ab initio. A court should consider the following factors:

1) whether the purpose or policy of s. 347 would be subverted by severance;
2) whether the parties entered into the agreement for an illegal purpose or with an evil intention;
3) the relative bargaining position of the parties and their conduct in reaching the agreement;
4) the potential for the debtor to enjoy an unjustified windfall. [See Note 21 below]

Note 21: Transport, note 14, at para. 43.

¶ 65 Based on this case, the Defendants argue that even if the criminal rate issue is resolved, the Court will still be required to engage in individual inquiries to determine, on a case by case basis, whether the doctrine of notional severance should be applied. Therefore, the Defendants submit that there is only one preliminary common issue in the first category of common issues, the resolution of which will result in negligible judicial economy, and does not provide justification for a class proceeding.

¶ 66 The Defendants also rely on the Transport case to negate the framing of the restitution issues, in category two, as common issues. They submit that in order to determine whether the parties entered into the agreement for an illegal purpose, the court will be required to look at evidence on the intention of each party to each individual loan agreement. Similarly, the Court will need to look at evidence on the bargaining position of each individual class member and their conduct in reaching the loan agreements.

¶ 67 The "common issues" under the Fair Trading Act category, are also "uncommon" issues according to the Defendants. The Defendants point to s. 13(3) of the Fair Trading Act, which requires a court to consider the following when determining whether to grant relief under the Act: "whether the consumer made a reasonable effort to minimize any damage resulting from the unfair practice and to resolve the dispute with the supplier before commencing the action in the Court". Due to this requirement, the Court will be required to inquire into the individual efforts of the class members to mitigate their damages or resolve the dispute on their own.

¶ 68 The Defendants also submit that the forth category, punitive damages, cannot be a common issue for the class members because individual inquiries will need to be made. Punitive damages are awarded when compensatory damages are inadequate to achieve the objectives of retribution, deterrence and denunciation. The determination cannot be made until after individual inquiries have been made relating to compensatory damages and notional severance.

¶ 69 The Defendants also rely on a recent decision from British Columbia, MacKinnon v. National Money Mart Company et al., [See Note 22 below] that considered whether to certify a class proceeding against 20 defendants who run payday loan type companies. This decision was released after the Applications were argued and the parties made additional submissions subsequent to its release.

Note 22: MacKinnon v. National Money Mart Company et al, [2005] B.C.J. No. 339, 2005 BCSC 271.

¶ 70 In National Money Mart, Mr. MacKinnon proposed to certify as a class all persons in the Province of British Columbia who had taken out payday loans from any of the 20 different payday loan businesses. Justice Brown called this proposed class action "industry-wide litigation". [See Note 23 below]

Note 23: National Money Mart., note 22, at para. 2.

¶ 71 The Defendant companies in the case, as in the present case, opposed certification on the ground there were insufficient common issues shared by the class members. Justice Brown specifically denied certification on that ground, stating that she was not satisfied the proposed common issues were common to the class. She noted the manner in which payday loan companies operate their businesses differs widely.

¶ 72 In order to determine the criminal interest rate issues, each fee charged by each defendant would need to be reviewed, and a determination made as to the amount of interest charged and received. The fact finding and legal analysis done for one class member and defendant, such as Mr. MacKinnon and Money Mart, would have little or no application to other borrowers and lenders because the court would be required to look at each separate form of agreement and fee charged. [See Note 24 below]

Note 24: Ibid. at paras. 23 - 26.

¶ 73 Justice Brown also held that even if there was sufficient commonality in the legal analysis, a class action would still not be the preferable procedure as each defendant company would be required to attend and participate in the review of agreements and business models which have little in common with theirs. Individual plaintiffs would be required to wait for determination of their claim while unrelated fees and agreements were considered. [See Note 25 below]

Note 25: Ibid. at para. 31.

¶ 74 She held that the remaining common issues, namely restitution, payments to franchisers, Trade Practice Act [See Note 26 below] issues and punitive damages, could not stand alone as common issues because they were all dependant on a determination of the criminal interest rate issue. [See Note 27 below] She also noted that even if a particular standard form loan agreement was found to constitute an agreement to receive interest at a criminal rate, the court would still have to look at individual circumstances such as: oral variations to the contract, repayments made by individuals, whether collection procedures were used, defences of defendants based on voluntariness or individuals being fully informed, and counterclaims for unpaid amounts. [See Note 28 below]

Note 26: R.S.B.C. 1996, c. 457.

Note 27: National Money Mart, note 22, at paras. 32 - 35.

Note 28: Ibid. at para. 39.

¶ 75 Justice Brown found that for any individual claimant or defendant it may take a very significant period of time, as the court works through other issues, before their individual circumstances are dealt with and that was not an efficient use of judicial resources. [See Note 29 below]

Note 29: National Money Mart., note 22, at para. 40.

¶ 76 She commented that these claims could potentially be pursued more effectively in "less ambitious" class proceedings. [See Note 30 below]

Note 30: Ibid. at para. 40.

¶ 77 The Defendants say National Money Mart is on point with this case. They acknowledge that the large number of defendants and different business models was a factor in the case, but submit that numerous other factors, that were relevant to the decision, are present in this case. In particular, the Defendants point to the following issues that were raised by Justice Brown in her reasons dismissing certification, and say that they are also issues that should result in dismissing the certification of this action:

- variances were made to the loan agreements;
-the court will have to determine on an individual basis the date of the advance of principal and the dates of repayment;
- payments may have been made after collection procedures are initiated requiring the court to consider what portion of the payment is principle versus interest and costs; and
- there are differences in the individual borrowers regarding their knowledge and

> reasons for entering into the loans that will effect the trade practice and punitive damages claims.

¶ 78 Mr. Ayrton's position is that one common issue predominates over all other issues in the case. He submits that the criminal rate issue is an overarching issue that unifies all class members. He also argues the standard form agreements used by the Defendants set out the brokerage fees upfront, therefore to determine whether the fee constitutes interest under the Criminal Code will involve the same fact finding and legal analysis for all class members. Mr. Ayrton submits that the calculation to determine if the Defendants received a criminal rate of interest under s. 347(1)(b) will involve a simple mathematical calculation based on the amount of repayment and when it is received, which is information contained in the ledgers of the corporate Defendants. Therefore, the analysis of individual circumstances is not necessary for these inquiries.

¶ 79 As for the Transport case, Mr. Ayrton submits the loan agreements at issue fall into the "exploitive loan sharking" end of the spectrum of illegal contracts referred to by the Supreme Court of Canada, and are not akin to a situation where a court would apply notional severance:

> Using notional severance to read down interest provisions to be just within the legal limit would not find application in traditional loan-sharking transactions. It would be available as a remedy where a court recognizes the commercial sophistication and professional advice received by both parties, concludes that the violation of s. 347 by the parties was unintentional, and considers it equitable to give effect to the highest legal interest obligation available. [See Note 31 below]

Note 31: Transport, note 14, at para. 39.

¶ 80 Mr. Ayrton also argues the Defendants have miscast the restitution issues by suggesting the Court will have to focus on borrowers' individual circumstances to determine if restitution should be awarded. In an action for unjust enrichment, after the court finds an enrichment of the defendant and corresponding deprivation of the plaintiff, the court next inquires whether there is a juristic reason for the enrichment. Mr. Ayrton submits that in a case involving s. 347 of the Criminal Code the juristic reason inquiry focusses on the lender, not on the borrower.

¶ 81 For example, in Garland v. Consumer's Gas Co. [See Note 32 below], the Supreme Court of Canada found a juristic reason for criminal rates of interest that a gas company had charged through its late payment penalty. The juristic reason was that the Ontario Energy Board, which regulated the gas company, had ordered the late payment penalties. However, as soon as the gas company was put on notice that there was a serious possibility the payments violated the Criminal Code, it could no longer rely on the orders as a juristic reason for the unjust enrichment.

Note 32: [2004] 1 S.C.R. 629, 2004 SCC 25

¶ 82 Mr. Ayrton submits that it is clear from this analysis that the "individual circumstances" to be considered in this action would be the knowledge of the lenders, not the borrowers. Therefore, the

restitution issue can be considered for the class as a whole.

¶ 83 While it is true some assessments of damages will need to be done on an individual basis, Mr. Ayrton argues that in most cases the Court will be able to ascertain damages based on his circumstances, since he is the Representative Plaintiff. The pretext to a class proceeding is that the representative plaintiff stands in the place of the class members because his circumstances are similar to those of the class members. Accordingly, the legal analysis proceeds based on those circumstances.

¶ 84 In determining whether the proposed issues are common issues or individual issues, it is important to look to the Act. The Act defines a common issue as "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 facts". [See Note 33 below] The Class Proceedings Act (British Columbia) shares this definition, and as it has been in existence for some time, courts in B.C. have had a chance to interpret this definition. A common issue has been interpreted as an issue that will be applicable to all in a class or subclass and will move the litigation forward. [See Note 34 below]

Note 33: Class Proceedings Act, note 4, s. 1(e)

Note 34: Harrington v. Dow Corning Copr. (2000), 193 D.L.R. (4th) 67, 2000 BCCA 605, at para. 24; Scott v. TD Waterhouse Investor Services (Canada) Inc. (2001), 94 B.C.L.R. (3d) 320, 2001 BCSC 1299, at para. 76.

¶ 85 In my view, the claims in this case raise similar issues of fact and law, that, once resolved, will advance the class members' claims in a meaningful way. The class members have all been advanced loans by the Defendants under a nearly identical scheme whereby they are required to pay a brokerage fee on top of interest for their loan. There is one central issue to their claims that, once resolved, will advance the class members' claims in a meaningful way.

¶ 86 That issue is whether the brokerage fee constitutes interest under s. 347 of the Criminal Code. If the answer is yes, there are other questions that follow regarding the receipt of that interest and what remedies flow from the receipt of that interest, that can be answered. It may be that at this stage the class members should be divided into sub-groups depending on whether they paid their loans on time, were granted an extension of a few days, or were granted an extension of a few months. However, the factual and legal issues for the court to determine regarding these sub-groups, such as the availability of notional severance, or a juristic reason for the Defendants' enrichment, can be determined based on the circumstances of a representative for those subgroups.

¶ 87 In addition, the Defendants' opposition to certification is largely answered by s. 8 of the Act itself. Section 8 directs the court not to refuse certification because damages will be assessed individually after the common issues are determined or because a subclass has claims that raise common issues not shared by all the prospective class members.

¶ 88 The National Money Mart case is distinguishable from this case on a number of grounds. In her decision, Justice Brown highlighted why the fact finding and legal analysis would not be shared among the class members by pointing out differences in the schemes of the payday loan companies. The companies charged various different fees such as processing fees, administration fees, documentation fees and so on. The organization of the companies also differed, with some acting as brokers for lenders, and some offering loans on their own behalf. Many of the companies also offered special terms or

arrangements, that differed from other companies special arrangements, to their customers depending on the borrowers' circumstances or credit rating.

¶ 89 The fact finding and legal analysis in this case will be shared by the class members. The Defendant companies used nearly identical forms and operated under the same scheme whereby a retail store brokered a loan for a separate lender, and charged interest plus a brokerage fee. The rate of interest charged and the brokerage fee scale appears to be the same for Payroll/PRL as it is for Hornby/Thurlow. Therefore, the question regarding whether the brokerage fee is interest, and whether it is interest at a criminal rate, will involve the same legal analysis for all corporate Defendants, and is clearly a common issue.

¶ 90 In National Money Mart, the failure of the criminal interest issue to be classified as a common issue resulted in the failure of the other proposed issues to be found in common. Justice Brown found that the restitution issues, Trade Practice Act issues, and Punitive Damages issues were all dependent on a determination that the defendants provided loans at a criminal rate of interest. Justice Brown's decision on this point highlights the interconnectedness of the issues regarding restitution, the Fair Trading Act and punitive damages, to the central issue regarding the criminal rate of interest. By resolving the criminal rate issue in this case, the class members' claims will unquestionably be advanced in a meaningful way.

¶ 91 It is true that Justice Brown also found that individual circumstances added to the reasons that the claims were not suitable for a class proceeding. She stated that it was neither fair nor efficient for a claimant or defendant to wait as the court deals with individual circumstances regarding the variance of loan agreements, defences, counterclaims, and so on.

¶ 92 I agree that in the context of the proposed class proceeding in the National Money Mart case the issues regarding individual circumstances were a further reason not to certify the proceeding. In the balancing done between "common issues" and "individual issues", the individual circumstances added even more weight to the "individual issues" side of the scale. However, that side of the scale was already fully loaded considering that Justice Brown did not find a single common issue in the proceeding.

¶ 93 That is not so in this case. This is an example where the claims may be pursued effectively in, to use the words of Justice Brown, "less ambitious" class proceedings.

¶ 94 When deciding whether a class proceeding is the preferable procedure, one should also keep in mind the policy reasons behind class proceeding legislation: access to justice; judicial economy; and behaviour modification. In my view, these three policy objectives will be met by certifying this action.

¶ 95 Access to justice will be provided to a group of people who would find it uneconomical to litigate one of these actions individually, both due to the potentially modest recovery and due to the reality that those seeking payday loans are generally not in a position to fund expensive litigation.

¶ 96 Judicial resources will be used efficiently by having similar issues of fact and law analyzed in one action.

¶ 97 Finally, if the plaintiffs are successful in their claims, the goals of accountability for wrongful actions and deterrence of future wrongful actions will likely be met.

¶ 98 I find that in the context of the entire claim, the common issues predominate over individual issues.

Appropriate Representative Plaintiff

¶ 99 The Defendants Payroll, PRL, and Mr. Ash also argued that Mr. Ayrton is not an appropriate representative plaintiff. They submit that Mr. Ayrton was knowledgeable about the nature of the loans when he entered into the later loan agreements, and is therefore potentially situated differently from others in the class and cannot represent them adequately.

¶ 100 The Defendants Hornby, Thurlow, and the directors of those companies, agree that Mr. Ayrton may be differently situated from other class members because they allege he entered into loans with their companies in order to push forward the class action and will not be deserving of a remedy. However, these Defendants feel that having a representative plaintiff with these personal circumstances will benefit their case, so they do not oppose his role as a Representative Plaintiff.

¶ 101 The arguments of the Defendants are arguments for the common issues judge to determine as they go to the merits of the case. Mr. Ayrton took out loans with all of the corporate Defendants. He and the class members share the common issue, namely, whether the Defendants charged interest at a criminal rate on their loans, therefore he is in a position to fairly and adequately represent the interests of the class. [See Note 35 below] He has produced a workable plan for the proceeding to progress. There is no evidence to suggest that he is in a conflict of interest with other class members regarding the common issues.

Note 35: Fakhri v. Alfalfa's Canada Inc. (c.o.b. Capers Community Market) (2003), 26 B.C.L.R. (4th) 152, 2003 BCSC 1717, at para. 75.

¶ 102 I am satisfied that Mr. Ayrton meets the requirements under the Act to be a representative plaintiff.

¶ 103 The Application for certification of these proceedings is granted and Mr. Ayrton is appointed as the Representative Plaintiff.

(3) Application to consolidate Action #1 and Action #2

¶ 104 Mr. Ayrton asks for Action #1 and Action #2 to be consolidated. He argues that the parties and issues are essentially identical and should be consolidated pursuant to Rule 229 of the Alberta Rules of Court.

¶ 105 The Defendants Hornby, Thurlow, and the Defendant directors of those companies oppose consolidation. They argue that the two actions are exactly the same, and that this duplicity constitutes an abuse of process of the court. Therefore they ask that Action #2 be struck under Rule 129(d) of the Alberta Rules of Court for being an abuse of process.

¶ 106 Actions #1 and #2 share the same issues of law and fact, as the discussions in the previous sections have explained. Rule 229 allows consolidation where two or more actions have a common question of law or fact. Consolidating these two actions would partly remove the Defendants' concerns about duplicity, as they would then be heard together.

¶ 107 The Defendants Hornby, Thurlow, and their respective Directors would still be named in both

so some duplicity would remain. The way to remove that duplicity is to strike them from Action #1.

¶ 108 I order that Actions #1 and #2 be consolidated and that the Defendants Hornby, Thurlow, and their respective Directors be struck from Action #1.

Costs

Counsel for Mr. Ayrton asked that this matter proceed on the basis of a no costs regime because it is a matter of public interest. As this issue was not raised in the Notice of Motion, it is inappropriate for me to consider the matter at this time. Counsel is advised to file a new Notice of Motion regarding this issue. Otherwise, costs for this application may be spoken to later by the parties.

LOVECCHIO J.

QL UPDATE: 20050428
cp/e/qlmmm/qlmll

Case Name:

Baxter v. Canada (Attorney General)

Between
Charles Baxter, Sr. and Elijah Baxter, plaintiff, and
The Attorney General of Canada, defendant, and
The General Synod of the Anglican Church of Canada, the Missionary Society of the Anglican Church of Canada, the Synod of the Diocese of Algoma, the Synod of the Diocese of Athabasca, the Synod of the Diocese of Brandon, the Synod of the Diocese of British Columbia, the Synod of the Diocese of Calgary, the Synod of the Diocese of Cariboo, the Incorporated Synod of the Diocese of Huron, the Synod of the Diocese of Keewatin, the Diocese of Moosonee, the Synod of the Diocese of Westminister, the Synod of the Diocese of Qu'Appelle, the Diocese of Saskatchewan, the Synod of the Diocese of Yukon, the Company for the Propagation of the Gospel in New England (also known as the New England Company), the Presbyterian Church in Canada, the Trustee Board of the Presbyterian Church in Canada, the Foreign Mission of the Presbyterian Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Canada, the Women's Missionary Society of the Presbyterian Church in Canada, the United Church of Canada, the Board of Home Missions of the United Church of Canada, the Women's Missionary Society of the United Church of Canada, the Methodist Church of Canada, the Missionary Society of the Methodist Church of Canada (also known as the Methodist Missionary Society of Canada), the Canadian Conference of Catholic Bishops, the Roman Catholic Bishop of the Diocese of Calgary, the Roman Catholic Bishop of Kamloops, the Roman Catholic Bishop of Thunder Bay, the Roman Catholic Archbishop of Vancouver, the Roman Catholic Bishop of Victoria, the Roman Catholic Bishop of Nelson, the Catholic Episcopal Corporation of Whitehorse, la Corporation Episcopale Catholique Romaine de, Grouard - McLennan, the Catholic Archdiocese of Edmonton, le Diocèse de Saint-Paul, the Roman Catholic Episcopal Corporation of MacKenzie, the Archepiscopal Corporation of Regina, the Roman Catholic Episcopal Corporation of Keewatin, the Roman Catholic Archiepiscopal

Corporation of Winnipeg, la Corporation Archiepiscopale Catholique Romaine de Saint-Boniface, the Roman Catholic Episcopal Corporation of the Diocese of Sault Ste. Marie, the Roman Catholic Episcopal Corporation of James Bay, the Roman Catholic Episcopal Corporation of Halifax, the Roman Catholic Episcopal Corporation of Hudson's Bay, la Corporation Episcopale Catholique Romaine de Prince Albert, the Roman Catholic Episcopal Corporation of Prince Rupert, the Order of the Oblates of Mary Immaculate in the Province of British Columbia, the Missionary Oblates of Mary Immaculate - Grandin Province, les Oblats de Marie Immaculee du Manitoba or the Oblates of Mary Immaculate in the Province of Manitoba, les Peres Montfortains (also known as the Company of Mary), Jesuit Fathers of Upper Canada, the Missionary Oblates of Mary Immaculate - Province of St. Joseph, les Missionnaires Oblats de Marie Immaculee (also known as les Reverends Peres Oblats de L'Immaculee Conception de Marie), the Oblates of Mary Immaculate, St. Peter's Province, les Reverends Peres Oblats de Marie Immaculee des Territoires du Nord Ouest, les Missionnaires Oblats de Marie Immaculee (Province du Canada - Est), the Sisters of Saint Anne, the Sisters of Instruction of the Child Jesus (also known as the Sisters of the Child Jesus), the Sisters of Charity of Providence of Western Canada, the Sisters of Charity (Grey Nuns) of St. Albert (also known as the Sisters of Charity (Grey Nuns) of St. Alberta), the Sisters of Charity (Grey Nuns) of the Northwest Territories, the Sisters of Charity (Grey Nuns) of Montreal (also known as les Soeurs de la Charité (Soeurs Grises) de I'Hopital General de Montreal), the Grey Sisters Nicolet, the Grey Nuns of Manitoba Inc. (also known as les Soeurs Grises du Manitoba Inc.), the Sisters of St. Joseph of Sault Ste. Marie, les Soeurs de Saint-Joseph de St-Hyacinthe and Institut des Soeurs de Saint-Joseph de Saint-Hyacinthe, les Soeurs de L'Assomption de la Sainte Vierge (also known as les Soeurs de L'Assomption de la Sainte Vierge), De Nicolet and the Sisters of Assumption, les Soeurs de L'Assomption de la Sainte Vierge de l'Alberta, the Daughters of the Heart of Mary (also known as la Societe des Filles du Coeur de Marie and the Daughters of the

Immaculate Heart of Mary), Missionary Oblate Sisters of Saint-Boniface (also known as Missionary Oblates of the Sacred Heart and Mary Immaculate, or les Missionnaires Oblats de Saint-Boniface), les Soeurs de la Charité d'Ottawa (Soeurs Grises de la Croix) (also known as Sisters of Charity of Ottawa - Grey Nuns of the Cross), Sisters of the Holy Names of Jesus and Mary (also known as the Religious Order of Jesus and Mary and les Soeurs de Jesus-Marie), the Sisters of Charity of St. Vincent de Paul of Halifax (also known as the Sisters of Charity of Halifax), les Soeurs de Notre Dame Auxiliatrice, les Soeurs de St. Francois d'Assise, Sisters of the Presentation of Mary (Soeurs de la Presentation de Marie), the Benedictine Sisters, Institut des Soeurs du Bon Conseil, Impact North Ministries, the Baptist Church in Canada, third parties

[2005] O.J. No. 2165
Court File No. 00-CV-192059CPA

Ontario Superior Court of Justice
W.K. Winkler J.

May 30, 2005.
(20 paras.)

Civil procedure — Applications and motions — Parties — Class or representative actions — Certification — Third party procedure.

Motion by the plaintiffs, Baxter and Baxter, against the defendant, Attorney General of Canada, for an order that the certification motion should be heard before other motions in their proposed class action on behalf of aboriginal persons who attended residential schools in Canada between 1920 and 1996. The Attorney General served third party claims for indemnity against over 80 religious organizations that allegedly controlled and operated the residential schools. Many of the organizations were resident outside of Ontario. The third parties outside Ontario intended to bring jurisdictional motions. The third parties in Ontario intended to bring Rule 21 motions to dismiss. The plaintiffs sought to have the certification motion heard first, in part because many proposed class members were elderly and dying.

HELD: Motion allowed. The certification motion would be heard first. Although the Class Proceedings Act did not expressly require the certification motion to be the first order of business, the 90 day time frame imposed in s. 2(3) provided a clear indication that the certification motion should normally be given priority. There was no compelling reason to hear the third party motions first. It would be pointless to hear the jurisdictional motions first because certified common issues could serve as a basis for proper assumption of jurisdiction by a court over extra-provincial parties. Unlike Rule 20 or 21 motions brought by proposed defendants, such motions brought by third parties did not have the same potential to render the certification motion unnecessary. The certification determination could be made without regard to any third party claim. The elderly potential class members would suffer significant

prejudice if other motions were heard first.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 2, s. 2(3)

Ontario Rules of Civil Procedure, Rule 20, Rule 21, Rule 29.09

Counsel:

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S. John Page for the Presbyterian Church in Canada, the Trustee Board of the Presbyterian Church in Canada, the Foreign Mission of the Presbyterian Church in Canada, Board of Home Missions and Social Services of the Presbyterian Church in Canada, the Women's Missionary Society of the Presbyterian Church in Canada, les Pères Montfortains

Alex D. Pettingill for the United Church of Canada, the Board of Home Missions of the United Church of Canada, the Women's Missionary Society of the United Church of Canada, the Methodist Church of Canada, the Missionary Society of the Methodist Church of Canada

Ronald F. Caza and Pierre Champagne for the Roman Catholic Episcopal Corporation of James Bay, les Soeurs de la Charité d'Ottawa, the Missionary Oblates of Mary Immaculate - Province of St. Joseph (also known as les Oeuvres Oblates de l'Ontario), les Missionnaires Oblats de Marie Immaculée (Province du Canada-est)

Frank D. Corbett for the Roman Catholic Bishop of Victoria

Jim Ehmann for the Archiepiscopal Corporation of Regina, the Roman Catholic Episcopal Corporation of Keewatin

Guy Lemay for les Soeurs de Saint-Joseph de St.-Hyacinthe, Soeurs de l'Assomption de la Sainte Vierge, Soeurs de l'Assomption de la Sainte Vierge de l'Alberta, Soeurs de Notre-Dame du Bon-Conseil de Chicoutimi, Soeurs de Saint-François d'Assise, Religieuses de Jésus Marie, Soeurs Notre-Dame Auxiliatrice de Rouyn-Noranda

Hugh Wright for the Roman Catholic Episcopal Corporation of Halifax

Mark R. Frederick for the Daughters of the Heart of Mary, Impact North Ministries, the Roman Catholic Bishop of Thunder Bay

Wally Zimmerman and Don McLean for Jesuit Fathers of Upper Canada

Peter D. Lauwers for the Roman Catholic Episcopal Corporation of the Diocese of Prince Rupert

Karen M. Trace for la Corporation Episcopale Catholique Romaine de Groudard McLennan, the Catholic Archdiocese of Edmonton, le Diocèse de Saint-Paul, the Roman Catholic Episcopal Corporation of Mackenzie

Noah Klar for the Sisters of Instruction of the Child Jesus (also known as the Sisters of the Child Jesus)

[Editor's note: A correction was released by the Court June 2, 2005; the changes have been made to text and the correction is appended to this document.]

W.K. WINKLER J.:—

Introduction

¶ 1 This is a motion in writing regarding the order of procedure in an intended class proceeding brought against the Attorney General of Canada on behalf of a class of aboriginal persons who attended residential schools in Canada from January 1, 1920 to December 31, 1996. The plaintiffs, defendant and third parties were directed to file written submissions regarding their respective positions on the sequencing of motions, including the certification motion.

Background

¶ 2 The issue regarding sequencing of the motions arises because the Attorney General has issued and served Third Party Claims against certain of the religious organizations that had allegedly controlled and operated the residential schools that are the subject of the proceeding. The Third Party Claims were issued on April 24, 2003 and have since been amended. There are currently over 80 religious organizations named as third parties, many of which are outside of Ontario. It is asserted by the Attorney General that the third parties are obligated to indemnify the Government of Canada for liability that may have been incurred in relation to their acts and omissions.

¶ 3 The Third Party Claims are advanced despite the fact that the plaintiffs have since amended their claim to seek only recovery for the several liability of the Attorney General. In the result, the Third Parties have indicated that there are several motions that should be heard in advance of the certification motion. The defendant supports this position. The plaintiffs contend that all such motions should be heard after the certification motion has been heard and determined.

¶ 4 At this juncture, in addition to the certification motion, there are two broad categories of motions that have either been brought or are contemplated by the third parties:

a) motions to challenge the jurisdiction of this court brought or contemplated by

third parties who are situate outside of Ontario (the "Jurisdictional Motions");

b) motions to dismiss the action under the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended, brought or contemplated by third parties who are located partially or entirely in Ontario (the "Rule 21 Motions").

Further, it should be noted that if the court determines that it has jurisdiction over some or all of the non-Ontario third parties, it has been indicated that each such party may then choose to bring its own motion to dismiss under the Rules of Civil Procedure.

Submissions of the Parties

¶ 5 The plaintiffs contend that, apart from the general proposition that a certification motion should be the first order of business in a proposed class proceeding, the circumstances of the proposed class members in this proceeding are such as to dictate that the motion be heard in priority to any other. The plaintiffs submit that many of the proposed class members are elderly and dying by the thousands annually, thus creating an urgency to the determination of the certification motion. They rely on section 2 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "CPA"), which requires a plaintiff in an intended class proceeding to bring a certification motion in a timely way. In particular, the plaintiffs point to s. 2(3) as supporting their contention that the certification motion should be heard first. It states, in part, that:

2(3) a [certification motion] shall be made:

(a) within ninety days after the later of,

(i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and

(ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or

(b) subsequently, with leave of the court.

In addition, the plaintiffs submit that there are a number of cases which, either explicitly or by implication, hold that the determination of the certification motion ought normally to be the first order of business in a class proceeding. (See: Moyes v. Fortune Financial Corp. (2001), 13 C.P.C. (5th) 147 (S.C.) at paras. 9 and 12; McNaughton Automotive Ltd. v. Co-operators General Insurance Co. (2001), 10 C.P.C. (5th) 1 (C.A.) at para 36 and Ward-Price v. Mariners Haven Inc., [2002] O.J. No. 4260 (S.C.)).

¶ 6 The defendant, on the other hand, argues that the third party motions should be heard prior to the certification motion. The defendant contends that there is no express provision in the CPA directing that certification must be the first step in a proceeding nor should the possibility of delay in a proceeding dictate that the certification motion must be heard in advance of other motions. In support of this position, the defendant further argued that if the court were to certify the action without the participation of the third parties, only to later decide that the third parties were proper parties to the action, the common issues would likely have to be reformulated. Conversely, according to the defendant, if the court were to postpone hearing the Jurisdictional Motions until after the decision to certify, only to then determine that it does not have jurisdiction to hear a national class action, the action would have to be decertified.

¶ 7 Instead of making individual submissions, many of the third parties adopted the submissions of the Roman Catholic Episcopal Corporation of James Bay, les Soeurs de la Charité d'Ottawa, and the Missionary Oblates of Marie Immaculate - Province of St. Joseph (now known as les Oeuvres Oblates de l'Ontario). Most of the third parties seek to have the Rule 21 Motions and the Jurisdiction Motions heard prior to the certification motion. A small number of third parties either did not take a position or only took a position with respect to one or the other of the potential third party motions. None of the third parties argued that the certification motion should be heard first.

¶ 8 The third parties who took positions on the issue of sequencing made arguments on several fronts. A number of them contended that motions to dismiss could be heard expediently and without interfering with the plaintiffs' proposed timetable. Others claimed that the determination of both the jurisdictional motions and the motions to dismiss could simplify the certification motion. Still others noted that third parties who are challenging jurisdiction risk being found to have attorned to the jurisdiction of the court if they first participate in the certification motion without a jurisdictional determination, thus rendering moot their potential jurisdiction motion.

Analysis

¶ 9 Although the CPA does not expressly require the certification motion to be the first order of business, the 90 day time-frame imposed by section 2(3) provides a clear indication that the certification motion should be heard promptly and normally be given priority over other motions. In another case involving the scheduling of motions in a class proceeding, Attis v. Canada (Minister of Health), [2005] O.J. No. 1337 (S.C.), this court held at para. 7 that "as a matter of principle, the certification motion ought to be the first procedural matter to be heard and determined."

¶ 10 Similarly, in Moyes, Nordheimer J. stated at para. 8:

> The time limits set out in section 2(3) would strongly suggest that the certification motion is intended to be the first procedural matter that is to be heard and determined. While I recognize that these time limits are rarely, if ever, achieved in actual practice, I do not consider that that reality detracts from the intent to be drawn from the section.

Nordheimer J. ultimately determined that the defendant's motion for summary judgment could not be heard until after the determination of the certification motion. (See also: Ward-Price v. Mariners Haven Inc., [2002] O.J. No. 4260 (S.C.), supra, at para 36).

¶ 11 Prior to certification, an action commenced under the CPA is nothing more than an intended class proceeding: Logan v. Canada (Minister of Health) (2003), 36 C.P.C. (5th) 176 (S.C.) at para. 23, aff'd 71 O.R. (3d) 451 (C.A.) (See also: Boulanger v. Johnson & Johnson Corp. (2003), 64 O.R. (3d) 208 (Div. Ct); Attis, supra at para 14.) In the pre-certification period it is not clear whether a proceeding will ultimately be certified. Further there is an element of fluidity in respect of the class definitions and the common issues. Accordingly, motions brought prior to certification may turn out to have been unnecessary, over-complicated or incomplete.

¶ 12 Moreover, courts will not always have sufficient information to adequately determine motions at the pre-certification stage. This is particularly apparent with respect to the Jurisdictional Motions. In several recent cases it has been held that the certified common issues in a class action can serve as a basis for the proper assumption of jurisdiction by the court over extra-provincial parties. (See: Harington v. Dow Corning Corp. (2000), 193 D.L.R. (4th) 67 (B.C. C.A.); Wilson v. Servier (2000), 50 O.R. (3d) 219 (S.C.), (2000), 52 O.R. (3d) 20 (Div. Ct.), leave to appeal denied, [2001] S.C.C.A. No. 88, S.C.C.

Bulletin, 2001, p. 1539.) The thrust of Harrington and Wilson, in relation to the jurisdiction determination, is that where a class action involving intra-provincial plaintiffs could be certified, and the common issues forming the basis for the certification are shared by both the resident class and extra-provincial non-residents against the defendant, the existence of such common issues provides a "real and substantial connection" of the non-residents to the forum in relation to the action. Thus, the underpinnings of a successful certification motion could have a direct bearing on the jurisdictional analysis. On the other hand, if the certification motion fails, the jurisdictional motion will in all likelihood be rendered moot. Therefore, it would be pointless to hear the jurisdiction motion in advance of the certification motion in that, at least to this extent, all of the necessary information relevant to jurisdiction is not presently available.

¶ 13 Given its nature, there are other factors present in this proceeding which augur in favour of hearing the certification motion in priority to other motions. The class period spans a period of over 75 years. At this point, a reasonable inference can be drawn that there are elderly potential class members for whom further delay represents significant prejudice. Those members of the potential class are entitled to have a determination of whether this proceeding is certifiable as a class action in a timely manner. As stated in R. 29.09 of the Rules of Civil Procedure:

> 29.09 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the third party claim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the defendant or the third party.

Here, the fact that there are currently over 80 third parties contributes to the potential for delay with its inherent prejudice to the elderly members of the putative class.

¶ 14 Admittedly, there are instances where, as indicated in both Attis and Moyes, there can be exceptions to the rule that the certification motion ought to be the first procedural matter to be heard and determined. It may be appropriate to make an exception where the determination of a preliminary motion prior to the certification motion would clearly benefit all parties or would further the objective of judicial efficiency, such as in relation to a motion for dismissal under Rule 21 or summary judgment under Rule 20. Such motions may have the positive effect of narrowing the issues, focusing the case and moving the litigation forward. An exception may also be warranted where the preliminary motion is time sensitive or necessary to ensure that the proceeding is conducted fairly. (See: Moyes, supra at para. 12; Re Holmes and London Life v. London Life Insurance Co. et al. (2000), 50 O.R. (3d) 388 (S.C.) at paras. 7-8; Hughes v. Sunbeam Corp. (Canada) Ltd. (2002), 61 O.R. (3d) 433 (C.A.), at para. 15, leave to appeal dismissed [2002] S.C.C.A. No. 446; Segnitz v. Royal and SunAlliance Insurance Co. of Canada, [2001] O.J. No. 6016 (S.C.); Stone v. Wellington County Board of Education (1999), 29 C.P.C. (4th) 320 (C.A.), leave to appeal dismissed, [1999] S.C.C.A. No. 336.); Vitelli v. Villa Giardino (2001), 54 O.R. (3d) 334 (S.C.); Pearson v. Inco (2001), 57 O.R. (3d) 278 (S.C)).

¶ 15 However, there is an important distinction between Rule 20 and 21 motions that are brought by the defendant and those that are brought by third parties. In many cases, Rule 20 and 21 motions brought by the defendant have the potential to render the certification motion unnecessary if they are determined prior to certification, thereby furthering the objective of judicial economy. Rule 20 or 21 motions brought by third parties in relation to claims against these third parties do not have the same potential to render the certification motion unnecessary. The proceeding as between the plaintiff and defendant will be unaffected and the determination as to whether the action is a certifiable class proceeding must still be made.

¶ 16 The certification determination remains necessary because the viability of the action as a class proceeding is a function of the claim by the plaintiff against the defendant, rather than the claim of the defendant against the third party. On that basis, the certification determination may be made without regard to any existing third party claim. Indeed, some courts have held that this factor may render third party participation on the certification motion unnecessary or, in any event, subject to the discretion of the court hearing the motion. As stated in Attis at para. 14:

> ... until such time as the action is certified, the nature of the proceeding is not yet crystallized so as to require the third party's participation. In consequence, the third party would have had no standing to participate in the certification motion in any event. See: Ward-Price v. Mariners Haven Inc. (2002), 36 C.P.C. (5th) 189 (Sup. Ct.). Indeed, the courts in British Columbia have on occasion stayed a third party claim until after the common issues trial where there is no valid reason for the third party to participate in the proceeding up to that time and where their involvement may turn out to be academic. See: Campbell v. Flexwatt Corp. (1996), 50 C.P.C. (3d) 290 (B.C.S.C.); Cooper v. Hobart (1999), 35 C.P.C. (4th) 124 (B.C.S.C.).

In my view, there will rarely be a need for motions relating exclusively to a third party claim to be heard prior to a certification motion as the potential benefits of hearing such motions prior to the certification motion tend to be limited.

¶ 17 In this case, I am not persuaded that there is any compelling reason to hear the third party motions prior to the certification motion. Some of the third parties have argued that the prior determination of the third party motions would simplify the certification motion. This argument, however, is flawed in that it both assumes the participation of the third parties on the certification motion and further assumes that such participation would be permitted in such a manner as to complicate the proceeding. On the other hand, in my view, there is a distinct possibility that the determination of the certification motion, if this motion is heard first, could simplify the third party motions or could render these motions unnecessary.

¶ 18 Similarly, I cannot accede to the argument advanced by some of the third parties that the Rule 21 Motions could be heard on short notice, and that the hearing of those motions would not interfere with the Plaintiffs' proposed timeline for the hearing of the certification motion. Even if this were the case, which seems unlikely, given the number of third parties that have been brought into this proceeding, the determination of any such motions would be potentially subject to appeal, the effect of which could be to significantly delay the determination of the certification motion.

Participation of 3rd Parties in the Certification Motion

¶ 19 The question of the participation of third parties on the certification motion will be dealt with in the fullness of time. Although some parties have made submissions in this regard, others have not. Since only submissions regarding the sequencing of motions were specifically requested, it would be inappropriate to determine this matter at this time.

Result

¶ 20 The certification motion shall be heard and determined prior to the Jurisdiction Motions or the Rule 21 Motions, including those motions that have not yet been brought. All Rule 21 Motions and Jurisdiction Motions that have been brought or that are brought prior to the determination of the certification motion will be stayed until after the certification motion has been heard and determined.

W.K. WINKLER J.

* * * * *

Correction
Released: June 2, 2005

* accent added to Charit"é"
* corrected spelling of Mission"n"aires
* corrected spelling from Auxiliatreice to Auxiliatrice
* corrected La Diocèse to Le de Saint-Paul

QL UPDATE: 20050603 cp/e/qlsxl/qlkjg/qlsxs/qlmll

Indexed as:

Bywater v. Toronto Transit Commission

Between
Sarah Bywater, plaintiff, and
Toronto Transit Commission, defendant

[1998] O.J. No. 4913
Court File No. 97-CU-129694

Ontario Court of Justice (General Division)
Winkler J.

Heard: November 25, 1998.
Judgment: December 2, 1998.
(20 pp.)

[Ed. note: Supplementary reasons for judgment released January 12, 1999. See [1999] O.J. No. 67.]

Practice — Parties — Individuals and corporations, status or standing — Class or representative actions, for damages — Class actions, member of the class — Class actions, certification, appointment of representative plaintiff — Judgments and orders — Summary judgments — On an admission.

This was a motion by Bywater for certification of an action as a class action and for partial summary judgment. A fire occurred in a subway tunnel that was part of the Toronto Transit Commission (TTC) subway system. The TTC acknowledged that approximately 100 people were treated for smoke inhalation at the scene or a hospital. Bywater was one of those people. She brought an intended class proceeding for $30,000,000 in damages for personal injury, property damage and Family Law Act claims. The TTC admitted liability for the fire publicly and in the statement of defence. Bywater proposed that all persons exposed to smoke in TTC vehicle or on its premises arising from the fire or their estates and all living relatives of such persons form the class.

HELD: The motions were allowed. The action met the criteria in section 5(1) of the Class Proceedings Act to be certified as a class action. There was no issue as to whether the pleadings disclosed a cause of action given the admission of liability. The class proposed by the plaintiff was largely adopted by the court. There was an identifiable class of persons. The class definition did not have to include a reference to damages resulting from smoke inhalation as this would unduly narrow the class and anticipate entitlement. The claims of the class raised the common issues of liability and the circumstances surrounding the fire. The admission did not eliminate the common issue of liability as without a certification order no admission bound the TTC in respect of the members of the proposed class. A class action was the preferable procedure as such a proceeding would undoubtedly promote judicial economies. Bywater was an appropriate representative plaintiff as she would fairly and adequately represent the interests of the class and did not have interests in conflict on the common issues. She submitted a workable litigation plan. Given the TTC's admission of liability, partial summary judgment was granted.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, ss. 1, 5(1), 5(1) (c), 5(1)(d), 6, 24, 24(1)(b), 24(1)(c), 25(1)(c).
Family Law Act.

Counsel:

Michael McGowan and Dorothy Fong, for the plaintiff.
Brian M. Leck and Gary Peacock, for the defendant.

¶ 1 **WINKLER J.** (endorsement):— This is a motion by the plaintiff for certification of this action as a class proceeding pursuant to the Class Proceedings Act 1992, S.O. 1992, c. 6. The action arises from a fire in the Toronto Transit Commission subway system on August 6, 1997. The plaintiff also moves for partial summary judgment based on the defendant's admission of liability for the cause of the fire.

¶ 2 The TTC is a statutory commission which operates the public transit system in Toronto. At approximately 7:15 p.m. on August 6, 1997 a fire occurred near the TTC's Donlands subway station. The fire, which was located in a pile of rubber pads, took place in a subway tunnel area between the Donlands and Greenwood subway stations. Smoke from the fire entered the two adjacent subway stations and spread as well to other areas of the subway system. As a result passengers were asked or forced to leave the system through various stations.

¶ 3 The precise number of passengers affected by the fire and ensuing smoke is unknown but the TTC estimates that approximately 1200 to 1400 persons were caused to evacuate the subway system because of the incident. Although the TTC states that many passengers inhaled no or very little smoke and suffered a maximum exposure to smoke in the range of five minutes, it acknowledges that approximately 110 people were treated for smoke inhalation at the scene or at a hospital.

¶ 4 The representative plaintiff is a passenger who exited a train at the Donlands station, and then, proceeding by way of the tunnel, left the system at the Pape station. Her estimate is that she was exposed to the smoke in the station for approximately three to five minutes, and spent a similar amount of time moving through the tunnel to the Pape station, where there was also some smoke present. She was treated for smoke inhalation at Scarborough General Hospital. The following day she returned to work and for about one week after the incident suffered shortness of breath. Although she stated it was difficult to remove the smoke residue from her skin, she had no other symptoms related to the incident.

¶ 5 The TTC conducted a subsequent review of the incident and a further clean up of the system. The Fire Department Inspectors also reviewed the system and found nothing of concern, nor did they identify any additional fire hazards.

¶ 6 The instant intended class proceeding was commenced on or about August 8, 1997. The plaintiff claims $30,000,000 in damages on behalf of the proposed class for personal injury, property damage and Family Law Act claims. The statement of claim sets out allegations of negligence and breach of contract. On August 13, 1997, the TTC publicly accepted responsibility and admitted liability for the cause of the subway fire. The statement of defence delivered by the TTC on or about September 24, 1997, contained this admission of liability.

Analysis and Disposition

¶ 7 In order to be certified as a class action, the criteria contained in s. 5(1) of the Act must be met:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members.

Cause of Action

¶ 8 The first branch of the test requires a determination of whether the pleadings disclose a cause of action. The defendant has admitted liability for the cause of the fire. There is, therefore, no issue in this regard and the first requirement of the Act is met.

Identifiable Class

¶ 9 The second requirement of the test for certification is that there be an identifiable class of two or more persons. The plaintiff proposes a class defined as follows:

> A. All persons other that TTC employees and emergency personnel, who were exposed to smoke and toxic gases in TTC vehicles or on TTC premises arising from a fire which commenced at approximately 7:15 p.m. on Wednesday, August 6, 1997 at or near the Donlands subway station or, where such a person died after the fire, the personal representative of the estate of the deceased person ... [referred to as the] Directly Affected Class Members; and
> B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the Family Law Act) of the Directly Affected Class Members, or where such a family member died after the fire, the personal representative of the estate of the deceased family member [referred to as the] Family Claimants.

The defendant contends that in the present circumstances there is no identifiable class. It states that the class description proposed by the plaintiff is imprecise with the result that the class members will be unascertainable. 1 disagree.

¶ 10 The purpose of the class definition is threefold: a) it identifies those persons who have a potential claim for relief against the defendant; b) it defines the parameters of the lawsuit so as to identify those persons who are bound by its result; and lastly, c) it describes who is entitled to notice pursuant to the Act. Thus for the mutual benefit of the plaintiff and the defendant the class definition

ought not to be unduly narrow nor unduly broad.

¶ 11 In the instant proceeding the identities of many of the passengers who would come within the class definition are not presently known. This does not constitute a defect in the class definition. In Anderson v. Wilson (1998), 37 O.R. (3d) 235 (Div. Ct.), Campbell J. adopted the words of the Ontario Law Reform Commission and stated at 248:

> ... a class definition that would enable the court to determine whether any person coming forward was or was not a class member would seem to be sufficient.

On this point, Newberg on Class Actions (3d ed. Looseleaf) (West Publishing) states at 6-61:

> Care should be taken to define the class in objective terms capable of membership ascertainment when appropriate, without regard to the merits of the claim or the seeking of particular relief. Such a definition in terms of objective characteristics of class members avoids problems of circular definitions which depend on the outcome of the litigation on the merits before class members may be ascertained ...

The Manual for Complex Litigation, Third (1995, West Publishing) states at 217:

> Class definition is of critical importance because it identifies the persons (1) entitled to relief, (2) bound by a final judgment, and (3) entitled to notice in a [class] action. It is therefore necessary to arrive at a definition that is precise, objective, and presently ascertainable ... Definitions ... should avoid criteria that are subjective (e.g. a plaintiff s state of mind) or that depend upon the merits (e.g., persons who were discriminated against). Such definitions frustrate efforts to identify class members, contravene the policy against considering the merits of a claim in deciding whether to certify a class, and create potential problems of manageability.

The defendant urges, in the alternative, that the class definition should include a reference to damages resulting from smoke inhalation. This requirement, if adopted, would run contrary to the tenets set out above. It would unduly narrow the class and it anticipates entitlement. Moreover, it would eliminate persons with strictly property damage claims. The reference to damages impinges on the merits of the claim and, thus, goes beyond the purpose of class definition. The definition proposed by the plaintiff is approved with the deletion of words "and toxic gases".

Common Issues

¶ 12 The third element of the test for certification is that claims of the class must raise common issues. The Act defines "common issues" in s. 1 as:

> (a) common but not necessarily identical issues of fact, or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

The Class Proceedings Act, 1992, is an entirely procedural statute, and, as such, does not create any new cause of action. A decision on certification does not constitute a determination on the merits of the action. The presence of common issues is at the very center of a class proceeding. It is the advancement of the litigation through the resolution of the common issues in a single proceeding which serves the goals of the Act. It is clear from the language of s. 5(1)(c) that the Act contemplates that there be a

connection between the common issues, the claims or defences and the class definition. In like fashion, the common issues must have a basis in the causes of action which are asserted.

¶ 13 Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.

¶ 14 I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class. A class proceeding by its very nature requires a certification order for the proposed class members to become parties to the proceeding. If the proposed class members are not parties to the proceedings, the admission of liability, as it relates to them, is no more than a bare promise. The words of the Divisional Court in Westminer Canada Holdings Ltd. v. Coughlan (1990), 75 O.R. (2d) 405, are apposite. Rosenberg J., speaking for the court, stated at 415:

> The defendants have undertaken to this court not to raise the limitation defence in Nova Scotia. The appellant did not seek such an undertaking. Such an undertaking does not end the matter. In my view the juridical disadvantage remains. In his text, James Cooper Morton, Limitation of Civil Actions (Toronto: Carswell, 1988), states at p. 106:
>
> > An agreement not to rely on the passage of time must meet the formal requirements of a contract before it can be considered binding. Specifically, consideration must pass between the parties. A bare promise not to rely on the passage of time is unenforceable.

In any event, absent a judgment by a court of competent jurisdiction on the basis of the admission, res judicata does not apply to the proposed class. See Thoday v. Thoday, [1964] 1 All E.R. 341 at 352. Therefore the admission simpliciter does not resolve the common issue of liability as it relates to the class members nor does it bind the defendant to them.

¶ 15 There is an additional common issue raised by the facts of this motion. One of the goals of the Act as stated by O'Brien J. in Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453 (Div. Ct.) is "judicial economy or the efficient handling of potentially complex cases of mass wrongs".

¶ 16 Evidence of the circumstances surrounding the fire, the general background of the events on August 6, 1997, including the evacuation of the affected portion of the subway system, the composition of the smoke, the manner in which TTC staff reacted to the emergency, and other evidence of general application to all the individual claims is relevant and indeed essential for a determination of individual damage claims. It is expedient, and in the interests of judicial economy, that this evidence and any consequent findings be dealt with as common issues of fact. Apart from the obvious efficiencies, this has the added advantage of removing the risk of inconsistent findings which accompanies a multiplicity of proceedings.

¶ 17 The plaintiff urges that an aggregate damages assessment applying to all class members be made a common issue. Section 24 of the Act permits of an aggregate determination of damages where appropriate, although the plaintiff concedes that this is a novel point and has never been ordered as a

common issue under the Act. Section 24 provides in part:

> 24(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,
>
> (a) monetary relief is claimed on behalf of some or all class members;
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

¶ 18 In my view, the case at bar is not appropriate for an aggregate assessment of damages. The action advances claims for personal injury, property damage and claims under the Family Law Act. These claims cannot, "reasonably be determined without proof by individual class members" as required by s. 24(1)(c). Furthermore, each individual claim will require proof of the essential element of causation, which, in the words of 24(1)(b), is "a question of fact or law other than those relating to an assessment of damages".

¶ 19 In addition, the assessment of damages in each case will be idiosyncratic. All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiffs time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations. Indeed here, the representative plaintiff was suffering from and experiencing symptoms of food poisoning at the time of the incident. The property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.

¶ 20 The issue of damages, said to be a common issue by the plaintiff, is an individual issue. Furthermore, aggregate assessment cannot be a common issue here because this case does not meet the requirements of ss. 24(1)(b) and (c). Even if by class definition the members of the proposed class have all suffered exposure to smoke, the extent of such exposure and any damage flowing from it will vary on an individual basis.

Preferable Procedure

¶ 21 Before dealing with the fourth requirement for certification contained in s. 5(1), that is, whether a class proceeding would be the preferable procedure for the resolution of the common issues, a review of general principles may be useful. It is not necessary that a determination of the common issues will determine liability. Rather, the common issues need only be issues of fact or law, the determination of which will move the litigation forward. The reasoning of Cumming J.A. in Campbell v. Flexwatt (1998), 15 C.P.C. (4th) 1 (B.C.C.A.), leave to appeal to S.C.C. denied, was adopted by Campbell J. in Anderson at 243, where he stated:

> It is not necessary, in order to proceed with a class action, to demonstrate that the common issues will in themselves determine liability. The common issues need only be issues of fact or law that move the litigation forward ...

and further at 247:

> ... a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues. (emphasis in original).

¶ 22 The Act is remedial legislation. As such, the Act ought to be given a purposive interpretation consistent with its goals of promoting judicial economy, facilitating access to justice and encouraging the modification of behaviour of actual or potential wrongdoers. In determining preferable procedure, the court, in the exercise of its discretion, undertakes a functional analysis of the individual and the common issues. Each case will therefore turn on its own facts. As O'Brien J. stated in Abdool, in respect of the application of discretion in certification, at 461:

> Appellant's counsel, in argument, relied on the apparent mandatory wording of s. 5(1) of the Act, specifying "the court shall certify" if certain requirements are met. I am not persuaded that the approach to be taken is that simple.
> Section 35 of the Class Proceedings Act, 1992, provides that the rules of court apply to class proceedings.
> Rule 1.04(1) of the Rules of Civil Procedure provides:
>
> > These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.
> In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing certification.

¶ 23 Section 6 was inserted in the statute to remove what had been impediments to representative actions prior to the Act. The section speaks to individual issues:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> 2. The relief claimed relates to separate contracts involving different class members.
> 3. Different remedies are sought for different class members.
> 4. The number of class members or the identity of each class member is not known.
> 5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.

¶ 24 Two points of view have emerged in dicta concerning the interpretation of s. 6. In Abdool, Moldaver J., as he then was, stated at 473:

> Section 6 of the Act directs that the court, in coming to its decision to certify or not, shall not refuse certification solely if any one of the five delineated grounds is found to exist. Implicit in this, however, is the recognition that a court is entitled to consider the grounds referred to in s. 6 and where two or more of them are found to exist, the

cumulative effect of these may legitimately be factored into the s. 5(1)(d) equation.

In Nantais v. Tectronics Proprietary (Canada) Limited (1995), 25 O.R. (3d) 331 (Gen. Div.), Brockenshire J. stated at 341:

> I am not sure that this statement was essential to the result. I say this because I am not at all sure that this interpretation of the section is correct. With respect, I note that Moldaver J. has read in the word "one" after "any" in the beginning of s. 6 which in my view gives a restrictive effect to this remedial legislation. I think, in the context, "any" should be read as "any one or more". I would hope that a subsequent amendment to the section would remove any confusion.

Campbell J. in Anderson after referring to this difference of opinion concerning the interpretation of s. 6, found it unnecessary to decide the issue on the facts before the court and stated at 248:

> Each case will turn on its own facts and not on abstract arguments about the interpretation of s. 6. Even if there is a conflict between these two obiter dicta, it makes no difference on the facts of this case.

Upon a further analysis, in my view, any conflict between the reasoning of Moldaver J. in Abdool and Brockenshire J. in Nantais is more apparent than real. The reasons of both indicate that in each case they weighed all the factors including individual issues in deciding whether a class proceeding was the preferable procedure. Individual considerations such as those set out in s. 6 are, in the words of Moldaver J. in Abdool, "legitimately factored into the s. 5(1)(d) equation."

¶ 25 The purpose for the inclusion of s. 6 in the Act is dealt with by Michael Cochrane in Class Actions: A Guide to the Class Proceedings Act, 1992, (Aurora: Canada Law Book, 1992) at 28:

> Prior to the enactment of the Class Proceedings Act, 1992, the courts had in their interpretation of Rule 12 and its predecessor (Rule 75), erected a variety of substantive, procedural and other barriers to representative litigation. To ensure that these barriers are not the subject of litigation at certification, s. 6 [was included] in the [Act] ...

Thus the central thrust of s. 6 is to ensure that the enumerated individual issues cannot be raised as absolute bars to certification. That is not to say, however, that individual issues are not to be taken into consideration in determining if a class proceeding is the preferable procedure. Indeed to so conclude would render any such exercise meaningless. Moreover, to apply a cumulative or quantitative approach to the individual issues referenced in s. 6 would have a like effect; for while they may exist, they may be relatively insignificant in the total context, or of unequal weight relative to each other or to the common issues. The court in reaching its decision on preferable procedure must of necessity consider all of the common and individual factors as part of the factual matrix.

¶ 26 In determining whether the class proceeding is the preferable procedure, the court does not inquire as to whether the common issues predominate the individual issues. The predominance test has been rejected by Ontario courts. Instead the proper approach is to weigh all of the relevant factors, including the common issues and the individual issues in the context of the goals of the Act. As Campbell J. stated in Anderson at 249:

> Even if there was an error in the interpretation of s. 6 it could not affect the result because none of the three factors present in this case, individually or cumulatively, are

significant enough to outweigh the degree of judicial economy and increased access to justice provided by the certification as a class action.

¶ 27 In the instant motion, four of the five factors in s. 6 are present. The plaintiff concedes in her factum that individual damages assessments will be required for some class members, that there are separate contracts, and that the precise numbers and identities of the class members are not presently known. In addition, the nature of the claims art such that different remedies will be sought for different class members.

¶ 28 In my view, none of these factors whether taken individually or together, are sufficient in the circumstances of this proceeding to support a conclusion that a class proceeding is not the preferable procedure. The personal injury and property damage claims are conceded by the plaintiff to be largely of a minor nature. There is a potential for hundreds of claims, each of which if dealt with separately would require a duplication of evidence to establish all of the background facts and circumstances. Thus, a class proceeding will undoubtedly promote judicial economies.

¶ 29 The defendant proposes that the preferable procedure is for the class members to proceed individually in the small claims court or through the simplified rules of procedure. In my view, this would result in a denial of access to the courts and in relation to the amount of any potential recovery, the costs of proceeding in this fashion would be significant. As O'Brien J. stated in Abdool "the goal is to permit advancement of small claims where the legal costs make it uneconomic to advance them." The individual issues in this matter require an assessment of damages for personal injury or property damage caused by the exposure to the smoke which, after the common issues are resolved, would be relatively straightforward.

¶ 30 The instant case, on its facts, is suited to be a class proceeding. The requirement that a class proceeding is the preferable procedure for resolution of the common issues is met.

Representative Plaintiff

¶ 31 A representative plaintiff need not be typical of the class or share every characteristic of every other member of the class. It is sufficient that he or she would fairly and adequately represent the interests of the class and be without interests in conflict on the common issues. In addition, the representative plaintiff must have set out a workable plan for the litigation.

i) Lack of Conflict/Adequate Representation

¶ 32 The representative plaintiff does not appear to have any interests which conflict with those of other class members on the common issues. There is no suggestion that she cannot fairly and adequately represent the class. These elements are satisfied.

ii) Litigation Plan

¶ 33 I am satisfied that the plaintiff and her counsel have submitted a workable litigation plan as it relates to the common issues. The plaintiff may submit an amended litigation plan dealing with individual issues within 30 days of the release of these reasons, hopefully with the consent of the parties as provided for in s. 25(1)(c), and failing that, the plaintiff may submit a plan for approval of this court.

iii) Notice

¶ 34 The issue of notice was not fully canvassed in argument. I advised counsel that I would hear submissions on the manner, form and content of the notice to the class if the disposition of the certification motion made this necessary. In light of these reasons, counsel may attend before me to make submissions on notice at a convenient time.

Partial Summary Judgment

¶ 35 The defendant admits liability for the cause of the fire. Partial summary judgment is granted accordingly to the plaintiff class. As stated by Osborne J.A. in Ford Motor Company of Canada Ltd. v. Ontario Municipal Employees Retirement Board (1997), 36 O.R. (3d) 384 (C.A.) at 396:

> The purpose of rule 51.06 somewhat parallels Rule 20's purpose. If a party makes an admission (as occurred in the defendant's statement of defence in Roytor), rule 51.06 gives the beneficiary of the admission access to an order based on the admission. For example, if a defendant admits to liability, or a particular part of a loss claimed by the plaintiff, rule 51.06 would permit a motions judge to grant an order based on the admission. Such an order will typically take the form of a summary judgment for part of the plaintiff's claim.

¶ 36 The motions for certification and for partial summary judgment are granted, for the reasons stated, upon compliance by the plaintiff with the conditions set out herein relating to the litigation plan and notice and obtaining the requisite approval of this court.

WINKLER J.

QL Update: 981207
cp/s/ln/mii/DRS/mjb

** Unedited **

Indexed as:

Campbell v. Flexwatt Corp.

Between
Jim Campbell and Michelle Ann-Marie Isherwood, plaintiffs (appellants), and
Flexwatt Corporation, Wintertherm Corporation, Canadian Standards Association, Her Majesty the Queen in Right of the Province of British Columbia, Thermaflex Limited, Aztech International Ltd., Flexel International Ltd., Adair Industries Ltd., City of Vancouver, Municipality of West Vancouver, City of Victoria, City of North Vancouver, District of North Vancouver, City of Burnaby, Corporation of the City of New Westminster, District of Maple Ridge and City of Surrey defendants (respondents), and
City of Abbotsford, City of Armstrong, City of Burnaby, City of Coquitlam, The Corporation of the City of Courtenay, The Corporation of the City of Cranbrook, The Corporation of the City of Duncan, The Corporation of the City of Grand Forks, City of Kamloops, City of Kelowna, City of Langley, City of Nanaimo, The Corporation of the City of Nelson, The Corporation of the City of New Westminster, The Corporation of the City of North Vancouver, City of Parksville, The Corporation of the City of Penticton, City of Port Alberni, The Corporation of the City of Port Coquitlam, City of Port Moody, City of Prince George, The Corporation of the City of Revelstoke, City of Richmond, The Corporation of the City of Rossland, The Corporation of the City of Surrey, City of Terrace, City of Vancouver, The Corporation of the City of Victoria, The Corporation of the City of White Rock, The Corporation of the District of Central Saanich, District Of Chilliwack, The Corporation of Delta, District of Hope, District of Invermere, District of Lake Country, The Corporation of the Township of Langley, Corporation of the District of Maple Ridge, District of Mission, The Corporation of the District of North Cowichan, The Corporation of the District of North Vancouver, The Corporation of the District Of Peachland, The Corporation of the District of Pitt Meadows, The Corporation of the District of Powell River, District of Salmon Arm, District of Sechelt, District of Sicamous, District of Squamish, The Corporation of the District of Summerland, The Corporation of the District of West Vancouver, Capital Regional District, Cariboo Regional District, Regional

District of Comox-Strathcona, Columbia-Shuswap Regional District, Cowichan Valley Regional District, Regional District of East Kootenay, Regional District of Central Okanagan, Central Fraser Valley Regional District, Greater Vancouver Regional District, Regional District of Kootenay Boundary, Regional District of Mount Waddington, Regional District of Nanaimo, Regional District of Okanagan-Similkameen, Powell River Regional District, Skeena-Queen Charlotte Regional District, Regional District of Kitimat-Stikine, Sunshine Coast Regional District, Thompson-Nicola Regional District, Town of Comox, Town of Gibsons, Town of Ladysmith, Town of Osoyoos, Town of Qualicum Beach, Town of Sidney, The Corporation of the City of Cumberland, Village of Gold River, The Corporation of The Village of Kaslo, The Corporation of the Village of Lake Cowichan, Village of Nakusp, The Corporation of the Village of Pemberton, Village of Port Alice, Village of Radium Hotsprings, The Corporation of The Village of Telkwa, Resort Municipality of Whistler, City of Colwood, District of Campbell River, Corporation of the Township of Esquimalt, District of Highlands, District of Langford, District of Metchosin, Fraser Valley Regional District, Corporation of the District of Oak Bay, The Corporation of the District of Saanich, District of North Saanich, Village of Belcarra, North Okanagan Regional District, The Corporation of the District of Matsqui, City of Castlegar, Regional District of Central Kootenay, Regional District of Squamish-Lillooet, Regional District of Dewdney-Alouette, Regional District Offraser-Cheam, District of Abbotsford, Windemere, Regional District of Alberni-Clayoquot,
third parties (respondents)

[1997] B.C.J. No. 2477

British Columbia Court of Appeal
Victoria, British Columbia
Cumming, Newbury and Huddart JJ.A.

Heard: October 9 and 10, 1997.
Judgment: filed November 7, 1997.
(44 pp.)

[Ed. note: Supplementary reasons for judgment filed February 25, 1998. See [1998] B.C.J. No. 418.]

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class actions, certification, considerations — Appointment of representative plaintiff — Notice of class

action — Costs.

This was an appeal from an order certifying an action as a class proceeding. The Chief Electrical inspector for the province ordered that radiant ceiling heating panels with certain specified brand names were to be disconnected. The order provided that the plaintiff class would consist of that class of persons who were residents of the province who owned the panels at the date of the orders of the chief electrical inspector. The primary issues for the plaintiff class included whether the panels were defective in design or manufacture and whether the Canadian Standards Association was negligent in setting the standards and certifying the panels as fit for their intended purposes. Secondary common issues included whether the province was negligent in permitting installations if they were defective or incompatible with gypsum board and whether the municipal defendants were negligent. The defendants argued that the lower court judge erred in finding that a class proceeding was appropriate, that the persons appointed to represent the members of the plaintiff class were not representative of the class and that the province was to bear the expenses of the notice of certification. The plaintiff argued that the judge erred when he ordered that the primary common issues as to the fitness of the panels for their intended purpose was to be tried and determined without reference to the building materials used.

HELD: The appeal by the plaintiff was allowed. The appeal by the defendants was dismissed. As required by the Class Proceedings Act, the pleadings raised a cause of action against the defendant municipality. The claims raised common issues which, for reasons of fairness and efficiency, ought to be determined in one proceeding. Common issues did not have to be identical among all members of the class. The threshold primary issue as to whether the panels were fit for their intended purpose was common to all named defendants. If the panels were found to be unfit, then the secondary issues would have to be addressed and any need for sub-classes would have to be determined. It was within the trial judge's discretion under section 24 of the Act to require that the province bear the cost of notification due to difficulties caused to the class by the disconnect orders.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, S.B.C. 1995, c. 21, ss. 1, 2, 4(1), 6(1), 24.

Counsel:

W.M. Holburn, Q.C. and S.O. Stewart, for Canadian Standards Association.
D. Acheson, Q.C., P. Guy and K. Whitley, for Jim Campbell and Michelle Anne-Marie Isherwood.
J.R. Singleton and J. Hand, for the District of West Vancouver and over 90 other third parties.
T.H. MacLachlan and T.M. Leadem, for Her Majesty the Queen in Right of the Province of British Columbia.
D.C. Creighton, for the City of Vancouver.
R. Hildebrand, for the City of Surrey.
M. Woodward, for the Corporation of Delta.
R.C. Macquisten, for the City of Victoria Capital Regional District and Cariboo Regional District.
W. Berardino, Q.C. and A. Borrell, for City of Kelowna, Township of Langley and District of North Cowichan.

[Ed. note: A Corrigendum was released by the Court November 10, 1997; the correction has been made to the text and the Corrigendum is appended to this document.]

Reasons for judgment were delivered by **Cumming J.A.**

¶ 1 CUMMING J.A.:-- This is a consolidated appeal from the decision of Mr. Justice Hutchison pronounced 14 June 1996 with supplemental reasons delivered 20 September 1996 certifying this action as a class proceeding under section 2 of the Class Proceedings Act, S.B.C. 1995, c. 21 and appointing Jim Campbell and Michelle Isherwood as representative plaintiffs.

¶ 2 Specifically, the order under appeal provided:

(a) that this proceeding be and is hereby certified as a class proceeding;
(b) that the class of persons in respect of which this Order is made is the Plaintiff Class of those residents in British Columbia who owned Radiant Ceiling Heating Panels with the brand names Aztech-Flexel, Thermaflex or Flexwatt (hereinafter "RCHPs") at the date of the Orders of the Chief Electrical Inspector for British Columbia that such panels be disconnected;
(c) that the sub-class of persons in respect of which this Order is made as against Canadian Standards Association is the Plaintiff sub-Class of those residents in British Columbia who owned RCHPs which were certified by Canadian Standards Association, at the date of the Orders of the Chief Electrical Inspector for British Columbia that such panels be disconnected;
(d) that Jim Campbell be and is hereby appointed representative Plaintiff for the Plaintiff Class and the Plaintiff sub-Class who have Radiant Ceiling Heating Panels manufactured by Aztech International Ltd. or Flexel International Ltd,;
(e) that Michelle Ann-Marie Isherwood be and is hereby appointed representative Plaintiff for the plaintiff Class and the Plaintiff sub-Class who have Radiant Ceiling Heating Panels manufactured by Flexwatt Corporation;
(f) that the Plaintiff Class and the Plaintiff sub-Class seek the relief of money damages;
(g) that the primary common issues for the Plaintiff Class and the Plaintiff sub-Class do not include a consideration of whether the RCHPs were compatible with drywall or gyproc building materials, but are:

    (i) were the RCHPs fit for their intended purpose, or defective in design and/or manufacture;
    (ii) did Canadian Standards Association fail in its duty to the Plaintiff Class and sub-Class in negligently setting standards and negligently certifying RCHPs as fit and safe for their intended purpose; and
    (iii) did Canadian Standards Association in certifying the RCHPs make negligent misrepresentations as to their fitness entitling the Plaintiff Class and sub-Class to damage irrespective of whether each Class member relied on such representation;

(h) that the secondary common issues for the Plaintiff Class and the Plaintiff sub-Class are:

    (iv) was Her Majesty the Queen in Right of the Province of British Columbia negligent in permitting installations of the RCHPs in premises in British Columbia if they were defective;
    (v) are RCHPs incompatible with gypsum board;
    (vi) was Her Majesty the Queen in Right of the Province of British Columbia negligent in permitting installations of the RCHPs in premises in British

Columbia if they were defective or incompatible with gypsum board;

(vii) if the RCHPs were not defective or incompatible with gypsum board, did Her Majesty the Queen in Right of the Province of British Columbia breach a duty of care to the Plaintiff Class and sub-Class by ordering those panels disconnected, causing the Plaintiff Class and sub-Class loss and damage for which they are entitled to compensation;

(viii) if RCHPs were incompatible with gypsum board was the Canadian Standards Association negligent in developing the standard or certifying the RCHPs;

(ix) if RCHPs were defective or incompatible with gypsum board, were the Defendant Manufacturers negligent or in breach of their duty in manufacturing or selling the RCHPs;

(x) if the Canadian Standards Association, Her Majesty the Queen in Right of the Province of British Columbia, Flexwatt Corporation, Aztech International Ltd. or Flexel International Ltd., or any of them, breached a duty to the Plaintiff Class or the Plaintiff sub-Class, what is the quantification of the Plaintiffs' damages;

(xi) if RCHPs were incompatible with gypsum board, were the Defendants Municipalities and Third Party Municipalities negligent in permitting the RCHPs to be installed with gypsum board; and

(xii) such further and other common issues as may be identified after the lifting of the stay of proceedings ordered against the Defendant and Third Party Municipalities in this Order.

(i) that the common issues (i) to (iii) are to be tried and determined first and then, dependent on the determination of those issues, common issues (iv) through (ix) are to be tried and determined. Thereafter, dependent on the determination of the the previous issues, common issue (x) is to be tried and determined. Finally, dependant on the determination of the previous issues, and in the event of the stay of proceedings ordered against against the Defendant and Third Party Municipalities being lifted, common issues (xi) and (xii) are to be tried and determined.

(j) that the Plaintiff Class and the Plaintiff sub-Class be granted leave to amend the Amended Statement of Claim and the pleading in respect of secondary common issue (v), failing which the Defendant, Her Majesty the Queen in Right of the Province of British Columbia may apply to set that part of this Order referring to secondary common issue (v) aside;

(k) that the manner in which and the time within which a Plaintiff Class or Plaintiff sub-Class member may opt out of this proceeding is three months after the Statutory Notification Period;

(l) that the manner in which and the time within which a Plaintiff Class or Plaintiff sub-Class member who is not a resident of British Columbia may opt in to this proceeding is three months after the Statutory Notification Period;

(m) that the Third Party Proceedings commenced by Canadian Standards Association be and are hereby stayed until further Order;

(n) that the proceedings against the Defendant and Third Party Municipalities be and are hereby stayed until further Order;

(o) that the Defendant and Third Party Municipalities be bound by the finding of fact made by the Court in determining the primary common issues (i), (ii) and (iii) and the secondary common issues (iv) to (xii);

(p) that the Defendant and Third Party Municipalities each have liberty to apply to

lift the stay of proceedings made against them; and

(q) that Her Majesty the Queen in Right of the Province of British Columbia shall bear the expense of the statutory notification of the Plaintiff Class and sub-Class of the certification of this proceeding and leave is granted to Province of British Columbia to make submissions on the method, form and content of such notification.

¶ 3 The plaintiffs (respondents) support the order made to certify the proceeding as a class action. However, the plaintiffs in their appeal contend that the first three common issues regarding fitness of the RCHPs for their intended purpose must be tried and determined with reference to the building materials with which the RCHPs were to be installed and used (secondary common issue h(v)).

¶ 4 The defendants (appellants) and third parties appeal the order and contend, generally, that the learned chambers judge erred when he certified the proceedings as a class proceeding.

¶ 5 Specifically, the appellant Canadian Standards Association ("CSA") contends that there are not sufficient common issues that could be tried against CSA in the context of a class proceeding and that a class proceeding is not the preferable procedure for the fair and efficient resolution of the common issues.

¶ 6 The appellant Her Majesty the Queen in Right of the Province of British Columbia contends that the proceeding should not be certified as a class proceeding against all defendants and, specifically, should not be a class proceeding against the Province of British Columbia. The Province further contends that it should not have to bear the expense of statutory notification of the Plaintiff classes and sub-classes as to the certification of this proceeding.

¶ 7 The appellant Municipalities of West Vancouver et al, City of Surrey, City of Victoria et al and the City of Vancouver, contend that the representative plaintiffs, Mr. Campbell and Ms. Isherwood, are not representative of those members of the class who might have claims against one or more of the appellant Municipalities. As did the appellant CSA, the appellant Municipalities also contend that common issues against the Municipalities are not raised and that a class proceeding is not the preferable procedure for the fair and efficient resolution of common issues against the appellants.

¶ 8 In addition to the above contentions the appellant City of Vancouver submits that the learned chambers judge erred when he found that the question framed should form the basis of a class certification of the plaintiff's claim notwithstanding that, the appellant says, it does not disclose a cause of action at law nor fall within the plaintiff's case as plead.

¶ 9 Finally, the appellant City of Kelowna et al contends that there are no common issues in relation to the third party municipalities and that a class proceeding is not the preferable procedure for the fair and efficient resolution of the common issues defined in relation to the third party municipalities.

Factual Background:

¶ 10 The class action from which this appeal is taken was filed by writ of summons on 1 August, 1995 on behalf of the owners of radiant ceiling heating panels with the brand names Aztech-Flexell, Thermaflex or Flexwatt (hereinafter "RCHPs").

¶ 11 This proceeding was certified as a class proceeding by Hutchinson J. pursuant to the Class Proceedings Act, S.B.C. 1995, c.21 on 14 June 1996 and the plaintiffs Mr. Jim Campbell and Ms.

Michelle Isherwood, were appointed as representative plaintiffs of the proposed class. A further hearing was held to settle the order that resulted in the supplemental reasons for judgment given on 20 September, 1996. The members of the classes are residents of British Columbia who have RCHPs manufactured by either Aztech International Ltd. or Flexel International Ltd., or by Flexwatt Corporation.

¶ 12 RCHPs have been used in North America for 10 to 15 years. The panels consist of thin carbon-ink based heating elements encased in transparent plastic film. The panels are installed directly to the underside of the ceiling framing and the ceiling finish material is then placed directly against the plastic film. Electricity is supplied to the elements through narrow metal electrical connectors which run parallel to each side of the panel. When electricity is applied to the system the panel radiates heat through the ceiling into the room below.

¶ 13 RCHPs made by Flexwatt were distributed by various companies in British Columbia including Wintertherm Corporation. Panels made by Thermaflex were manufactured in Scotland and distributed in British Columbia by two distributors, Aztech International and Adair Industries Limited. The Canadian Standards Association ("CSA") first set a standard for RCHPs in 1985. In l988 it certified the Flexwell RCHPs as meeting these standards. In l989 it revised the standard and on 3 November 1989 it certified the Aztech-Flexel (Thermoflex) RCHP. Subsequently the CSA standard (the "217 Standard") was adopted by the Province of British Columbia pursuant to regulations under the Electrical Safety Act.

¶ 14 Approximately 2200 homes in British Columbia had the RCHPs in question. The first incident involving a Flexwatt RCHP occurred on Saltspring Island on 18 September, 1991. The first incident involving a Thermaflex RCHP occurred in Maple Ridge on 18 February, 1993.

¶ 15 Between February 1993 and April 1995 there were approximately 30 incidents of fire or property damage in British Columbia. Between 02 November 1993 and 18 November 1994 the Chief Electrical Inspector for the Province of British Columbia issued several equipment disconnect orders for the RCHPs.

¶ 16 On 27 September 1994 the disconnect order for Thermaflex RCHPs was made permanent and on 18 November 1994 the Chief Electrical Inspector extended the equipment disconnect order to include all Flexwatt RCHPs installed in British Columbia. To date, there has been no indication from the Chief Electrical Inspector that the RCHPs will ever be permitted to be reconnected.

Canadian Standards Association and RCHP Standards

¶ 17 CSA is one of nine organizations authorized by the Standards Council of Canada to certify electrical equipment to the standards of the Canadian Electrical Code. (The Canadian Electrical Code Part 1 is adopted as the B.C. Electrical Code).

¶ 18 CSA has two primary roles. First, it facilitates the development of consensus standards and second, it tests products for certification to various national and international standards. Electrical equipment cannot be used in British Columbia unless it meets a standard adopted under the B.C. Electrical Code.

¶ 19 The CSA developed the safety standard for RCHPs (the "217 Standard") in 1985 and revised the standard in 1989. The 217 Standard was adopted by the Province of British Columbia pursuant to the Regulations under the Electrical Safety Act.

¶ 20 CSA first certified Flexwatt RCHPs to the 217 Standard on 25 May, 1988 and first certified Aztec-Flexel (Thermaflex) RCHPs to the 217 Standard on 03 November, 1989.

¶ 21 The 217 Standard defines RCHPs as being part of a heating system which includes the building material in which they were installed. Section 2.1 defines the RCHPs as being intended for use with normal construction materials.

¶ 22 Section 4.11 of the 217 Standard states that RCHPs should not exceed the maximum allowable temperatures of the ceiling building materials. Subsection 5.2.2(g) of the 217 Standard states that RCHP installation instructions must contain information on the building materials used with them.

¶ 23 Table 1 of the 217 Standard specifies the maximum temperature standards for the RCHPs next to building materials and specifies a temperature of 85C next to gypsum board or wood. Section 6 of the 217 Standard specifies that RCHPs must be tested in a simulated ceiling before being certified. The panels must be installed in accordance with the manufacturer's installation instructions using material recommended by the manufacturers.

¶ 24 According to section 4.4 of the National Standard for Canada for Gypsum Board Application, CAN/CSA-A82.31-M91, prepared by CSA, gypsum board should not "be used where exposed to excessive or continuous moisture, nor to extreme temperature or continuous temperature in excess of 52C". In 1992 the British Columbia Building Code adopted this CSA standard.

ISSUES

¶ 24a

A. The issue raised by the plaintiffs (appellants) in their appeal is stated in their factum, as an alleged error in judgment, in this way:

1. The learned chambers judge erred in ordering that the primary common issues concerning whether the RCHPs were fit for their intended purpose are to be tried and determined without reference to the building materials used with the RCHPs.

B. The issues raised by the defendants (appellants) in their appeals may be summarized as follows:

Did the learned chambers judge err:

2. In finding that there was a cause of action?
3. In finding that there were common issues?
4. In finding that a class proceeding was the preferable procedure for the fair and efficient resolution of the common issues?
5. In finding that Mr. Campbell and Ms. Isherwood were representative of the members of the plaintiff class?
6. In certifying issue (vii) regarding the disconnect order issued by the Province of British Columbia?
7. In ordering that the Province of British Columbia bear the expense of the statutory notice of certification?

[The Court did not number this paragraph. QL has assigned the number 24a.]

DISCUSSION

¶ 25 I preface my discussion of the issues with a note of caution. Appellate courts are always slow to interfere with discretion properly exercised. This course should be particularly so in considering the terms of a certification order. The Legislature enacted the Class Proceedings Act on 1 August 1995 to make available in this province a procedure for the fair resolution of meritorious claims that are uneconomical to pursue in an individual proceeding, or, if pursued individually, have the potential to overwhelm the courts' resources. Class proceedings are an efficient response to market demand only if they can resolve disputes fairly. Trial court judges must be free to make the new procedure work for plaintiffs and defendants. Many of the arguments made by counsel for the appellants, focused on fairness to the defendants and third parties, can be made to the chambers judge charged with managing the action as it proceeds. In considering those arguments, I will be keeping in mind the ability of the chambers judge to vary his order from time to time as the action proceeds and the need arises, whether from concern about fairness or efficacy; he may even decertify the proceeding. I shall also keep in mind that this court will interfere with the exercise of discretion only when persuaded that the chambers judge erred in principle or was clearly wrong. In this regard proceedings under the Creditors' Arrangement Act are instructive. The skeleton procedure provided by that Act has become a useful tool for corporate reorganization because trial courts have been permitted procedural flexibility. Of course, whether to certify a class proceeding is not a matter of discretion, strictly speaking, because s. 4(1) of the Act mandates certification if the criteria are met. The discretion resides in the assessment of the circumstances.

Issue 1: Fit for the Purpose

¶ 26 I will deal first with the plaintiffs' appeal on the scope of the threshold issue.

¶ 27 The plaintiffs contend that in order to determine the threshold issue as to whether RCHPs were fit for the purpose for which they were intended it is first necessary to ask: for what were they intended?

¶ 28 The answer to that question is simple: the RCHPs were intended to be used as part of a heating system in which the panels heat ceiling material which in turn radiates heat to the room below. The question that remains is: can the fitness of the RCHPs be determined without reference to the ceiling materials they were intended to heat? The plaintiffs argue that it is impossible to determine whether a product is fit for the purpose without looking into the purpose for which it is actually intended to be used. I agree. To find otherwise puts the determination of whether a product is "fit for the purpose" into a purely academic realm.

¶ 29 In Ashington Piggeries v. Christopher Hill Ltd., [1971] 1 All E.R. 847, a mink farmer purchased feed made from herring meal to be fed to his mink. The herring meal contained an ingredient that was toxic to mink and the farmer suffered losses. The toxin in the herring meal could affect all animals but was fatal only to mink. Because the buyer made known the purpose for which the herring meal was purchased the seller was liable, as the product was not fit for its intended purpose. It was not open to the herring meal supplier to argue that the herring meal was not fatal in other animals and so was good for other purposes.

¶ 30 In Griffiths v. Peter Conway Ltd., [1939] 1 All E.R. 685 a woman with abnormally sensitive skin purchased a Harris tweed coat. She argued that the coat was not fit for its purpose because she could not wear it. Her action failed because her skin condition was a special state of affairs which she did not communicate to the seller. The coat was not sold to be used by someone with abnormally sensitive skin.

¶ 31 Each of the those cases are examples of the need to examine the use to which a product is intended to be put, and is indeed put, in order to determine whether the product is fit for the purpose for which it was intended.

¶ 32 In Grant v. Australian Knitting Mills, [1936] A.C. 85 the plaintiff purchased woolen underwear and contracted dermatitis because the undergarment was defective in that it contained sulphates from the manufacturing process. The House of Lords ruled that the manufacturer breached its tort duty of care, totally aside from any contractual considerations. Lord Wright reasoned that negligence law requires a duty of care, breach of that duty and damage, and stated at 104:

> It may be said that the duty is difficult to define, because when the act of negligence in the manufacture occurs there was no specific person towards whom the duty could be said to exist: the thing might never be used: it might be destroyed by accident, or it might be scrapped, or in many ways fail to come into use in the normal way: in other words the duty cannot at the time of manufacture be other than potential or contingent, and only can become vested by the fact of actual use by a particular person (emphasis is mine).

¶ 33 The plaintiffs argue that to consider a tort duty in product liability without considering the use that product was actually put to is meaningless. Again, I am in agreement. A tort duty cannot arise from a defective product if the product is never used because there can be no duty, breach or damage. The duty, breach or damage only arises when the product is used for its intended purpose and proves to be defective.

¶ 34 In fact, one of the foundations of modern negligence law is based on a product liability lawsuit in which the court inquired into the purpose for which the product was intended. In Donoghue v. Stevenson, [1932] All E.R. Rep. 1 (H.L.), the bottle of ginger-beer which contained a snail was not fit for the purpose of being consumed. It may have been fit for the purpose of sitting on a shelf, but it was manufactured, sold and purchased to be consumed. Therefore, in order to determine whether a product is fit for its purpose, it is first necessary to consider the purpose for which the product was intended.

¶ 35 The wording of section 18 of the Sale of Goods Act makes it clear that the intention of the legislation is to look at the purpose for which a product is intended to be used in order to determine the product's fitness:

> If the buyer or lessee, expressly or by implication, makes known to the seller or lessor the particular purpose for which the goods are required, so as to show that the buyer or lessee relies on the seller's or lessor's skill or judgment, and the goods are of a description that it is in the course of the seller's or lessor's business to supply, whether the seller or lessor is the manufacturer or not, their is an implied condition that the goods are reasonably fit for that purpose.

¶ 36 I am persuaded by both the case law and the legislation that, in order to determine whether a product is fit for the purpose, it is necessary to look to the purpose for which it was intended and the purpose to which it was put.

¶ 37 RCHPs were intended to heat building materials; they were intended to be used as part of a heating system in which the RCHPs were to heat the building materials which in turn were to radiate heat to a room below. The standards developed by the CSA specifically set out that RCHPs were meant to be used with building materials. RCHPs could not legally be sold in British Columbia unless they

met the standards of the building materials with which they were installed. Therefore, both common sense and logic dictate that in order to determine whether the RCHPs were fit for heating building materials, it is necessary to look at the building materials themselves and the purpose to which the RCHPs and the building materials were put.

¶ 38 To consider RCHPs without reference to building materials would be to envisage RCHPs heating a room while suspended in air without contact with building materials. They may be fit this purpose, but that is not the purpose for which they were produced, purchased and installed. Therefore, it is not only illogical to try and determine whether the RCHPs were fit for the purpose for which they were intended without reference to the building materials, it is also impossible. It may be that the use of different building materials in conjunction with the RCHPs will require the creation of one or more subclasses but that is a matter for the trial judge to resolve. No argument was addressed to us in this regard and I would not presume to suggest what should be done.

Issue 2: Cause of Action

¶ 39 The defendants, with the exception of the City of Vancouver, do not seriously dispute there is a cause of action in law. The majority argue, however, that each representative plaintiff must have a cause of action against each defendant.

¶ 40 Subsection 4(1) of the Class Proceedings Act provides that:

> ...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 interest 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.

¶ 41 Subsection 6(1) of the Class Proceedings Act sets out that:

> Despite section 4(1), if a class includes a subclass whose members have claims that raise common issues not shared by all the class members so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court must not certify the proceeding as a class proceeding unless there is, in addition to the representative plaintiff for the class, a representative plaintiff who

(a) would fairly and adequately represent the interests of the subclass, ...

¶ 42 There is no requirement that there be a representative plaintiff with a cause of action against every defendant; the legislation simply requires that there be a cause of action. If a class includes a subclass whose members have claims that raise common issues not shared by all members of a class then the court must appoint a representative plaintiff for the subclass if the court determines that the representative plaintiff for the class could not fairly and adequately represent the interests of the subclass.

¶ 43 The defendants submit that the case of Harrington v. Dow Corning Corp. (1996), 22 B.C.L.R. (3d) 97 is reflective of the proposition that a representative plaintiff must have a cause of action against each defendant. In Harrington Mr. Justice Mackenzie stated at 114 paragraph 51:

> Negligence is a cause of action which involves the manufacturers severally and it may be appropriate to divide the class into sub-classes by manufacturer, with separate representatives for each sub-class.

Justice Mackenzie then went on to certify the class action without requiring a representative plaintiff for each manufacturer irrespective of the fact that there were sixteen defendants and the representative plaintiff had a cause of action against only five of them. This indicates, and I agree, that it is not necessary that a representative plaintiff have a cause of action against each defendant in order to certify a proceeding as a class proceeding.

¶ 44 The defendants also referred to a number of American cases in support of their proposition that the representative plaintiffs must have a cause of action against all defendants. These cases, although relevant, are not particularly helpful on this issue as they are based on the American requirement of "typicality" which is not part of Canadian law. Rule 23 of the United States Federal Rules of Civil Procedure states:

> 23(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder or all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

¶ 45 The typicality requirement has been interpreted to mean that the representative plaintiffs must have the same cause of action against the defendants as all members of the class. This requirement is not a part of the British Columbia Class Proceedings Act nor its Ontario counterpart. This indicates, and I agree, that it is not necessary that a representative plaintiff have a cause of action against each defendant in order to certify a proceeding as a class proceeding.

¶ 46 At this stage, I am not prepared to determine whether the appointment of further representative plaintiffs is required as it is unnecessary until the threshold questions have been answered. I am of the opinion that the representative plaintiffs are capable of fairly and adequately representing the class for the purpose of the primary/threshold issues and any need to appoint further representative plaintiffs for sub-classes can be addressed after the threshold questions have been answered. To do otherwise at this time seems somewhat futile.

¶ 47 I now turn to the submission of the City of Vancouver. The City of Vancouver submits that the pleadings do not disclose a cause of action against Vancouver that is known to law. The appellant City argues that a statutory duty to inspect does not exist as Vancouver has not adopted the British Columbia Electrical Code or the British Columbia Building Code and the Electrical Safety Act and Regulations have limited application in Vancouver.

¶ 48 The plaintiffs argue, however, that irrespective of any duty to inspect, the named municipal defendants had a broader duty to ensure that unsafe products were not used. The appellants further argue that all of the named municipal defendants and the Province breached this broader duty.

¶ 49 Whether the City of Vancouver, or any of the other named defendants, owed a duty of care to the plaintiffs is a triable issue. If a duty of care was owed, whether it was subsequently breached is also a triable issue. Therefore, I am of the opinion that a cause of action does exist against the appellant City.

¶ 50 The mere fact that the determination of whether the appellant City owed a duty of care to the plaintiffs may be more difficult than in the case of the other named defendants because the City has not adopted the same legislation, should not bar certification of this action as a class proceeding.

Issue 3: Common Issues

¶ 51 The Class Proceedings Act requires that the claims of the class members raise common issues which, for reasons of fairness and efficiency, ought to be determined within one proceeding. Common issues can be issues of fact or law and do not have to be identical for every member of the class. Section 1 of the Class Proceedings Act defines common issues as:

> (a) common but not necessarily identical issues of fact; or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

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

¶ 53 When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

¶ 54 Where there is a large number of individual issues arising out of the common issues to be addressed, courts have restricted the common questions in order to maintain the desirability of the class proceeding as the preferable procedure. This approach can be seen in Harrington where Mackenzie J. narrowed a long list of common issues proposed by the plaintiffs to one question: was the product fit for the purpose for which it was intended? He ruled that the fitness for purpose issue was a common issue as it moved the class towards a finding of liability (or non-liability), but noted that it does not have to be determinative of liability. Mr. Justice Mackenzie's views on certification are best set forth at page 24, paragraph 41 of his reasons:

> I am satisfied that the question: Are silicone gel breast implants reasonably fit for

their purpose? raises a threshold issue which is common to all intended members of the class who have been implanted with silicone gel breast implants and to the several manufacturers of such implants. If the plaintiff succeeds on this issue, then it moves the class a long way to a finding of liability. Quantum of damages would still have to be individually assessed but s. 7(a) of the Act makes clear that individual assessment of damages is not a barrier to certification.

¶ 55 When looking at the issues of commonality the chambers judge found that the findings in Harrington were applicable but would be of more assistance to the case at bar if the manufacturers of the offending RCHPs were before the court and not out of business. Despite these comments, the chambers judge still found that there were sufficient common issues and that it was just and convenient to certify the action as a class proceeding.

¶ 56 In Chase v. Crane Canada Inc. (1996), 26 B.C.L.R. (3d) 339 (S.C.), the defendant argued that the negligent manufacture and sale of a toilet tank was not a common issue because the case involved the production and sale of tanks over a long period of time, and manufacturing processes and other circumstances had changed. However, the court held that the plaintiff's allegations were sufficiently similar throughout the period in question to satisfy the requirements for certification.

¶ 57 In Peppiatt v. Nicol (1993), 16 O.R. (3d) 133 (Gen. Div.), claims arose from alleged misrepresentations contained in brochures distributed by the defendant. These brochures were at times slightly different, and various class members had bought their equity interest as a result of reading different brochures. However, the court held that the definition of common issues was broad enough to encompass such a situation. On a later application to decertify the proceeding the defendants again raised the issue of the different versions of the representations. The court did not decertify the proceeding but instead divided the class into various sub-classes depending on which publication they had read. This is a viable option for the case at bar.

¶ 58 The appellants submit that individual issues predominate over the common issues and therefore would inevitably result in a breakdown into a multitude of individual trials. Mr. Singleton argues that even if the threshold question of "fit for the purpose" was certified this would not move the action even one step further because, again, the inevitable result would be the breakdown of the action into a multitude of individual trials based on inspection and installation. Thus, the appellants submit, the proceeding should not be certified as a class proceeding.

¶ 59 The plaintiffs, on the other hand, disclaim any reliance on negligent or improper inspection or installation. The plaintiffs assert that the threshold question as to whether the RCHPs were fit for the purpose for which they were intended is common to all defendants and will be determined without reference to either inspection or installation. They further argue that individual issues do not predominate and that an answer to the threshold issue will, indeed, move the case forward.

¶ 60 The language in paragraph 4(1)(c) of the Class Proceedings Act is aimed at alleviating the debate between common issues and individual issues, for it states that an action must be certified if:

> 4(1)(c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;...

¶ 61 Although the issue of predominance still arises as a factor for consideration when determining whether or not a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, nowhere does the Act mandate that if an individual issue should predominate, an

action must not be certified. Instead, the Act sets out a variety of factors to be considered. The existence of an individual issue is not necessarily determinative.

¶ 62 In my view, the threshold primary issue as to whether the RCHPs were fit for their intended purpose is common to all named defendants. If the RCHPs are found to be fit for the purpose for which they were intended then the majority of the other secondary issues become moot. If, however, the RCHPs are found unfit, then the other secondary issues will have to be addressed and any need for sub-classes can be addressed at that time. Regardless of whether the RCHPs are found to be fit or unfit - the answer will move the case forward.

¶ 63 As a final, although I suspect a somewhat obvious, point, the determination of whether the RCHPs were fit for the purpose for which they were intended is premised on the fact that the panels were properly installed. Therefore, the threshold question is: when properly installed, were the RCHPs fit for their intended purpose? The issue of individual installation of the RCHPs is irrelevant; however, the general concept of installation in conjunction with the associated building materials is significant in the determination of whether the panels were fit for their intended purpose.

Issue 4: Is a class proceeding the preferable procedure for the fair and efficient resolution of the common issues?

¶ 64 Paragraph 4(1)(d) of the Class Proceedings Act sets out that one of the requirements for certifying a proceeding as a class proceeding is that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues". Although subsection 4(2) gives a variety of factors to be considered when determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court is still given a broad discretion when determining whether a class proceeding would be fair and efficient.

¶ 65 It is to be noted that a class proceeding does not have to be the preferable procedure for resolving the whole controversy, but merely the preferable procedure for resolving the common issues. Thus, fairness concerns about denial of individual discovery, and of the opportunity to seek contribution and indemnity become relevant only when issues are not common because they require examination of individual circumstances or defence claims not shared by class (or subclass) members. It would be premature at this stage to say that the chambers judge erred when he certified conditionally, common issues viii) and ix) as to damages. I am not presently persuaded the concerns are well founded with regard to the first seven issues, but that will continue to be a matter for the chambers judge and ultimately, the trial judge.

¶ 66 The submissions about the efficiency of the procedure founded on judicial comments in two Ontario cases, Abdool v. Anaheim Management Ltd (1995), 21 O.R. (3d) 453 (Div.Ct.) and Sutherland v. Canadian Red Cross Society (1994), 17 O.R. (3d) 645 (Gen.Div.) and the recent decision of Kirkpatrick J. in Bittner and Jasperse v. Louisiana-Pacific Corporation and Louisiana-Pacific Canada Ltd., [1997] B.C.J. No. 2281, (16 October 1997), Vancouver Registry No. C971947, demonstrate that a chambers judge must do something in the nature of a cost/benefit analysis in deciding whether to certify a proceeding. This is a task for which a trial court judge is uniquely well-qualified.

¶ 67 The trial judge, in his finding, invoked this discretion and found that, although there may be difficulties in embarking on a suit on behalf of over 2,000 potential claimants, a class proceeding was the preferable procedure for the "fair and efficient" disposal of the issues. In coming to this conclusion he considered each of the factors set out in subsection 4(2) and made the following comments:

(a) questions affecting individual members do not predominate heavily over questions common to the members of the class;
(b) a significant number of class members do not have a valid interest in individually controlling the prosecution of separate actions;
(c) the class proceeding may involve claims that are or have been the subject of other proceedings but the Act enables those persons, principally owners of strata title condominiums, the opportunity to opt out of the class proceedings should they choose;
(d) other means of resolving the claims are not more practical and efficient; and
(e) the administration of the class proceeding would not, in my opinion, create greater difficulties than those likely to be experienced were relief to be sought by other means.

¶ 68 I am in agreement with both the approach taken by the trial judge and the conclusion he reached and therefore consider it is unnecessary to address each of the arguments presented by the appellants. It is clear to me that it would be highly inefficient and completely ineffective to require each owner of the RCHPs to bring an individual action, particularly before the threshold question as to whether the RCHPs were fit for their purpose has been addressed.

Issue 5: Are Mr. Campbell and Ms. Isherwood representative of the members of the plaintiff class?

¶ 69 A representative plaintiff should be someone who would fairly and adequately represent the interests of the class, someone who 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 someone who does not have, on the common issues, an interest that is in conflict with the interests of other class members.

¶ 70 The three fundamental arguments posed by the appellants are that (1) the representative plaintiffs do not have a cause of action against each of the defendants; (2) the representative plaintiffs do not fairly and adequately represent the interests of the proposed class; and (3) the representative plaintiffs are in conflict with other class members on the proposed common issues.

¶ 71 I have already addressed the issue of whether or not the representative plaintiffs have, or need, a cause of action against each of the defendants and found that the threshold questions to whether the RCHPs were fit for the purpose for which they were intended, constitutes one element of the representative plaintiffs' cause of action against the defendants. After the determination of the threshold questions any need to create sub-classes or appoint further representative plaintiffs can be addressed. As a result there remain the arguments that Mr. Campbell and Ms. Isherwood do not fairly and adequately represent the interests of the class and that they are in conflict with other members of the class.

¶ 72 The appellants submit that the representative plaintiffs are not truly representative because of the fact that they have no knowledge of the regime in jurisdictions in which they do not reside with respect to building bylaws, permits and inspection requirements. The appellants further argue that the representative plaintiffs installed their own RCHPs and therefore do not have any information concerning the manner of the installations or inspection of the RCHPs in the other class members' homes; thereby putting the representative plaintiffs in vastly different positions in relation to the question of reliance from homeowners who purchased properties in which the panels were already installed.

¶ 73 The argument made by the appellants that the representative plaintiffs do not have any knowledge of the varying bylaws and inspection procedures of the various municipalities, although true, is very limiting. If the courts were to expect every representative plaintiff to be cognizant of the inner workings of various municipalities in the province, this would ensure that no class proceeding would ever be certified. To hold representative plaintiffs to such a high standard would essentially nullify the effect of the Class Proceedings Act.

¶ 74 The argument posed by the appellants with regard to the issue of the representative plaintiffs installing their own RCHPs is advanced to demonstrate that the representative plaintiffs cannot fairly and adequately represent the class. As well, it is used to demonstrate that the representative plaintiffs have an interest that is in conflict with the other members of the class because they cannot pursue a theory of negligent installation. First, I am unable to see the connection between the representative plaintiffs installing their own RCHPs and being unable to represent the class fairly and adequately; and second, counsel for the plaintiffs in argument before us made it clear that the plaintiffs are not putting forth a theory of negligent installation or inspection in this case and, therefore, there can be no conflict. Their case against the Province and the nine defendant municipalities is that they failed in their alleged duty under the Electrical Safety Act to refuse to allow unsafe products into the province and to be used there, and secondly, they failed to recognize the conflict in the standards. I pause to observe that some amendments may be required to the pleadings but that is a matter for the trial judge.

¶ 75 In Endean v. The Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) Smith J. considered the representative plaintiff requirements and held that the two most important considerations in determining whether a plaintiff was appropriate were whether there was a common interest with other class members and whether the representatives would "vigorously prosecute" the claim.

¶ 76 It has been established that there is a common interest and I can see no reason why the representative plaintiffs would not vigorously prosecute the claim. Any individual plaintiffs who feel that the representative plaintiffs would not represent them well may opt out of the class proceeding and pursue individual actions.

Issue 6: Is the certification of Issue (vii) appropriate?

¶ 77 Issue (vii), in its present form, reads as follows:

> if the RCHP's were not defective or incompatible with gypsum board, did Her Majesty the Queen in the Right of the Province of British Columbia breach a duty of care to the Plaintiff Class and sub-Class by ordering those panels disconnected, causing the Plaintiff Class and sub-Class loss and damage for which they are entitled to compensation...

¶ 78 The Province has argued that it is only because of the assumed validity of the disconnect orders that the members of the class exist. The Province argues that because the class is defined as people who own RCHPs which were ordered disconnected, taking away the disconnect orders takes away the definition of the class.

¶ 79 The plaintiffs submit that it is not the validity or the merit of the disconnect order - it is the mere existence of it that is significant. Valid or not, the disconnect orders were made. As a result, the class members are unable to use their RCHPs. Therefore the class exists because of the mere existence of the disconnect orders.

¶ 80 In my view, the common class arose as a result of the permanent disconnection order made for the Thermaflex RCHPs, and as a result of the de facto permanent disconnection order made for the Flexwatt RCHPs. The validity of the orders does not, and cannot, alter the fact that the members of the plaintiff class are no longer able to use their RCHPs.

¶ 81 The Province also submits that the Chief Electrical Inspector was acting in a quasi-judicial capacity in exercising his powers pursuant to the Electrical Safety Act. Whether the Electrical Inspector was acting in a quasi-judicial capacity in ordering the disconnection of the RCHPs is a triable issue but one that will not have to be addressed unless the RCHPs are found to have been fit for the purpose for which they were intended. Therefore, until the threshold question has been answered the validity of the disconnect orders is irrelevant.

Issue 7: Province of BC to bear the expense of statutory notice of certification.

¶ 82 Section 24 of the Act provides that:

> 24 (1) The court may make any order it considers appropriate as to the costs of any notice under this Division, including on order apportioning costs among parties.
> (2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

¶ 83 The Province concedes that this section gives the court the discretion to make any order it considers appropriate regarding the costs of notice. However, it submits that in making the series of disconnect orders the Chief Electrical Inspector was acting in a quasi-judicial capacity and in furtherance of his mandate pursuant to the provisions of the Electrical Safety Act, and therefore it should not be required to bear the cost of notice until a court has adjudicated regarding the disconnect orders.

¶ 84 The trial judge invoked the discretion given under section 24 to require the Province to bear the cost of notification due to the difficulties caused to the class by the disconnect orders. I would not interfere.

¶ 85 For these reasons, I would allow the appeal of the plaintiffs and dismiss the appeals of the defendants and the third parties. The plaintiffs are entitled to their costs.

¶ 86 As a consequence of this disposition the order certifying this class action requires some amendment. I attach, as an appendix to these reasons, a draft of those amendments which give effect to the disposition of these appeals which I have proposed.

CUMMING J.A.
NEWBURY J.A.:— I agree.
HUDDART J.A.:— I agree.

APPENDIX
AMENDMENTS TO CERTIFICATION ORDER

THIS COURT ORDERS:

(a) that this proceeding be and is hereby certified as a class proceeding;
(b) that the class of persons in respect of which this Order is made is the Plaintiff Class of those residents in British Columbia who owned Radiant Ceiling

Heating Panels with the brand names Aztech-Flexel, Thermaflex or Flexwatt (hereinafter "RCHPs") at the date of the Orders of the Chief Electrical Inspector for British Columbia that such panels be disconnected;

(c) that the sub-class of persons in respect of which this Order is made as against Canadian Standards Association is the Plaintiff sub-Class of those residents in British Columbia who owned RCHPs which were certified by Canadian Standards Association, at the date of the Orders of the Chief Electrical Inspector for British Columbia that such panels be disconnected;

(d) that Jim Campbell be and is hereby appointed representative Plaintiff for the Plaintiff Class and the Plaintiff sub-Class who have Radiant Ceiling Heating Panels manufactured by Aztech International Ltd. or Flexel International Ltd,;

(e) that Michelle Ann-Marie Isherwood be and is hereby appointed representative Plaintiff for the plaintiff Class and the Plaintiff sub-Class who have Radiant Ceiling Heating Panels manufactured by Flexwatt Corporation;

(f) that the Plaintiff Class and the Plaintiff sub-Class seek the relief of money damages;

(g) that the primary common issues for the Plaintiff Class and sub-Class are:

i) when installed with the manufacturer's instructions in ceilings constructed of building materials approved by the manufacturer, and used in accordance with the manufacturer's instructions, were the RCHPs fit for their intended purpose or defective in design and/or manufacture?

ii) did the Canadian Standards Association owe the Plaintiff Class and sub-Class a duty to take care when setting standards for RCHPs and in testing and certifying RCHPs to standards set by it, and if so, did the Canadian Standards Association breach the duty of care it owed to the Plaintiff Class and sub-Class in negligently setting standards for RCHPs and/or in negligently testing and certifying the RCHPs to such standards and/or as fit and safe for their intended purpose?

iii) did Canadian Standards Association in certifying the RCHPs to standards set by it make negligent misrepresentations as to their fitness, entitling the Plaintiff Class and sub-Class to damages irrespective of whether each Class or sub-Class member relied upon such representation?

(h) that the secondary common issues for the Plaintiff Class and sub-Class are:

iv) did Her Majesty the Queen in Right of the Province of British Columbia owe the Plaintiff Class and sub-Class a duty to take care in setting standards for RCHPs or having them set, and in certifying RCHPs to standards set for them, or having them so certified, and did Her Majesty the Queen in Right of the Province of British Columbia breach the duty of care it owed to the Plaintiff Class and sub-Class in negligently setting standards for RCHPs, or having them set, and/or in negligently testing and certifying the RCHPs to such standards, or having them so certified, and/or by permitting the installation of RCHPs in British Columbia?

v) if RCHPs, when installed in accordance with manufacturer's instructions with Canadian building materials, were not fit for their intended purpose, and/or were defective in design and/or manufacture, i.e., if, issue (g)(i) is answered "no" did Her Majesty the Queen in Right of the Province of British Columbia breach a duty of care owed to the Plaintiff Class or sub-Class in permitting the installation of RCHPs in premises in British

Columbia?

vi) if RCHPs, when installed in accordance with manufacturer's instructions with Canadian building materials, were not fit for their intended purpose, and/or were defective in design and/or manufacture, did the Defendant Manufacturers breach a duty of care owed to the Plaintiff Class or sub-Class in manufacturing or selling the RCHPs in British Columbia?

vii) if RCHPs, when installed in accordance with manufacturer's instructions with Canadian building materials, were fit for their intended purpose, and were of proper design and/or manufacture, did Her Majesty the Queen in Right of the Province of British Columbia breach a duty of care owed to the Plaintiff Class or sub-Class by ordering the RCHPs disconnected, causing the Plaintiff Class or sub-Class loss and damage for which they are entitled to compensation?

viii) if the Canadian Standards Association, Her Majesty the Queen in Right of the Province of British Columbia, Flexwatt Corporation, Aztech International Ltd. or Flexel International Ltd., or any of them breached a duty to the Plaintiff Class or sub-Class, what is the quantification of the damages resulting from such breach?

ix) if RCHPs, when installed in accordance with manufacturer's instructions with Canadian building materials, were not fit for their intended purpose, and/or were defective in design and/or manufacture, were the Defendant Municipalities and/or Third Party Municipalities negligent in permitting the installation of the RCHPs in premises, with Canadian building materials, and if so, what damages, if any, to the Plaintiff Class and sub-Class resulted from such negligence?

x) such further and other common issues as may be identified after the lifting of the stay of proceedings ordered against the Defendant and Third Party Municipalities.

(i) that the primary common issues are to be tried and determined first and then, dependent on the determination of those primary common issues, secondary common issues iv), v), vi) or secondary common issue vii) are to be tried and determined, and then, dependent upon the determination of those common issues, secondary common issue viii) is to be tried and determined and then, dependent upon the determination of those common issues secondary common issues ix) and x) are to be tried and determined;

* * * * *

CORRIGENDUM

Released: November 10, 1997

CUMMING J.A.:-- On page 2 of my reasons for judgment dated November 7, 1997, counsel's name should read "K. Whitley".

CUMMING J.A.

QL Update: 971206
cp/d/jep/cmi/jkb/DRS

3218520 Canada Inc. v. Bre-X Minerals Ltd. et al.*

[Indexed as: Carom v. Bre-X Minerals Ltd.]

51 O.R. (3d) 236
[2000] O.J. No. 4014
Docket No. C33905

Court of Appeal for Ontario
Finlayson, Feldman and MacPherson JJ.A.

October 31, 2000

* Application for leave to appeal to the Supreme Court of Canada dismissed October 18, 2001 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28309. S.C.C. Bulletin, 2001, p. 1837.

Civil procedure — Class proceedings — Certification — Common issues — Preferable procedure — Representative plaintiffs being shareholders of Alberta company developing gold mine in Indonesia — Allegations that defendants conspired to increase share price for their own benefit by fraudulent and negligent representations of gold resources — Investors suffering loss when share values plummeting after disclosure that reports of gold resources fraudulent — Representative plaintiffs seeking certification and advancing claims of conspiracy, fraudulent misrepresentation, negligent misrepresentation and breach of Competition Act — Class Proceedings Act, 1992, S.O. 1992, c. 6.

The three representative plaintiffs in a class proceeding lost a great deal of money investing in a corporation that was developing a gold mine in Indonesia. They alleged that the defendants, who were two gold mine corporations and its insiders, lied to the public about the presence of gold in the mine in a series of 160 press releases and other statements. Winkler J. certified a class action with respect to the plaintiffs' claims of fraudulent misrepresentation, conspiracy and breach of the Competition Act, R.S.C. 1985, c. C-34. He also held that a class proceeding was the preferable procedure for the resolution of 15 common issues. Winkler J. refused, however, to certify the plaintiffs' claim for negligent misrepresentation, which he held did not relate to the plaintiffs' certified claims. Winkler J. further held that a class proceeding was not the preferable procedure for the determination of the negligent misrepresentation claim. Winkler J.'s decision was affirmed by the Divisional Court. Leave having been granted, the plaintiffs appealed to the Court of Appeal. The issues for the appeal were whether the Divisional Court: (1) erred in failing to order that the class proceedings that will determine the 15 certified common issues should apply to the claim in negligent misrepresentation; and (2) erred in determining that a class action was not the preferable procedure for dealing with the negligent misrepresentation claim.

Held, the appeal should be allowed.

Winkler J. and the Divisional Court erred on a matter of general principle. There was no sufficient difference between the plaintiffs' claims in fraudulent and in negligent misrepresentation to justify the certification of one and not the other. The creation of a dichotomy in the litigation was an error in principle, policy and logic. The standard for certification is not to be set too high because this would compromise the procedural objectives of the Class Proceedings Act, 1992 of judicial economy and promotion of access to justice, and it is not necessary that the plaintiffs in a class action present absolutely identical issues of fact or law. Resolution of the entire action through the class proceeding or

even resolution of particular legal claims is not required. For certification, there need only be common issues of fact or law that move the litigation forward. Given the accepted definitions of the torts of fraudulent and negligent misrepresentation, there was no principled basis for treating them differently on the question of certification. Further, there was a substantial overlap of factual issues common to both torts.

On the issue of preferable procedure for the determination of the negligent misrepresentation claim, a crucial factor was that there was to be a class proceeding for the plaintiffs' three other claims. There was no precedent in other cases of certifying some but not all of the potential claims, and the cases seemed to favour either complete certification or no certification. There was substantial merit in trying to utilize the Class Proceedings Act, 1992 to deal with as many issues as possible. Conversely, it was not necessary that the entire litigation be resolved by the determination of the common issues. Certification can be the preferable procedure in situations far short of the final resolution of the lawsuit. It was sensible and desirable that the negligent misrepresentation claim be placed with the other three claims. Accordingly, the appeal should be allowed.

Cases referred to

Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 121 D.L.R. (4th) 496, 31 C.P.C. (3d) 197 (Div. Ct.); Anderson v. Wilson (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409, 36 C.P.C. (4th) 17 (C.A.); Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, 106 D.L.R. (4th) 339, 16 C.P.C. (3d) 156 (Gen. Div.); Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), supp. reasons (1999), 30 C.P.C. (4th) 131 (Ont. Gen. Div.); Campbell v. Flexwatt Corp. (1997), 44 B.C.L.R. (3d) 343, [1998] 6 W.W.R. 275, 15 C.P.C. (4th) 1 (C.A.) [Leave to appeal to S.C.C. refused (1998), 228 N.R. 197n]; Chadha v. Bayer Inc. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (S.C.J.); Controltech Engineering Inc. v. Ontario Hydro, [1998] O.J. No. 5350 (Gen. Div.), affd [2000] O.J. No. 379 (Div. Ct.); Dabbs v. Sun Life Assurance Co. of Canada (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482, [1999] I.L.R. 1-3629, 27 C.P.C. (4th) 243 (C.A.), quashing (1998), 40 O.R. (3d) 429, [1998] I.L.R. 1-3575, 22 C.P.C. (4th) 381 (Gen. Div.) [Leave to appeal to S.C.C. refused (1998), 235 N.R. 390n]; Hollick v. Metropolitan Toronto (Municipality) (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426, 7 M.P.L.R. (3d) 244 (C.A.) [Leave to appeal granted [2000] S.C.C.A. No. 41]; Maxwell v. MLG Ventures Ltd., [1995] O.J. No. 1136 (Gen. Div.); Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63, 22 C.P.C. (4th) 198 (Gen. Div.); Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552, 40 C.P.C. (3d) 245 (Gen. Div.); Peppiatt v. Nicol (1993), 16 O.R. (3d) 133, 20 C.P.C. (3d) 272 (Gen. Div.); Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171, 85 C.P.R. (3d) 1, 30 C.P.C. (4th) 182 (Gen. Div.), supp. reasons (1999), 43 O.R. (3d) 389 (Gen. Div.); Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776, 86 C.P.R. (3d) 1, 31 C.P.C. (4th) 340 (Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 1 "common issues", 5(1), 8(1)
Competition Act, R.S.C. 1985, c. C-34

Authorities referred to

Ontario, Report on Class Actions (Ontario Law Reform Commission, 1982)
Report of the Attorney General's Advisory Committee on Class Action Reform (1990)

APPEAL from a judgment of the Divisional Court (O'Driscoll, Campbell and MacFarland JJ.) (1999),

46 O.R. (3d) 315, 6 B.L.R. (3d) 82.

Paul J. Pape, for appellants.
H. Douglas Stewart, Q.C., for Bresea Resources Ltd.
Joseph Groia and Kevin Richard, for John Felderhof.
Alan Lenczner, Q.C., and Lawrence Thacker, for Jeannette Walsh, personally and as estate trustee for David Walsh, and for T. Stephen McAnulty.
Robert Potts and Robert Muir, for John Thorpe.
Brian Bellmore and K. Mitchell, for Rolando Francisco.
Paul Le Vay and Johanna Braden, for Paul Kavanagh.

The judgment of the court was delivered by

MACPHERSON J.A.: —

Introduction

[1] Disasters spawn litigation. Trains collide or derail, planes crash, ships sink, lakes and rivers become polluted, chemical factories explode, ordinary people eat, drink, wear or use unhealthy or defective products. People -- sometimes hundreds, even thousands -- are injured or killed by these events. When the crisis subsides, some of the victims turn to the courts for redress and compensation.

[2] One of the modern mechanisms for dealing with the litigation fallout from major disasters is the class action. In Ontario, this type of action is regulated in a detailed fashion by a relatively recent statute, the Class Proceedings Act, 1992, S.O. 1992, c. 6.

[3] In the Report of the Attorney General's Advisory Committee on Class Action Reform (1990), a class action was defined in simple, straightforward terms, at p. 15:

> A class action is an action brought on behalf of, or for the benefit of numerous persons having a common interest. It is a procedural mechanism that is intended to provide an efficient means to achieve redress for widespread harm or injury by allowing one or more persons to bring the action on behalf of the many.

[4] In this passage, one of the principal procedural goals of class actions is stated explicitly, namely litigation efficiency. This goal is sometimes framed with different terminology -- judicial economy. The underlying objective of either formulation is the same, namely to find a mechanism to enable the court system to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered injuries from the same event or product.

[5] There is, however, a second fundamental procedural goal of class actions. It is to encourage access by victims to the court system. In its landmark study, Report on Class Actions (1982), the Ontario Law Reform Commission discussed the linkage between class actions and access to the courts in considerable detail. The Commission stated its conclusion on this point, at p. 139:

> The Commission is of the view that many claims are not individually litigated, not because they are lacking in merit or unimportant to the potential claimant, but because of economic, social, and psychological barriers. We believe that class actions can help to

overcome such barriers and, by providing increased access to the courts, may perform an important function in society. Quite clearly, effective access to justice is a precondition to the exercise of all other legal rights.

[6] The Class Proceedings Act, 1992 ("CPA") is anchored in the principles of access to justice and judicial economy. Lawyers and judges in Ontario are in the early stages of grappling with this law. Class proceedings have been certified in several cases. Some of the cases have dealt with defective products such as silicone gel breast implants and pacemakers: see, respectively, Bendall v. McGhan Medical Corp. (1993), 14 O.R. (3d) 734, 106 D.L.R. (4th) 339 (Gen. Div.), and Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331, 127 D.L.R. (4th) 552 (Gen. Div.). In other cases, courts have certified mass tort claims in relation to a single accident, for example, a fire in a subway: see Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.).

[7] Certifications of class actions under the CPA have not been limited to situations in which redress is sought for physical injuries. Economic injury or financial loss has also served as a basis for some class actions. For example, a class action was certified for a copyright infringement claim by writers who alleged that a publisher had wrongfully reproduced their work in electronic form: see Robertson v. Thomson Corp. (1999), 43 O.R. (3d) 161, 171 D.L.R. (4th) 171 (Gen. Div.). Another class action was certified for a claim by building owners that certain companies had engaged in illegal price fixing in relation to construction materials: see Chadha v. Bayer Inc. (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (S.C.J.).

[8] However, certifications of class actions have not been automatic. Probably the most notable domain in which certification has been refused relates to claims grounded in allegations of misrepresentation. For example, a claim against a petroleum company for misrepresenting the nature of a franchise to potential franchisees was not certified: see Rosedale Motors Inc. v. Petro-Canada Inc. (1998), 42 O.R. (3d) 776, 31 C.P.C. (4th) 340 (Gen. Div.). A claim against Ontario Hydro for misrepresentation in the context of a bidding process was also not certified: see Controltech Engineering Inc. v. Ontario Hydro, [1998] O.J. No. 5350 (Gen. Div.), affd [2000] O.J. No. 379 (Div. Ct.).

[9] The present appeal involves some of the causes of action that have been considered by Ontario courts in previous cases -- misrepresentation, anti-competitive practices and conspiracy. It arises in the context of economic, not physical, injuries suffered by thousands of people who invested in a sham gold mining company. The plaintiffs in the action lost a great deal of money. They allege that the defendants, the "insiders" of the company, made great fortunes by lying to the public about the presence of gold in a mine in Indonesia. The investors seek redress from the "insiders" of the company. The procedural mechanism the investors want to employ in their litigation is certification as a class action.

[10] The motions judge, Winkler J., certified a class action with respect to three of the claims advanced by the plaintiffs -- fraudulent misrepresentation, the tort of conspiracy and breach of the Competition Act, R.S.C. 1985, c. C-34 [reported at 44 O.R. (3d) 173]. However, he refused to certify a class action for a fourth claim put forward by the plaintiffs, namely negligent misrepresentation. Winkler J.'s decision was upheld by the Divisional Court [reported at 46 O.R. (3d) 315].

[11] The appeal from the Divisional Court's decision raises at least two interesting and important questions. First, is it appropriate to certify part of an action as a class proceeding? Is it logical and desirable to permit a two-track lawsuit, with some claims proceeding under the CPA while others advance through the normal route of lawsuits initiated by individual plaintiffs? Second, is there a sufficient distinction between the torts of fraudulent misrepresentation and negligent misrepresentation to justify routing them onto separate tracks in the litigation process? Why is it appropriate to certify a class action for a claim of fraudulent misrepresentation, but refuse certification for a claim of negligent

misrepresentation?

A. Factual Background

(1) The events

[12] I begin this section of my reasons with two preliminary points, the first to provide context, and the second in the nature of a warning.

[13] The contextual point is this. The plaintiffs initiated eight lawsuits relating to the Bre-X gold mine and stock market debacle which I will shortly describe. The main action is against Bre-X Minerals Ltd., Bresea Resources Ltd. and various individuals who held senior positions in these companies. In the main action, the plaintiffs also sued two stock brokerage firms, Nesbitt Burns Inc. and First Marathon Securities Ltd., and two research analysts, Egizio Bianchini and Kerry Smith, employed by these firms. The second action was brought against two engineering companies which conducted analyses of gold resources on behalf of Bre-X. Five other actions were brought against various stock brokerage firms and some of their individual analysts who are alleged to have promoted Bre-X stock. An eighth action was brought against Ingrid Felderhof and Spartacus Corp.; it was stayed at an early juncture.

[14] The motions judge heard motions seeking certification of the first seven actions as class proceedings. His decision was that class proceedings were inappropriate for all seven actions. His decisions with respect to all of the brokerage firms, the two engineering firms, and all of the named individual analysts in those firms, have not been appealed by the plaintiffs. In other words, the only defendants who remain in the proposed class action are the companies and individuals directly involved in the gold mine venture. I make this point at the outset to indicate that what might appear on the record as a highly complicated matter (eight lawsuits, three categories of defendants, and almost three dozen named defendants) is in fact, at this juncture, a much smaller matter -- a single action, a single category of defendants and 10 named defendants. In short, the lawsuit that will go forward is against two gold mine companies and their senior officers; it no longer relates to stock brokerage firms or engineering companies which provided professional services to the gold mine companies and to investors.

[15] I move now to my second preliminary point. Although the title and sub-title of this section of my reasons are "factual background" and "the events", an important warning is required at the outset. There has been no trial in this matter. Indeed, at this juncture none of the defendants has been required to file a Statement of Defence. The "facts" in the action thus far are not facts at all; rather, they are allegations by the plaintiffs. However, as required by the CPA, the courts below accepted the factual background set out in the plaintiffs' statement of claim for purposes of determining whether the plaintiffs' claims should be certified as a class action. I will do the same, but underline that at this point no one should accept those allegations as proven.

[16] Bre-X Minerals Ltd. ("Bre-X") was a junior mining company. In 1989, its shares were listed on the Alberta Stock Exchange. Bresea Resources Ltd. ("Bresea") and Bre-X held shares in each other. Bresea was controlled by the directing minds of Bre-X.

[17] In 1987, an Australian-based joint venture obtained a contract of work to drill for gold in a remote area of Indonesia known as the Busang. For several years, the results of the project were generally poor. In the spring of 1993, Bre-X acquired an option to purchase an 80 per cent interest in the Busang project.

[18] On May 6, 1993, Bre-X and Bresea issued a press release announcing the deal and stating that the

property showed sufficient gold to yield an annual after-tax cash flow of US $10 million to Bre-X. Thereafter, Bre-X and Bresea issued a series of 160 press releases and other statements building on the favourable results in the first release. From January 1994, Bre-X reported core drilling results that gave investors reason to believe that the Busang properties contained one of the largest gold deposits ever discovered. The price of Bre-X shares rose from 50 cents in 1993 to more than $200 in late 1996. Many Canadians made fortunes during these years by trading in Bre-X shares.

[19] In fact, there were no economic gold deposits in the Busang properties. The core samples drilled by Bre-X had been, in the language of the mining industry, "salted" with gold which could not have come from the Busang. In short, someone committed a massive fraud. As expressed bluntly in a May 3, 1997 report by Strathcona Mineral Services Ltd., a company retained by Bre-X to perform a technical audit of Bre-X's exploration work:

> [T]he magnitude of the tampering with core samples that we believe has occurred and resulting falsification of assay values at Busang, is of a scale and over a period of time and with a precision that, to our knowledge, is without precedent in the history of mining anywhere in the world.

[20] In 1997, Bre-X collapsed. Its shares became worthless, and many Canadians lost fortunes. Some of them want to sue those they hold responsible for the fraud.

(2) The parties

[21] At present, there are three representative plaintiffs in the class action. 3218520 Canada Inc. was the corporate investment vehicle for Greg Windsor. He purchased 500 Bre-X shares in September 1996 for $13,975. Osamu Shimizu purchased 300 Bre-X shares in September 1996 for $7,887. Both of these sets of shares are now worthless. 662492 Ontario Limited was the corporate investment vehicle for Ivo Battistella. Between May 1996 and April 1997, he traded in Bre-X shares and lost about $762,000.

[22] The plaintiffs have sued Bre-X and Bresea. They have also sued several Bre-X "insiders", including David Walsh, Chairman and President, [See Note 1 at end of document] Jeannette Walsh, Corporate Secretary, John Felderhof, Vice-Chairman, Senior Vice-President and supervising geologist, T. Stephen McAnulty, Vice-President, John Thorpe, Treasurer, Rolando Francisco, Executive Vice-President and Chief Financial Officer, Hugh Lyons, outside director, and Paul Kavanagh, outside director. The plaintiffs allege that these insiders were responsible for their losses and, in addition, made huge financial gains by selling their own Bre-X shares before the fraud became known. The scale of the alleged fraud, and some sense of the magnitude of the losses suffered by investors, is apparent from the financial gains the insiders are alleged to have garnered: David Walsh -- $25,018,512; Jeannette Walsh -- $30,605,010; John Felderhof -- $71,211,417; Stephen McAnulty -- $8,234,460; John Thorpe -- $4,109,973; Rolando Francisco -- $1,254,500; Hugh Lyons -- $3,250,000; and Paul Kavanagh -- $511,500.

(3) The litigation

[23] On April 3, 1997, the plaintiffs issued their notice of action. On November 3, 1997, they delivered their Statement of Claim. Their claim is grounded in four causes of action: the torts of conspiracy, fraudulent misrepresentation and negligent misrepresentation, and breach of the Competition Act. On December 3, 1997, the plaintiffs brought their motion for certification of the action as a class proceeding.

[24] The requirements for certification are set out in s. 5 of the CPA:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant who,
>
> (i) would fairly and adequately represent the interest 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 for the class, an interest in conflict with the interests of other class members.

[25] On April 8, 1998, the motions judge, Winkler J., determined that the pleadings disclosed a cause of action pursuant to s. 5(1)(a). On February 11, 1999, the motions judge adopted a national class as the identifiable class under s. 5(1)(b). This class included persons not resident in Ontario, although these non-residents were permitted to opt out of the class and the action.

[26] On May 13, 1999, the motions judge disposed of the remaining aspects of the certification motion, including certification of common issues (s. 5(1)(c)), preferable procedure (s. 5(1)(d)), representative plaintiffs (s. 5(1)(e)) and the remaining issues of class description.

[27] On the question of common issues, the motions judge certified 15 common issues for determination in a class proceeding. The formal Order provides:

> 8. THIS COURT DECLARES that the common issues for the Class against the Certified Defendants are:
>
> (a) Did Busang contain gold in commercial quantities or in quantities sufficient to make the mining of it commercially viable ("gold in mineable quantities")?
> (b) Was Bre-X operating a legitimate business?
> (c) Were the core samples from Bre-X salted with gold and, if so, how, when, where and by whom?
> (d) Did Bre-X follow generally accepted mining exploration practices and techniques and, if not, how did it deviate? Was any deviation reasonable under the circumstances?
> (e) Did Bre-X, Bresea and the Insiders or any of them conspire to inflate the price of Bre-X and Bresea shares on the Markets? If they did, what are the particulars of the conspiracy?
> (f) Did Bresea and the named individual defendants, or any of them, know or ought to have known the answers to the questions (a), (b), (c), (d) and (e) or any of them and, if so, who knew or ought to have known what, when and why and what should have they done, if anything?
> (g) Did Bre-X and/or the named individual defendants represent that:

(i) There is gold in mineable quantities in the Busang?
(ii) Any company associated with SNC-Lavalin Inc. audited Bre-X's work or otherwise verified the accuracy of Bre-X's resource database?
(iii) Bre-X was operating a legitimate business?

(h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?
(i) Are the named individual defendants, or any of them, personally liable for any damages resulting from or caused by the representations identified by issue (g)?
(j) What is the meaning of the words "as a result of" in section 36 of the Competition Act?
(k) Does the Negligence Act or the concept of contributory negligence apply in assessing loss or damage under section 36?
(l) Must the plaintiffs prove an anti-competitive component to the Competition Act cause of action? If so, have they? Does Part VI apply to behaviour which is not anti-competitive?
(m) Should the full costs of investigation in connection with this matter and the cost of the proceedings or part thereof be assessed globally as provided for in section 36 of the Competition Act, and, if so, who should pay and in what amount(s)?
(n) Was there a breach of section 52 of the Competition Act by Bre-X and the named individual defendants giving rise to liability pursuant to section 36 if the Class member can prove damages as a result of the representation(s)?
(o) Was the conduct of the defendants, or any of them, such that they ought to pay globally to the Class members exemplary or punitive damages?

[28] The motions judge held that these common issues relate to the torts of conspiracy and fraudulent misrepresentation and to breach of the Competition Act. He also held that a class proceeding is the preferable procedure for the resolution of these common issues.

[29] There is no dispute about any of the above. The motions judge's decisions relating to whether the pleadings disclose a cause of action and his definition of the plaintiff class have not been appealed. Moreover, his identification of 15 common issues and his determination that these issues are relevant to the conspiracy, fraudulent misrepresentation and Competition Act causes of action have been accepted by all parties.

[30] The point of contention in this appeal relates to the motions judge's determination, confirmed by the Divisional Court, that the 15 common issues he identified did not relate to the claim of negligent misrepresentation. Additionally, the motions judge held, and the Divisional Court confirmed, that if some of the common issues were applicable to negligent misrepresentation, nevertheless the preferable procedure was that they be determined in separate actions brought by individual plaintiffs. In short, the courts below have held that the plaintiffs' claims in conspiracy, fraudulent misrepresentation and breach of the Competition Act meet all of the components of the test in s. 5(1) of the CPA, but that the plaintiffs' claim in negligent misrepresentation fails both s. 5(1)(c) ("common issues") and s. 5(1)(d) ("preferable procedure"). Hence, the courts below refused to certify the claim in negligent misrepresentation as part of the class action.

[31] The plaintiffs sought leave to appeal from the decision of the Divisional Court upholding the motions judge's refusal to permit the claim in negligent misrepresentation to proceed as part of the class action. By Order dated March 14, 2000, a panel of this court (Osborne A.C.J.O. and Abella and Moldaver JJ.A.) granted the plaintiffs' motion for leave to appeal.

B. Issues

[32] There are two issues on this appeal:

(1) Did the Divisional Court err in failing to order that the class proceeding which will determine the 15 certified common issues should apply to the claim in negligent misrepresentation?
(2) Did the Divisional Court err by determining that a class action was not the preferable procedure for dealing with the negligent misrepresentation claim?

C. Analysis

(1) The "common issues" issue

[33] The motions judge certified 15 common issues for the class action. He explicitly held that these common issues are relevant to three of the legal claims advanced by the plaintiffs -- conspiracy, fraudulent misrepresentation and breach of the Competition Act.

[34] However, the motions judge further held that the 15 common issues did not relate to the plaintiffs' claim of negligent misrepresentation. He explained the different results for the torts of fraudulent misrepresentation and negligent misrepresentation in this fashion [at pp. 196-98 O.R.]:

> The essence of each tort is the representation made by the defendant to the plaintiff. The plaintiffs contend that the series of statements contained in the press releases and other documentation emanating from Bre-X, notwithstanding their number and diversity of content, contain a common misrepresentation, namely that "gold was present in mineable quantities in the Busang". Thus they contend that a number of common issues arise from what they state is a singular misrepresentation.
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> The plaintiffs identify some 160 statements made by the defendants over a four-year period to a class indeterminate in number and national in scope. The statements were distributed to the public through various forms of media and subject to whatever editorial control that may have been exercised by the respective proprietors. The statements were received by investors with varying degrees of sophistication and knowledge, and more importantly, differing investment strategies.
>
> . . . . .
>
> A reduction of the numerous representations to a common representation requires analysis and characterization of each individual representation, the plaintiff's perception of the representation and the circumstances in which it was made. This is, of necessity, an individual inquiry. Thus, the plaintiffs' contention that a multitude of statements can be reduced to a single core representation is antithetical to the essence of a common issue in a class proceeding. That is to say, that the common trial in the class proceeding is intended to resolve issues which have been determined to be common between the defendants and the plaintiff class. As such, a resolution binds every class member. The existence of the common issue must be discernible at the certification stage since it provides the basis for the common issue trial and the viability of a class proceeding. The common issue cannot be dependent upon findings which will have to be made at individual trials, nor can it be based on an assumption to circumvent the necessity for the individual inquiries. As such, there is no prospect of a resolution in a trial on common issues which would advance this

litigation in any manner as it relates to the claim in negligent misrepresentation.

However, I am of the view that the claim in fraudulent misrepresentation raises common issues. The plaintiffs' allegation is that the Bre-X operation was fraudulent. Therefore, it is contended, every representation, whenever made, is tainted by the fraud. The allegation that the fraud permeates every statement raises common issues regardless of whether individual issues may arise from the actual communications made to the class members.

(Emphasis added)

[35] In a relatively short endorsement, the Divisional Court agreed with the motions judge's reasoning and with the dichotomy he created. A. Campbell J. said [at p. 316 O.R.]:

There is a complex, overlapping, differing and sometimes inconsistent tissue of representations made by different people at different times. As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.

The common issue cannot be dependent upon findings which have to be made, as here, at individual trials.

[36] There is no doubt that class actions are a new, different and, in many cases, complex development in the Ontario legal system. Because of this, a practice has developed of assigning a small number of judges to hear certification motions. Those judges develop an expertise which should be recognized and respected by appellate courts. As expressed by Carthy J.A. in Anderson v. Wilson (1999), 44 O.R. (3d) 673 at p. 677, 175 D.L.R. (4th) 409 (C.A.):

. . . I am mindful of the deference which is due to the Superior Court judges who have developed expertise in this very sophisticated area of practice. The Act provides for flexibility and adjustment at all stages of the proceeding and any intervention by this court at the certification level should be restricted to matters of general principle.

[37] Bearing in mind this admonishment, I have reached the reluctant conclusion that the Divisional Court and the motions judge have erred on a matter of general principle. I do not agree that there is a sufficient difference between the plaintiffs' claims in fraudulent misrepresentation and negligent misrepresentation to justify certification of the former and non-certification of the latter. In my view, the creation of such a dichotomy in this litigation is an error in logic, in principle and in policy. I reach this conclusion for several reasons.

[38] My first two reasons are contextual ones.

[39] First, s. 8(1) of the CPA provides that a certification order should set out the common issues of the class. Section 1 of the CPA defines "common issues" as:

(a) common but not necessarily identical issues of fact, or

(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[40] The observation I would make about this definition is that it represents a conscious attempt by the Ontario legislature to avoid setting the bar for certification too high. The important procedural objectives

of the CPA, namely promoting access to justice and judicial economy, would not be realized if there was a requirement that the prospective plaintiffs in a class action present absolutely identical issues of fact or law.

[41] Second, the courts have also been wary of setting the bar too high on the common issues factor. In many cases, the Ontario courts have stated explicitly that certification should be ordered if the resolution of the common issues would advance the litigation. Resolution through the class proceeding of the entire action, or even resolution of particular legal claims in the action, is not required. In Campbell v. Flexwatt Corp. (1997), 15 C.P.C. (4th) 1, 44 B.C.L.R. (3d) 343 (C.A.), Cumming J.A. said, at p. 18 C.P.C.:

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

In Anderson v. Wilson, supra, Carthy J.A., speaking for a unanimous court, expressly adopted this reasoning.

[42] Against the backdrop of the low bar set by the legislature and judiciary for common issues, I turn to my third, and most important, reason for thinking that the courts below erred. Given the accepted definitions of the torts of fraudulent misrepresentation and negligent misrepresentation, I can see no logical or principled basis for treating them differently on the question of certification. I could understand an order certifying, or refusing to certify, both claims. I do not, however, understand why opposite orders were considered appropriate for the two claims.

[43] The best way to commence my discussion of my doubts on this issue is by setting out the motions judge's careful and accurate description of the elements of the two torts. He said [at pp. 195-96 O.R.]:

> The constituent elements of a claim for fraudulent misrepresentation were enunciated by the Supreme Court of Canada in Parna v. G. & S. Properties Ltd., [1971] S.C.R. 306 at p. 316, 15 D.L.R. (3d) 336 at p. 344:
>
> ". . . Anson on Contract [12th ed., p. 187], where "fraud" has been defined, reads:
> [Fraud is] a false representation of fact, made with a knowledge of its falsehood, or recklessly, without belief in its truth, with the intention that it should be acted upon by the complaining party, and actually inducing him to act upon it."
>
> See also Derry v. Peek (1889), 14 App. Cas. 337 at p. 374, [1886-90] All E.R. Rep. 1 (H.L.).
>
> The tort of negligent misrepresentation has five constituent elements. There must be a duty of care arising from a special relationship between a representator and a representee. There must be a representation made that was untrue, inaccurate or misleading. The representor must have made the statement negligently. The representee must have reasonably relied upon the statement and further, suffered damage as a result of the reliance. See Queen v. Cognos Inc., [1993] 1 S.C.R. 87 at p. 110, 99 D.L.R. (4th) 626.

[44] There are substantial similarities in these definitions of the two torts. A fraudulent

misrepresentation is "a false representation of fact"; a negligent misrepresentation is one that is "untrue, inaccurate or misleading". A fraudulent misrepresentation can be one that is made "recklessly, without belief in its truth"; a negligent misrepresentation is one that is made "negligently" or, to employ the standard non-conclusory word, "carelessly". At least two of the 15 common issues that have been certified relate directly to the tort of fraudulent misrepresentation:

> (g) Did Bre-X and or the named defendants represent that:
>
> (i) There is gold in mineable quantities in the Busang? . . .
>
> (h) Were the representations identified by issue (g) made knowing that they were false or recklessly, caring not whether they were false or without exercising reasonable care and attention?

These common issues relate to two of the four components of the tort of fraudulent misrepresentation -- a false statement and two potential reasons (knowledge or recklessness) for the statement. In my view, they relate equally to two of the five components of the tort of negligent misrepresentation -- a false statement and one potential reason (carelessness) for the statement. My conclusion, therefore, is that there is a sufficient overlap in the legal claims of the plaintiffs, grounded in fraudulent misrepresentation and negligent misrepresentation, to justify certification for both claims.

[45] Fourth, in my view there is a substantial overlap of factual issues common to both torts. There are two core issues in this litigation: first, was there gold in mineable quantities in the Busang; and second, if there was not, what was the various defendants' knowledge of the true state of affairs?

[46] The defendants' conduct with respect to the first question was manifested in the 160 statements and press releases which informed the public about exploration developments in the Busang. These 160 statements will have to be analyzed in the context of the fraudulent misrepresentation claim. The analysis might become somewhat complicated. For example, it cannot be said categorically that the fraud crystallized with the first press release on May 6, 1993 and that all of the other statements from Bre-X during the next four years were mere elaborations on the crystallized fraud. This would not be true for several of the named defendants who were not associated with Bre-X in 1993 -- for example, Francisco, Lyons and Kavanagh. It follows that an individualized assessment of each defendant's conduct will be required in the certified class action relating to fraudulent misrepresentation.

[47] Given this reality, I see no principled basis for treating the claim in negligent misrepresentation differently. Under both torts, the focus will be on the defendants, their knowledge and their conduct. Did they know (fraud) that there was no gold in the Busang? Were they careless about (negligence) their knowledge of the state of affairs in the Busang? The answers to these questions under the tort of fraudulent misrepresentation might be different for each defendant. Some might have participated in the fraud from its inception. Some might have joined the fraud later. Others might never have known that there was a fraud or participated in it in a fashion that might give rise to liability. Precisely the same thing can be said about the tort of negligent misrepresentation. Some of the defendants might have been careless about the state of affairs in the Busang from the outset. Some might have become careless later. Others might never have been careless or participated in Bre-X's affairs in a fashion that would give rise to liability. In short, the complexity that exists with respect to determining the defendants' states of mind and conduct is inherent in both torts. It follows that certification should either be granted or withheld for both claims.

[48] I make one other observation with respect to the overlap of factual issues common to both torts. Both the motions judge and the Divisional Court attached great significance to the fact that the contested

representations by Bre-X were not made on a single occasion; rather, they took the form of 160 statements and press releases. In the eyes of the motions judge and the Divisional Court, this posed particularly difficult problems on the reliance component of the tort of negligent misrepresentation. As expressed by the Divisional Court [at pp. 316-17 O.R.]:

> The alleged negligent misrepresentations include 160 or more Bre-X press releases over a four-year period beginning May 10, 1993. The representations were different in content and made at different times by different people for different reasons. . . . As Winkler J. pointed out, the case of each individual plaintiff requires an individual inquiry as to what representations he or she relied upon and how he or she was affected by the particular representation. These individual inquiries cannot be circumvented.

[49] With respect, I think it is a mistake, at this early juncture of the litigation, to overemphasize the number and diversity of Bre-X's representations. One of the potential benefits of a class action with certified common issues relating to the knowledge and conduct of the defendants is that the resolution of those issues might narrow substantially the subsequent inquiries on the plaintiffs' side of the coin. As I understand the theory of the plaintiffs, the named defendants participated in a scheme to promote Bre-X shares by embarking on a program of issuing press releases they knew to be false, that portrayed the assay results from the Busang site as demonstrating the existence of a gold mine of staggering dimensions. If these facts can be established by the plaintiffs, the questions raised in para. 8(f) of the order declaring the common issues must be addressed. What did the individual defendants know about the promotional fraud? Here, if knowledge of the fraud cannot be attributed to a given defendant, the lesser degree of complicity respecting carelessness can be addressed. At this stage of the proceedings, the court does not know what this will entail by way of evidence. It is possible -- I put it no higher -- that fixing the knowledge and conduct of each Bre-X insider will present a much clearer picture. For example, if the moment when a Bre-X insider became careless about a representation or representations in which he participated could be isolated, the subsequent consideration, admittedly in individual trials, of such issues as duty of care and reliance might be rendered more focussed and manageable. This would "move the litigation forward". In short, the existence of 160 representations should not be used as a reason to refuse certification as a class action; rather, certification is, potentially, a way of reducing those 160 representations to a much smaller number of relevant ones.

[50] Fifth, in this action and in five companion actions, the plaintiffs made claims against five stock brokerage firms which provided investment advice and services to them. The motions judge concluded that the claims of fraudulent misrepresentation and negligent misrepresentation against the brokerage firms raised common issues appropriate for certification. He said [at pp. 236-38 O.R.]:

> . . . I accept the plaintiffs' contention that common issues are raised on the basis that it is arguable that a finding can be made at a common issue trial that there is a point in time at which the analysts were, or ought to have been, aware of the alleged fraud.
>
> . . . . .
>
> The essence of misrepresentation is the negligent statement. If a point in time is fixed at which the analysts knew or ought to have known of the alleged fraud, then any statement to the contrary after that point is an inaccurate, negligently made statement. Such a finding would advance the litigation.

I agree with this analysis. In my view, if the words "Bre-X insiders" were substituted for "analysts", this reasoning would be equally applicable.

[51] In summary, the motions judge and the Divisional Court certified 15 common issues as appropriate for resolution in a class proceeding. The focus of these common issues is the knowledge and conduct of the defendants, the Bre-X insiders. The conduct, especially the reliance, of the plaintiffs stays on the sidelines at this juncture in the litigation. The plaintiffs advance four claims against the defendants. The courts below certified three of them, including the claim for fraudulent misrepresentation. I agree with these components of the courts' decisions. However, the courts below refused to certify the claim in negligent misrepresentation. For the above reasons, I am of the view that they erred in this refusal. After setting out the definitions of fraudulent and negligent misrepresentation, the motions judge said [at p. 196 O.R.]: "The essence of each tort is the representation made by the defendant to the plaintiff." I agree with that statement. However, in my view it serves to bind together, not divide, the treatment of both claims under the CPA.

(2) The "preferable procedure" issue

[52] Section 5(1)(d) of the CPA provides that a court shall certify a class proceeding if it would be the preferable procedure for the resolution of the common issues. The motions judge concluded that a class proceeding was not the preferable procedure for the claim of negligent misrepresentation. He said [at p. 202 O.R.]:

> I have concluded that there are no common issues concerning the claim in negligent misrepresentation but even if I had not so concluded, I would nevertheless find that a class proceeding is not the preferable procedure for the resolution of any such issues for the reasons particularized in the SNC-Carom II and Brokers actions.

The Divisional Court agreed with the motions judge's reasoning and conclusion on this point.

[53] The SNC-Carom II and Brokers actions were companion actions brought by the plaintiffs against, respectively, companies which analyzed Bre-X's Busang project and stock brokerage firms which advised, and sold shares to, the plaintiffs. The crucial fact of these companion actions was that the claims of negligence and negligent misrepresentation were the only claims against the defendants. After a careful review of the relevant factors, the motions judge determined that a class proceeding was not a preferable procedure.

[54] The crucial difference in the present appeal is that a class action has already been certified for three of the four claims advanced by the plaintiffs. The question then becomes: if most of the plaintiffs' claims will proceed in a class proceedings context, is there a strong reason to exclude the claim in negligent misrepresentation from the proceedings? In my view, for several reasons, the answer to this question is "No".

[55] First, and at a general level, I am not aware of any Ontario case, before this one, in which some of the potential claims were certified while others were not certified. Anderson v. Wilson, supra, Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Gen. Div.), Maxwell v. MLG Ventures Ltd., [1995] O.J. No. 1136 (Gen. Div.), and Peppiatt v. Nicol (1993), 16 O.R. (3d) 133, 20 C.P.C. (3d) 272 (Gen. Div.) are all cases in which certifications were ordered. In several of these cases there were multiple claims advanced by the plaintiffs. On the other hand, Hollick v. Metropolitan Toronto (Municipality) (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (C.A.), [See Note 2 at end of document] Controltech Engineering Inc. v. Ontario Hydro, supra, Rosedale Motors Inc. v. Petro-Canada Inc., supra, Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63, 22 C.P.C. (4th) 198 (Div. Ct.), and Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (3d) 453, 121 D.L.R. (4th) 496 (Div. Ct.) are all cases in which certification was refused. Again, in several of these cases there were multiple claims

against the defendants. The implicit message from these results is that the courts seem to employ a starting point or presumption -- I put it no higher -- in favour of either complete certification or no certification. The decisions of the motions judge and Divisional Court in the present matter are not in tune with these results.

[56] Second, in my view there is substantial merit in trying to utilize the CPA to deal with as many issues as possible. On this point, the motions judge's analysis of the relationship among the three claims he certified is instructive [at p. 202 O.R.]:

> Since I have found a class proceeding to be the preferable procedure for resolving the common issues in respect of the claim in conspiracy, I have concluded as well that it is in keeping with the goals of the CPA to determine the common issues arising out of the claims in fraudulent misrepresentation and breach of the Competition Act as part and parcel of the inquiry. The determination of the common issues proposed for the claims in fraudulent misrepresentation and under the Competition Act will not unduly complicate the common issue trial. In my view, it advances the goals of judicial economy to take advantage of the opportunity for efficiency presented by the common issue trial necessary for the claim in conspiracy. The fact that there will be a common issue trial between the same parties, on a claim which arises from the same background circumstances, favours including the common issues arising from claims in fraudulent misrepresentation and breach of the Competition Act, even though the plaintiffs may still have to engage in lengthy individual trials to determine the actual liability of the defendants on the claims. In these unique circumstances, the efficiencies achieved on the one hand, offset the inefficiencies on the other.

I agree with this analysis. I would simply extend it to the plaintiffs' fourth claim, the one in negligent misrepresentation.

[57] Third, I observe that the plaintiffs and defendants accept that detrimental reliance is an element of both the torts of fraudulent and negligent misrepresentation. Moreover, they agree that the reliance component will have to be dealt with at individual trials on the issue of fraudulent misrepresentation. Yet the defendants do not use this two-track scenario as a basis for challenging, by way of appeal or cross-appeal, the certification of the claim in fraudulent misrepresentation. In my view, this silence tells in favour of moving the negligent misrepresentation claim onto the same unchallenged track on which the fraudulent misrepresentation claim is already situated.

[58] Fourth, the fact that determination of some of the common issues relevant to the claim in negligent misrepresentation (or indeed the other three claims) will not resolve the entire litigation is not determinative. Certification can be the preferable procedure in situations far short of final resolution of the lawsuit.

[59] On this point, the decision of this court in Anderson v. Wilson, supra, is instructive. In that case, the court certified claims in negligence and breach of contract by patients exposed to Hepatitis B through electroencephalogram tests administered by the defendant clinics. The court found that the class proceeding could not resolve the ultimate issues of liability and damages because it could not provide an answer to the pivotal question of causation. In those circumstances, Carthy J.A. framed the question in these terms, at p. 683 O.R.:

> The question then becomes whether there are sufficient common issues left to justify certification. In my view, it seems sensible with this number of potential plaintiffs and the

> similarities that are evident in their claims, that any potential efficiency in advancement of their claims through the flexibility provided by the CPA should, where reasonable, be utilized.

[60] In my view, this passage evinces a proper understanding of, and respect for, the objectives of the CPA. The CPA does provide a flexible procedure for dealing with multiple plaintiffs with similar claims, usually arising out of a single accident, catastrophe or other major event.

[61] Carthy J.A. then proceeded to answer his own question in Anderson v. Wilson. He said, at pp. 683-84 O.R.:

> In this case, the common issue as to the standard of conduct expected from the clinics from time to time, and whether they fell below the standard, can fairly be tried as a common issue. Resolving this issue would move the litigation forward. The participation of the class members is not needed for that inquiry, although their later evidence may bear upon whether standards, such as the use of gloves, were actually met in individual cases. Isolating this one major issue, the class action proceeding clearly appears to be the preferable method of resolution to the benefit of all parties.

[62] A similar analysis can be made in the present appeal. The major common issue in this action is the knowledge and conduct of the Bre-X insiders. What did they know about gold in the Busang and when did they know about it? And, given their knowledge, what did they tell the public and what legal rubrics (innocent, false, careless, anti-competitive, conspiratorial) should be attached to their statements? The answers to some of these questions may become complicated. Moreover, different answers may be required for different defendants. However, the complications are offset by two overarching considerations. First, the presence and the stories of the plaintiffs are not required for the first stage of the lawsuit. The focus is on the defendants, their knowledge and their conduct. The determination of these matters, although perhaps difficult, will move the litigation forward. Second, it is uncontroverted that there will be a class proceeding with respect to three of the plaintiffs' claims. In that context, it seems sensible and desirable to place the claim of negligent misrepresentation on the same litigation track.

Disposition

[63] I think it important, and fair, to place the disposition of this appeal in a proper context. The Bre-X debacle has given rise to seven separate lawsuits involving three different groups of defendants -- the Bre-X insiders, external analyst corporations and stock brokerage firms. The plaintiffs have sought certification of all of their legal claims in all seven actions. A single judge, Winkler J., has been charged with dealing with all class proceedings aspects of these actions. In a series of comprehensive, careful and, I might say, timely decisions, the motions judge has resolved many important and difficult issues, including whether there are causes of action, the definition of the plaintiff class, mechanisms for non-residents of Ontario to participate (or not) in the class proceedings, and, ultimately, the appropriateness of certification of class actions in terms of the statutory criteria of "common issues" and "preferable procedure". In all of this, the vast majority of the motions judge's decisions have been accepted by the parties.

[64] The sole exception -- and it is a minor one in the grand scheme of the lawsuits relating to Bre-X -- is this appeal, which challenges the decisions of the Divisional Court and the motions judge refusing to certify the plaintiffs' claim in negligent misrepresentation against the Bre-X insiders.

[65] For the reasons I have outlined above, I would allow the appeal. Paragraph 9 of the Order of the Superior Court of Justice should be amended by deleting reference to the claim in negligent misrepresentation.

[66] In my view, the appellants are entitled to their costs of the appeal, including the motion for leave to appeal. The appellants are also entitled to their costs in the Divisional Court. The costs order of the motions judge should stand.

Order accordingly.

Notes

Note 1: Mr. Walsh is deceased. The action continues against his estate with his wife, Jeannette Walsh, as estate trustee.

Note 2: Leave to appeal granted on September 21, [2000] S.C.C.A. No. 41.

Cloud et al. v. The Attorney General of Canada et al.

[Indexed as: Cloud v. Canada (Attorney General]

73 O.R. (3d) 401
[2004] O.J. No. 4924
Docket: C40771

Court of Appeal for Ontario,
Catzman, Moldaver and Goudge JJ.A.

December 3, 2004

*Applications for leave to appeal to the Supreme Court of Canada were dismissed with costs May 12, 2005 (Major, Fish and Abella JJ.)

Civil procedure — Class proceedings — Certification — Identification of class — Common issues — Preferable procedure — Action with respect to injuries suffered by members of First Nations who were residents at residential school operated by federal government and church — Claims for breach of fiduciary duty, negligence, assault, sexual assault, battery and breach of aboriginal rights — Certification granted — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1).

The plaintiffs, who were members of various First Nations, sought to bring a class proceeding pursuant to the Class Proceedings Act, 1992 (the ôCPAö) on behalf of the former students of the Mohawk Institute Residential School (the ôSchoolö), which was located near the Six Nations Reserve in Brantford, Ontario. The plaintiffs sought damages for breach of fiduciary duty, negligence, assault, sexual assault, battery and breach of aboriginal rights. They alleged that the residential school was designed and operated to create an atmosphere of fear, intimidation and brutality, and that it had the aim of promoting the assimilation of native children. The plaintiffs also sought damages on behalf of their family members pursuant to the Family Law Act, R.S.O. 1990, c. F.3. The action was against those alleged to be responsible for running the residential School from 1922 to 1969; that is, the plaintiff's action was on behalf of the approximately 1,400 native children that attended the Sc hool and against the Attorney General of Canada, the General Synod of the Anglican Church of Canada, the Incorporated Synod of the Diocese of Huron and the New England Company, an English charitable organization with the mission of teaching the Christian religion and English language to the native peoples of North America.

The plaintiffs sought certification of the action pursuant to s. 5(1) of the CPA. Haines J. dismissed the motion, and his order was affirmed by a majority of the Divisional Court (Gravely and Valin JJ., Cullity J., dissenting). The court found that the action should not be certified, primarily because there was no identifiable class of plaintiffs and no common issues and, therefore, a class action could not be the preferable procedure. The action was viewed as one in which the issues were almost exclusively unique to each student and hence required adjudication individual by individual. Leave to appeal having been granted, the plaintiffs appealed.

Held, the appeal should be allowed.

The criteria for certification under s. 5(1) of the CPA were satisfied. With respect to the cause of action criterion set out in s. 5(1)(a), the parties agreed that the pleadings disclosed causes of action,

including the claims for breach of fiduciary duty owed to the student class and to the members of the families and sibling classes.

To satisfy the identifiable class requirement of s. 5(1)(b), each class must be bounded and not of unlimited membership and there must be some rational relationship between the classes and the common issues. It is not necessary that all class members fully share a cause of action; the shared interest need only extend to the resolution of the common issues. All the dimensions of this requirement were satisfied. ***[page402]***

The underlying question for the common issues requirement of s. 5(1)(c) is whether allowing the action to proceed as a representative one will avoid duplication of fact-finding or legal analysis. An issue will be common only if its resolution is necessary to the resolution of each class member's claim and if it is a substantial ingredient of each of the class members' claims. However, an issue can constitute a substantial ingredient even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided. That there are numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure. The task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues that may remain after the common trial.

Cullity J. approached the commonality issue correctly and reached the right result. He found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. The need to determine the existence of these duties and whether they were breached in respect of all class members was a significant part of the claim of each class member. A significant part of the claim of every class member focused on the way that the defendants ran the School. No individual can succeed in his or her claim to recover for harm suffered without establishing the defendants' obligations and their breach. The common trial will take these claims to the point where only causation and harm remain to be established. The claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement.

The preferability requirement of s. 5(1)(d) has two core concepts: (1) whether or not the class action would be a fair, efficient and manageable method of advancing the claim; and (2) whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification. The inquiry must take into account the importance of the common issues in relation to the claim as a whole, but the preferability requirement can be met even where there are substantial individual issues. The common issues need not predominate over the individual issues; rather, the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action. In the immediate case, the nature and exten t of the legal duties owed by the defendants to the class members and whether those duties were breached will be of primary importance in the action as framed. The resolution of these common issues takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action. A single trial of the common issues will achieve substantial judicial economy and enhance access to justice.

The workable litigation plan requirement of s. 5(1)(e)(ii) was satisfied. Accordingly, the action satisfied all the requirements of s. 5(1) of the CPA and must therefore be certified.

Cases referred to

Bonaparte v. Canada (Attorney General) (2003), 64 O.R. (3d) 1, [2003] O.J. No. 1046 (C.A.) (sub nom. Lafrance Estate v. Canada (Attorney General)); ***[page403]*** Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014, 196 D.L.R. (4th) 344, 1 C.P.C. (4th) 62, 11 B.L.R. (3d) 1 (C.A.) (sub nom. 3218520 Canada Inc. v. Bre-X Minerals Ltd.); Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 205 D.L.R. (4th) 19; Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93, 49 B.C.L.R. (2d) 273, 74 D.L.R. (4th) 321, 117 N.R. 321, [1990] 6 W.W.R. 385, 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105 (sub nom. Hunt v. T & N plc); Rumley v. British Columbia, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 95 B.C.L.R. (3d) 1, 205 D.L.R. (4th) 39, 275 N.R. 342, [2001] 11 W.W.R. 207, 2001 SCC 69, 10 C.C.L.T. (3d) 1, 9 C.P.C. (5th) 1; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534 , [2000] S.C.J. No. 63, 94 Alta. L.R. (2d) 1, 201 D.L.R. (4th) 385, 272 N.R. 135, [2002] 1 W.W.R. 1, 2001 SCC 46, 8 C.P.C. (5th) 1 (sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere)

Statutes referred to

Class Proceedings Act, R.S.B.C. 1996, c. 50

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 10, 24, 25

Crown Liability Act, S.C. 1952-53, c. 30

Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50, s. 24(1) [as am.]

Family Law Act, R.S.O. 1990, c. F.3

Indian Act, R.S.C. 1906, c. 81

APPEAL from the order of the Divisional Court (Gravely and Valin JJ., Cullity J., dissenting) (2003), 65 O.R. (3d) 492, [2003] O.J. No. 2698.

Kirk M. Baert and Russell M. Raikes, for appellants.

Paul Vickery, Monika Lozinska and Donald Padget, for respondent Attorney General of Canada.

Robert B. Bell, for respondent New England Company.

Brian T. Daly and Lisa Gunn, for respondent Diocese of Huron.

The judgment of the court was delivered by

GOUDGE J.A.: —

Introduction

[1] The appellants seek to bring this action on behalf of the former students of the Mohawk Institute Residential School [the ôSchoolö], a native residential school in Brantford, Ontario, and their families.

They seek to recover for the harm said to have resulted from attending the School. The action is against those said to be responsible for running the School, namely Canada, the Diocese of Huron and the New England Company.

[2] The question before us is whether the action should be certified pursuant to s. 5(1) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the ôCPAö).

[3] The motion judge and the majority of the Divisional Court found that the action should not be certified, primarily because ***[page404]*** they saw no identifiable class of plaintiffs and no common issues, and, therefore, a class action could not be the preferable procedure. Rather, they viewed the case as one in which the issues were almost exclusively unique to each student and hence required adjudication individual by individual.

[4] Cullity J. dissented in the Divisional Court. He found that the criteria for certification set out in s. 5 (1) of the CPA were met. He found that there were common issues of sufficient relative importance in the context of the action as a whole that it should be certified.

[5] In a case like this, set in the context of a residential school, the primary challenge is to determine if there are common issues and then, in light of the almost inevitable individual issues, to assess the relative importance of those common issues in relation to the claim as a whole. That question is centre stage in this appeal.

[6] Cullity J. decided in favour of certification. I agree with his conclusion and, in large measure, with his analysis. Thus, for the reasons that follow, I would allow the appeal and certify the action.

The Background

[7] The legislative context for this appeal is found in s. 5(1) of the CPA. It provides that an action must be certified if certain specified criteria are met. The subsection reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members. ***[page405]***

[8] The facts relevant to this appeal centre on the Mohawk Institute Residential School which was located in Brantford near the Six Nations Reserve. The School began its existence in 1828 as a residential school for First Nations children. It was founded by the New England Company, an English

charitable organization dating back to the 17th century, with the mission of teaching the Christian religion and the English language to the native peoples of North America.

[9] The New England Company ran the School until 1922, when it leased the School to the federal government. Under the lease, Canada agreed to continue the School as an educational institution for native children and agreed to continue to train them in the teachings and doctrines of the Church of England. Indeed, in 1929, Canada sought to appoint an Anglican clergyman as principal of the School and looked to the Bishop of the Diocese of Huron to nominate appropriate candidates, a selection process that was repeated in 1945. The lease also entitled the New England Company to maintain some measure of control over the premises. It was renewed in similar terms in 1947 and ran until 1965, when the New England Company sold the School to Canada. Four years later, in 1969, the School closed.

[10] This action covers the years from 1922 to 1969. During that time, there were 150 to 180 students at the School each year, ranging in age from four to 18 and split roughly equally between boys and girls. All were native children, that is Indians within the meaning of the Indian Act, R.S.C. 1906, c. 81, as amended. In all, approximately 1,400 native children attended the School in these years. They constitute the primary class of claimants proposed for this action. The appellants put forward two additional classes, a ôsiblingsö class (namely the parents and siblings of the students) and a ôfamiliesö class (namely their spouses and children).

[11] The appellants are members of the various First Nations from which the students came. They allege that Canada, the New England Company and the Diocese of Huron, either singly or together, were responsible for the operation and management of the School.

[12] Broadly put, their claim is that the School was run in a way that was designed to create an atmosphere of fear, intimidation and brutality. Physical discipline was frequent and excessive. Food, housing and clothing were inadequate. Staff members were unskilled and improperly supervised. Students were cut off from their families. They were forbidden to speak their native ***[page406]*** languages and were forced to attend and participate in Christian religious activities. It is alleged that the aim of the School was to promote the assimilation of native children. It is said that all students suffered as a result.

The Judgments Below

[13] The statement of claim commencing this action was issued on October 5, 1998. It seeks damages on behalf of the students for breach of fiduciary duty, negligence, assault, sexual assault, battery, breach of aboriginal rights and breach of treaty rights. Damages are also claimed on behalf of the siblings and families of the students for breach of fiduciary duty and for loss of care, guidance and companionship pursuant to the Family Law Act, R.S.O. 1990, c. F.3. Finally, the statement of claim advances a claim for punitive damages.

[14] In June of 2001, the appellants sought certification of the action pursuant to the CPA, although they excluded the claims for sexual assault from that request.

[15] Haines J. dismissed the motion. He dealt in turn with each of the criteria for certification set out in s. 5(1) of the CPA. He found that it is plain and obvious that any claims arising from acts or omissions before May 14, 1953, when the Crown Liability Act, S.C. 1952-53, c. 30 came into effect, cannot succeed because the Superior Court of Justice has no jurisdiction to consider those claims. For the period from 1953 to 1969 he concluded that the pleadings were sufficient to disclose a cause of action for breach of fiduciary duty, for the torts alleged, and for breach of aboriginal rights, but not for breach

of treaty rights. Finally, he found it plain and obvious that the claims of the siblings and family members could not succeed.

[16] The motion judge then examined whether there was an identifiable class and whether there were any common issues. He found neither, because in essence he could see no cause of action common to all the students who attended the school between 1922 and 1969. He found that the circumstances and experiences of the students were far too diverse to support the notion that the respondents owed identical duties to each student, nor could it be said that, to the extent these duties were breached against one, they were breached against all.

[17] The motion judge then briefly addressed the preferability criterion. He concluded that it was not met because of the wide variety of important individual issues requiring independent inquiry, and thus certification would not serve the objectives of access to justice, judicial economy and behaviour modification. ***[page407]***

[18] Lastly, the motion judge found the appellants to be suitable representatives but the proposed litigation plan to be unworkable in that it sought a common minimum award of damages for each student who had attended the school.

[19] In dismissing the motion for certification, the motion judge summed up his conclusion at para. 80 of his reasons:

> I have concluded that the statement of claim does disclose a cause of action with respect to certain claims of the student plaintiffs. I have found, however, that the plaintiffs have failed to establish there is an identifiable class and have failed to demonstrate their claims raise common issues. In the result, the motion for certification is dismissed.

[20] On appeal, the majority of the Divisional Court upheld this conclusion. They agreed with the motion judge that the Superior Court of Justice has no jurisdiction over claims arising before May 14, 1953, and that the claims of family members under the Family Law Act must fail because they are based on legislation first enacted in 1978 that cannot be given retroactive effect, as decided in this court's decision in Bonaparte v. Canada (Attorney General) (2003), 64 O.R. (3d) 1, [2003] O.J. No. 1046 (C.A.).

[21] Although the majority noted that the motion judge found no common issues, they did not discuss either that conclusion or his finding that there was no identifiable class. Rather, they found it necessary to address only the preferability criterion in s. 5(1)(d) of the CPA. They concluded that there was no evidence of access to justice difficulties with individual students pursuing individual claims and no need to consider behaviour modification because residential schools are now a thing of the past in Canada. Most importantly, they concluded that no judicial economy would be achieved by certification because no matter how any common issues might be framed, their resolution would do nothing to avoid or limit the individual claims which would be inevitable, given the diverse experiences of each student. Finally, they said that a class action would be unfair to the defendants and would create an unmanageable trial.

[22] Cullity J. dissented. He found each of the five criteria in s. 5(1) of the CPA to be satisfied, and concluded that the appeal should be allowed and the action certified.

[23] In addressing whether the pleadings disclose a cause of action as required by s. 5(1)(a), he found that claims against the Crown for vicarious liability for the actions of its employees prior to May 14, 1953, can be brought in the Superior Court of Justice because of the jurisdiction given to that court by

the Crown Liability and Proceedings Act, R.S.C. 1985, c. C-50 as amended, and because the ban in s. 24 (1) of the Crown Liability Act does not ***[page408]*** extend to claims like this because they could have been brought against the Crown before May 14, 1953, in the Exchequer Court.

[24] Similarly, he found that the claim against the Crown for breach of fiduciary duty is a claim in equity that could have been brought against the Crown in the Exchequer Court before May 14, 1953, and can therefore now be brought in the Superior Court even if it arises before that date. Although he does not say so expressly, it is implicit in his reasons that he treated the claim for breach of aboriginal rights in the same way, because he found it to be a common issue as well.

[25] However, he agreed with the motion judge that the claims in tort for breach of duty owed by the Crown directly to class members can only be advanced if they arose after May 14, 1953. Finally, he also agreed that the claim pursuant to the Family Law Act cannot stand.

[26] He found that the requirement that there be an identifiable class was also met. He held that the members of the class of individuals who were students at the school between 1922 and 1969 could be ascertained by objective criteria rationally linked to the common issues he identified.

[27] He also concluded that the families and siblings of the students both constituted identifiable classes, provided that the claim for breach of fiduciary duty owed to them by the Crown could be said to disclose a cause of action sufficient to meet the criterion in s. 5(1)(a).

[28] He then turned to examine in more detail whether the claims of class members raised common issues as required by s. 5(1)(c). He began by describing the sizeable challenge faced by the motion judge on this score, given that the litigation plan first presented by the plaintiffs proposed a list of 53 common issues. Many, such as how the operations of the school were funded, were drafted with such particularity that their resolution would be of little moment in the trial of these claims. He quite rightly pointed out that although class actions often require active and continual management of the proceedings by the court, plaintiffs' counsel nonetheless has the responsibility to establish that the criteria for certification are met, including the identification of common issues. Counsel cannot expect the judge on a certification motion to single-handedly fashion the common issues in order to meet the requirements of s. 5(1)(c).

[29] By the time of the appeal to the Divisional Court, the appellants had reworked their list and were proposing eight more broadly framed common issues. Cullity J. found that with some further refashioning there were common issues sufficient to satisfy s. 5(1)(c). He placed considerable reliance on the reasons of ***[page409]*** the Supreme Court of Canada in Rumley v. British Columbia, [2001] 3 S.C.R. 184, [2001] S.C.J. No. 39, 205 D.L.R. (4th) 39 which were released after the decision of the motion judge here. He focused on the duty of care said to be owed to all members of the student class and the fiduciary duty owed both to them and the families and siblings classes. He found that the common issues could be defined in terms of these duties and their breach. He described his conclusion about the common issues at paras. 25 and 31 of his reasons:

> As in Rumley, they would include a failure to have in place management and operations procedures that would reasonably have prevented abuse and, in addition, issues similar to those described by the Court of Appeal in Bonaparte as the essence of the claims for breach of fiduciary duty against the Crown in that case: namely, whether ôthe very purpose of the Crown's assumption of control over the primary plaintiffs was to strip the Indian children of their culture and identity, thereby removing, as and when they became adults, their ability aeto pass on to succeeding generations the spiritual, cultural and behavioural

bases of their people.'ö

. . . . .

> While I would not accept without modification the original formulation -- or the reformulation -- of the common issues proposed on behalf of the plaintiffs, such issues could, I believe, be defined in terms of the existence and breach of duties of care, and fiduciary duties, owed by the defendants to class members -- and the infringement of the aboriginal rights of the members -- with respect to the purposes, operations, management and supervision of the Mohawk Institute and with respect to each of the categories of harm referred to in paras. 51 and 52 of the statement of claim. The issues relating to the existence and breach by the Crown of duties of care in tort would be confined to conduct that occurred after May 13, 1953. I would also include as common issues the claim for punitive damages arising from any of the above breaches that are proven and the possibility of an aggregate assessment of damages.

[30] He did, however, go on to reject the claim for vicarious liability, finding that because the claim addressed the conduct of particular employees towards particular students it could not qualify as a common issue.

[31] Finally, he turned to the preferability requirement of s. 5(1)(d). He found that any deference owed to the motion judge on this issue was displaced because the preferability analysis can be properly done only in light of the common issues identified and the motion judge identified none. He went on to conclude that the trial of the common issues he identified would be a fair, efficient and manageable method of advancing the claims pleaded and would be preferable to other procedures. Unlike his colleagues, he accepted the evidence of the vulnerability of class members and thus found that the objective of access to justice would be served to an appreciable extent by certification. ***[page410]*** However, he gave most weight to the judicial economy to be achieved by having one trial of the common issues rather than 1,400.

[32] In summary, he found that the focus of the trial of the common issues would be on the conduct of the respondents rather than on the precise circumstances of particular class members and that the existence of individual issues such as limitation periods or causation of harm to individual students was not enough to outweigh the conclusion that resolution of the common issues would significantly advance this action.

[33] He concluded by finding that although the proposed litigation plan required reformulation in light of his findings, its deficiencies were not sufficient to deny the motion. He would have allowed the appeal, granted certification and left the details of the litigation plan to be resolved by counsel under the supervision of the judge assigned to case manage the proceedings.

Analysis

[34] With leave, the appellants appeal to this court, seeking an order setting aside the orders of the Divisional Court and the motion judge and certifying the action. They invite us to do so on the basis of the reasoning of Cullity J. which they fully endorse. They argue that all five of the criteria in s. 5(1) of the CPA are met and that the court must therefore certify. The respondents contest each of these, some more vigorously than others, most pointedly the preferability requirement.

[35] Before addressing in turn each of these factors, it is helpful to repeat the full subsection and set

out the principles applicable to its application as they have been developed by the Supreme Court of Canada and this court. Section 5(1) reads as follows:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of application discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant 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 ***[page411]*** class and of notifying class members of the proceeding, and
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[36] The Supreme Court of Canada has issued three important decisions to guide the development of class actions in Canada: Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, [2000] S.C.J. No. 63, 201 D.L.R. (4th) 385; Hollick v. Toronto (City), [2001] 3 S.C.R. 158, [2001] S.C.J. No. 67, 205 D.L.R. (4th) 19, and Rumley, supra. In Hollick, the Supreme Court of Canada had its first opportunity to enunciate the interpretive approach to be applied to the CPA in general and to its certification provisions in particular.

[37] Speaking for the court at paras. 14-16, McLachlin C.J.C. made clear that in light of its legislative history, the CPA should be construed generously and that an overly restrictive approach must be avoided in order to realize the benefits of the legislation as foreseen by its drafters, namely serving judicial economy, enhancing access to justice and encouraging behaviour modification by those who cause harm. She underlined the particular importance of keeping this principle in mind at the certification stage.

[38] In addition, she emphasized that the certification stage is decidedly not meant to be a test of the merits of the action, but rather focuses on its form. As she said at para. 16, ôThe question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action.ö

[39] For its part, this court has said that because of the expertise developed in this new and evolving field of class actions by the small group of judges across the province who have significant experience in hearing certification motions, an appellate court should proceed with deference and should restrict its intervention to matters of general principle. See Carom v. Bre-X Minerals Ltd. (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.). This admonition is somewhat complicated in this particular case because both Haines J. and Cullity J. have been part of that small group.

[40] It is against this backdrop then that the debate between the parties on each of the requirements of s. 5(1) must be considered.

The Cause of Action Criterion -- s. 5(1)(a)

[41] It is now well established that this requirement will prevent certification only where it is ôplain and obviousö that the pleadings disclose no cause of action, as that test was developed in ***[page412]*** Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, [1990] S.C.J. No. 93.

[42] Although the parties originally differed on whether that test is met here, by the time of argument in this court they had come to agree that the appellants' pleadings disclose the following causes of action within the meaning of that test:

(a) The claim for vicarious liability of the defendants over the full period of this action, namely 1922 to 1969 (although the appellants do not contest Cullity J.'s conclusion that these claims do not give rise to any common issue);
(b) The claim for breach of fiduciary duty owed to the members of the student class over the full time frame of the action;
(c) The claim for breach of fiduciary duty owed to the members of the families and siblings classes over the full time frame of the action (given this court's decision in Bonaparte, supra); and
(d) The claims for negligence of the defendants but only between 1953 and 1969.

[43] I agree with the parties that these causes of action survive the test in s. 5(1)(a). Although it was not the subject of separate argument before us, I would reach the same conclusion concerning the claim for breach of the aboriginal rights of the members of the student class over the full time frame of the action, because this claim is so closely akin to the claim for breach of fiduciary duty.

[44] On the other side of the coin, the appellants also now properly concede that the following claims cannot be proceeded with:

(a) The claims of the members of the families and siblings classes pursuant to the Family Law Act;
(b) The claims for negligence occurring before 1953; and
(c) The claims for breach of treaty rights (which the motion judge found were not made out on the pleadings and which the appellants did not thereafter pursue).

The Identifiable Class Requirement -- s. 5(1)(b)

[45] Hollick, supra, at para. 17, describes what is necessary to meet this requirement. The appellants are required to show that the three proposed classes are defined by objective criteria which can be used to determine whether a person is a member without ***[page413]*** reference to the merits of the action. In other words, each class must be bounded and not of unlimited membership. As well, there must be some rational relationship between the classes and the common issues. The appellants have an obligation, although not an onerous one, to show that the classes are not unnecessarily broad and could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues.

[46] As I have said, Haines J. found that the appellants failed to establish any identifiable class. In my view, he applied the wrong test in doing so by requiring that all students fully share a cause of action. This is inconsistent with Hollick, supra, which makes clear that the shared interest need only extend to the resolution of the common issues. The application of a wrong test is an error in principle and the decision which results can attract no deference. For its part, the majority of the Divisional Court did not address the identifiable class issue. However, Cullity J. found that the requirement in s. 5(1)(b) had been satisfied by the appellants.

[47] In my view, he was correct in doing so. The appellants satisfy all the dimensions of this requirement. Membership in the student class is defined by the objective requirement that a member have attended the school between 1922 and 1969. Membership in the families class requires that a person meet the objective criterion of being a spouse, common-law spouse or child of someone who was a student. Likewise, the siblings class is defined as the parents and siblings of those students. None of the three proposed classes is open-ended. Rather all are circumscribed by their defining criteria. All three classes are rationally linked to the common issues found by Cullity J. in that it is the class members to whom the duties of reasonable care, fiduciary obligation and aboriginal rights are said to be owed and they are the ones who are said to have experienced the breach of those duties. Finally, because all class members claim breach of these duties and that they all suffered at least some harm as a result, thes e classes are not unnecessarily broad. All class members share the same interest in the resolution of whether they were owed these duties and whether these duties were breached. Any narrower class definition would necessarily leave out some who share that interest. Thus I conclude that the identifiable class requirement is met.

The Common Issues Requirement -- s. 5(1)(c)

[48] As with each of the criteria in s. 5(1), the common issues requirement must be discretely addressed and satisfied for the ***[page414]*** action to be certified. However, there is no doubt that this analysis will often overlap with that required by other factors in s. 5(1). Indeed in some cases these inquiries may be somewhat interdependent. For example, the identification of common issues will often depend in part upon the definition of the identifiable class and vice versa. This particular interrelationship is reflected in the requirement that there be some rational relationship between the identifiable class and the common issues. Hence the discussion of common issues must have in mind the identifiable class, just as the discussion of identifiable class proceeded in light of the common issues.

[49] Moreover, like the other criteria in s. 5(1), save for the disclosure of a cause of action, the common issues criterion obliges the class representative to establish an evidentiary basis for concluding that the criterion is met. McLachlin C.J.C. put it this way in Hollick, supra, at para. 25: ôIn my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action.ö

[50] Hollick also makes clear that this does not entail any assessment of the merits at the certification stage. Indeed, on a certification motion the court is ill-equipped to resolve conflicts in the evidence or to engage in finely calibrated assessments of evidentiary weight. What it must find is some basis in fact for the certification requirement in issue.

[51] Hollick also explains the legal test by which the common issues requirement is to be assessed. After dealing with the identifiable class factor, the Supreme Court addressed this question at para. 18:

> A more difficult question is whether ôthe claims . . . of the class members raise common issuesö, as required by s. 5(1)(c) of the Class Proceedings Act, 1992. As I wrote in Western Canadian Shopping Centres, the underlying question is ôwhether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysisö. Thus an issue will be common ôonly where its resolution is necessary to the resolution of each class member's claimö (para. 39). Further, an issue will not be ôcommonö in the requisite sense unless the issue is a ôsubstantial . . . ingredientö of each of the class members' claims.

[52] This requirement has been described by this court as a low bar. See Carom, supra, at para. 42.

Indeed this description is consistent with the commonality finding in Hollick itself. The class action proposed there was on behalf of some 30,000 people who lived in the vicinity of a landfill site that was alleged to cause harm through noise and physical pollution. The Supreme Court found that the issue of whether the site emitted pollutants into ***[page415]*** the air met the test of s. 5(1)(c) because each class member would have to show this or see his claim fail. The court did not see this conclusion to be at all undermined by the fact that this common issue was but one aspect of the liability issue and a small one at that. It clearly accepted that after the trial of the common issue the many remaining aspects of liability and the question of damages would have to be decided individually. Yet it found the commonality requirement to be met.

[53] In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

[54] Neither the reasons of the motion judge nor those of the majority of the Divisional Court reflect this approach to the commonality assessment. The motion judge focused on those aspects of the claim that in his view would require individual determination, student by student. Although he did not have the benefit of the Supreme Court decision in Hollick, supra, he did not analyze what parts of the claim could be said to be common as explained in that decision. Moreover, in my view, he erred in his ultimate conclusion that there were no common issues. For its part, the majority of the Divisional Court felt it unnecessary to address this criterion.

[55] On the other hand, I think Cullity J. approached the commonality issue correctly and reached the right result. As I have described, rather than focusing on how many individual issues there might be and concluding from that that there could be no common issues, Cullity J. analyzed whether there were any issues the resolution of which would be necessary to resolve each class member's claim and which could be said to be a substantial ingredient of those claims.

[56] Relying on Rumley, he found that a substantial part of each claim was the alleged breach of the various legal duties said to be owed to all class members. For the student class these duties are framed in negligence, fiduciary obligation and aboriginal rights. For the other two classes the claim is one of fiduciary obligation. The need to determine the existence of these duties and whether they were breached in respect of all class members ***[page416]*** is a significant part of the claim of each class member. Finally, he found that the claim for an aggregate assessment of damages for the breaches found and the claim for punitive damages for the respondents' conduct also met the commonality requirement. Thus he found that s. 5(1)(c) was met.

[57] The appellants urge us to adopt Cullity J.'s conclusion. On the other hand, the respondents attack it in several ways.

[58] The respondents' basic challenge is that the claims of the class members are so fundamentally individual in nature that any commonality among them is superficial. I do not agree. Cullity J. focused on the appellants' claim of systemic breach of duty, that is whether, in the way they ran the School, the respondents breached their lawful duties to all members of the three classes. In my view, this is a part of every class member's case and is of sufficient importance to meet the commonality requirement. It is a real and substantive issue for each individual's claim to recover for the way the respondents ran the School. As the analysis in Hollick, supra, exemplifies, the fact that beyond the common issues there are

numerous issues that require individual resolution does not undermine the commonality conclusion. Rather, that is to be considered in the assessment of whether a class action would be the preferable procedure.

[59] The respondents also argue that the claim of systemic negligence in running the School cannot serve as a common issue because the standard of care would undoubtedly change over time as educational standards change. However, in my view this argument is answered by Rumley, which was also a claim based on systemic negligence in the running of a residential school for children. There the Supreme Court found that the class action proceeding is sufficiently flexible to deal with whatever variation in the applicable standard of care might arise on the evidence. In that case the claim covered a 42-year period. Here, in analogous circumstances, the negligence claim covers only 16 years, from 1953 to 1969.

[60] The respondents also say that the affidavit material shows that many of the appellants and other class members did not suffer much of the harm alleged, such as loss of language and culture. They argue that this underlines the individual nature of these claims and negates any commonality. Again, I disagree. There is no doubt that causation of harm will have to be decided individual by individual if and when it is found in the common trial that the respondents owed legal duties to all class members which they breached. However, this does not undermine the conclusion that whether such duties were owed, what the standard of care was, and whether the respondents breached those duties ***[page417]*** constitute common issues for the purposes of s. 5(1)(c).

[61] Equally the respondents' assertion of limitations defences does not undermine the finding of common issues. In the context of these issues, these defences must await the conclusion of the common trial. They can only be dealt with after it is determined whether there were breaches of the systemic duties alleged and over what period of time and when those breaches occurred. Only then can it be concluded when the limitations defence arose. Moreover, because an inquiry into discoverability will undoubtedly be a part of the limitations debate and because that inquiry must be done individual by individual, these defences can only be addressed as a part of the individual trials following the common trial. As with other individual issues, the existence of limitations defences does not negate a finding that there are common issues.

[62] The respondents other than Canada also argue that, at least for them, the finding of common issues by Cullity J. is undermined by their assertion that their proximity to Canada in exercising control over the operation of the School varied over time. Again, I disagree. At best that assertion may provide these respondents with a defence to the appellants' claims in the common trial for certain periods of time. Nonetheless the common issues remain and require resolution.

[63] Lastly, the respondents say that in reaching his conclusion about common issues, Cullity J. should not have relied on Rumley, but should have distinguished it. They say this essentially for two reasons. First, Rumley involved sexual abuse of students and therefore there could be little debate about the duty to prevent it owed by those running the school, whereas, here, the legal duties alleged are seriously contested. Second, they say that in Rumley there were very few individual issues requiring resolution because, for example, sexual abuse had been found to occur and there were no issues of vicarious liability or limitations requiring individual resolution.

[64] In my view, neither of these renders Rumley inapplicable to this case. Although the existence of the systemic duty of care to all students and its precise nature may be more hotly contested here than in Rumley, nonetheless the issue is a significant one requiring resolution for each class member and is a proper common issue.

[65] Moreover, at para. 33 of Rumley, the Supreme Court made clear that the comparative extent of individual issues is not a consideration in the commonality inquiry although it is obviously a factor in the preferability assessment. Although the court underlined that it was dealing with the British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50 (which explicitly states that ***[page418]*** the common issues requirement may be met whether or not these issues predominate over individual issues, whereas the CPA is silent on the point), in my view the same approach is implicit in the CPA. A weighing of the relative importance of the common issues and the remaining individual issues is necessarily an important part of the preferability inquiry. I do not think that the CPA contemplates a duplication of that task as part of the commonality inquiry. The CPA's silence on the point cannot be read as mandating the opposite of the B.C. legislation. Thus the extent of individual issues that may remain after the common trial in this case does not undermine the conclusion that the commonality requirement is met.

[66] I therefore agree that the appellants have met the commonality requirement. A significant part of the claim of every class member focuses on the way that the respondents ran the School. It is said that their management of the School created an atmosphere of fear, intimidation and brutality that all students suffered and hardship that harmed all students. It is said that the respondents did this both by means of the policies and practices they employed and because of the policies and practices they did not have that would reasonably have prevented abuse. Indeed, it is said that their very purpose in running the School as they did was to eradicate the native culture of the students. It is alleged that the respondents breached various legal duties to all class members by running the School in this way.

[67] In the affidavits of the ten representative plaintiffs there is a clear showing of some basis in fact supporting this description of the way in which the School was run. Although their cross-examinations support the conclusion that students were not all treated the same way and did not all experience the same suffering, the appellants have shown some basis in fact for their assertion that the management and operation of the School raises the common issues required for certification by s. 5(1)(c). They have met their evidentiary burden.

[68] The appellants acknowledge that if they are successful in the common issues trial it will be necessary to separately establish causation of harm and quantification of damages for each individual class member for all three classes.

[69] Nevertheless, it is my view that whether the respondents owed legal obligations to the class members that were breached by the way the respondents ran the School is a necessary and substantial part of each class member's claim. No individual can succeed in his or her claim to recover for harm suffered because of the way the respondents ran the School without establishing these obligations and their breach. The common trial will take ***[page419]*** these claims to the point where only causation and harm remain to be established. In my view, it will adjudicate a substantial part of each class member's claim by doing so. Hence the appellants have met the commonality requirement.

[70] I also agree with Cullity J. that in a trial of these common issues, the claims for an aggregate assessment of damages and punitive damages are properly included as common issues. The trial judge should be able to make an aggregate assessment of the damages suffered by all class members due to the breaches found, if this can reasonably be done without proof of loss by each individual member. Indeed, this is consistent with s. 24 of the CPA. As well, given that the common trial will be about the way the respondents ran the School and their alleged purpose in doing so, it can also properly assess whether this conduct towards the members of the three classes as a whole should be sanctioned by means of punitive damages.

[71] In summary, I agree with Cullity J. that the appellants have met the requirements set by s. 5(1)(c) of the CPA. The focus of the common trial will be on the conduct of the respondents as it affected all

class members, and how and for what purpose they ran the School. Although evidence from individuals that speaks to the respondents' systemic conduct may be relevant to this, findings of causation and extent of harm must await the individual trials to follow.

[72] As the class action proceeds, the judge managing it may well determine that the common issues should be restated with greater particularity in light of his or her experience with the class proceeding. To permit that process to unfold with flexibility, at this stage. I would state the common issues in general terms, as follows:

(1) By their operation or management of the Mohawk Institute Residential School from 1953 to 1969 did the defendants breach a duty of care owed to the students of the School to protect them from actionable physical or mental harm?
(2) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the students of the School to protect them from actionable physical or mental harm, or the aboriginal rights of those students?
(3) By their purpose, operation or management of the Mohawk Institute Residential School from 1922 to 1969 did the defendants breach a fiduciary duty owed to the families and siblings of the students of the School? ***[page420]***
(4) If the answer to any of these common issues is yes, can the court make an aggregate assessment of the damages suffered by all class members of each class as part of the common trial?
(5) If the answer to any of these common issues is yes, were the defendants guilty of conduct that justifies an award of punitive damages?
(6) If the answer to that is yes, what amount of punitive damages is awarded?

The Preferable Procedure Requirement -- s. 5(1)(d)

[73] As explained by the Supreme Court of Canada in Hollick, supra, at paras. 27-28, the preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members. The analysis must keep in mind the three principal advantages of class actions, namely judicial economy, access to justice and behaviour modification, and must consider the degree to which each would be achieved by certification.

[74] Hollick also decided that the determination of whether a proposed class action is a fair, efficient and manageable method of advancing the claim requires an examination of the common issues in their context. The inquiry must take into account the importance of the common issues in relation to the claim as a whole.

[75] At para. 30 of that decision the court also makes clear that the preferability requirement in s. 5(1)(d) of the CPA can be met even where there are substantial individual issues and that its drafters rejected the requirement that the common issues predominate over the individual issues in order for the class action to be the preferable procedure. This contrasts with the British Columbia legislation in which the preferability inquiry includes whether the common issues predominate over the individual cases.

[76] In Ontario it is nonetheless essential to assess the importance of the common issues in relation to the claim as a whole. It will not be enough if the common issues are negligible in relation to the individual issues. The preferability finding in Hollick itself was just this and the requirement was

therefore found not to be met. That decision tells us that the critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action. ***[page421]***

[77] Neither the motion judge nor the majority of the Divisional Court properly addressed this vital aspect of the preferability inquiry, and thus their conclusion cannot stand. As Cullity J. said, the determination of whether, in the context of the entire claim, the resolution of the common issues will significantly advance the action can only be done in light of the particular common issues identified. Here the motion judge found none and therefore could not make this assessment. The majority of the Divisional Court did not address the common issues requirement but simply stated its conclusion that any attempt to formulate common issues in terms of systemic negligence would not significantly advance the litigation given the numerous individual claims. With respect, without an articulation of what the common issues are, any assessment of their relative importance in the context of the entire claim cannot be properly made. It would risk a conclusion based not on relative importance but simply on the existen ce of a large number of individual issues. It would also preclude any appellate review.

[78] On the other hand, as I have outlined, Cullity J. found that in the context of the entire claim the resolution of the common issues he found would significantly advance the action and that otherwise the preferability requirement was met. I agree with that conclusion.

[79] As they did with the common issues, the respondents contest this finding in several different ways. Here too their primary attack is that the vast majority of issues require individual determination. They say that these issues involve individual acts of abuse, different perpetrators, unique individual circumstances both before and after attendance at the school widely varying impacts and damage claims, and an array of different limitations, triggers and discoverability issues. They argue that the common issues are negligible in comparison and that their resolution will not significantly advance the action.

[80] I do not agree. An important part of the claims of all class members turns on the way the respondents ran the School over the time frame of this action. The factual assertion is both that the respondents had in place policies and practices, such as excessive physical discipline, and that they failed to have in place preventative policies and practices, such as reasonable hiring and supervision, which together resulted in the intimidation, brutality and abuse endured by the students at the School. It is said that the respondents sought to destroy the native language, culture and spirituality of all class members. The legal assertion is that by running the School in this way the respondents were in breach of the various legal obligations they owed to all class ***[page422]*** members. Together these assertions comprise the common issues that must be assessed in relation to the claim as a whole.

[81] I agree with Cullity J. that whether framed in negligence, fiduciary obligation or aboriginal rights, the nature and extent of the legal duties owed by the respondents to the class members and whether those duties were breached will be of primary importance in the action as framed. If class members are to recover, they must first succeed on this issue. It is only at that point that individual issues of the kind raised by the respondents would arise. Save for those relating to limitations, they are all aspects of harm and causation, both of which the appellants acknowledge they will have to establish individual by individual. The limitations questions are all individual defences, which the appellants also acknowledge will require individual adjudication.

[82] The resolution of these common issues therefore takes the action framed in negligence, fiduciary duty and aboriginal rights up to the point where only harm, causation and individual defences such as limitations remain for determination. This moves the action a long way.

[83] The common issues are fundamental to the action. They cannot be described as negligible in relation to the consequential individual issues nor to the claim as a whole. To resolve the debate about the existence of the legal duties on which the claim is founded and whether these duties were breached is to significantly advance the action.

[84] This assessment is not quantitative so much as qualitative. It is not driven by the mere number of individual adjudications that may remain after the common trial. The finding in Rumley demonstrates this. The class there was defined as students at the residential school between 1950 and 1992 who reside in British Columbia and claimed to have suffered injury, loss or damages as a result of misconduct of a sexual nature occurring at the school. The common issues were defined very similarly to those in this case. The Supreme Court recognized that following their resolution, adjudication of injury and causation would be required individual by individual. Although the number of individual adjudications appears to have been uncertain, the time frame of the action alone suggests that it might be relatively high. Yet the court was able to conclude that the common issues predominated over those affecting only individual class members, which is a consideration required by the British Columbia legislati on. This [was] an even higher standard than that set for preferability under the CPA, namely that viewed in the context of the entire claim, the resolution of the common issues must significantly advance the action. However, in both cases the assessment ***[page423]*** is a qualitative one, not a comparison of the number of common issues to the number of individual issues.

[85] In this case that qualitative assessment derives from the reality that resolving the common issues will take the action a long way. That assessment is also informed in an important way by the considerations of judicial economy and access to justice. Because residential schools for native children are no longer part of the Canadian landscape, the third objective of class proceedings, namely behaviour modification, is of no moment here.

[86] However, I think that a single trial of the common issues will achieve substantial judicial economy. Without a common trial, these issues would have to be dealt with in each individual action at an obvious cost in judicial time possibly resulting in inconsistent outcomes. As Cullity J. said, a single trial would make it unnecessary to adduce more than once evidence of the history of the establishment and operation of the School and the involvement of each of the respondents.

[87] Access to justice would also be greatly enhanced by a single trial of the common issues. I do not agree with the majority of the Divisional Court that there is nothing in the record to sustain this conclusion. The affidavit material makes clear that the appellants seek to represent many who are aging, very poor, and in some cases still very emotionally troubled by their experiences at the School. Cullity J. put it this way at para.á46 of his reasons:

> While the goal of behavioural modification does not seem to be a value that would be achieved to any extent by certification, I am satisfied that the vulnerability of members of the class -- as evidenced by the uncontradicted statements in the affidavits sworn by the representative plaintiffs -- is such that the objective of providing access to justice would be served to an appreciable extent. Each of the representative plaintiffs referred to the poverty of many of the former students, their inability to afford the cost of individual actions and the effect such proceedings would have on the continuing emotional problems from which they suffer as a result of their experiences at the Mohawk Institute. These statements were not challenged on cross-examination and, unlike my colleagues, I see no reason to reject their truth or their significance.

[88] In short, I think that the access to justice consideration strongly favours the conclusion that a class action is the preferable procedure. The language used by the Chief Justice in Rumley at para. 39 is

equally apt to this case:

> Litigation is always a difficult process but I am convinced that it will be extraordinarily so for the class members here. Allowing the suit to proceed as a class action may go some way toward mitigating the difficulties that will be faced by the class members. ***[page424]***

[89] The respondents also attack Cullity J.'s preferability finding by saying that a class action would be unfair to them and would create an unmanageable proceeding. I do not agree. The common issues require resolution one way or the other. It is no less fair to the respondents to face them in a single trial than in many individual trials. Nor, at this stage, is there any reason to think that a single trial would be unmanageable. The common issues centre on the way the respondents ran the School and can probably be dealt with even more efficiently in one trial than in 1,400.

[90] That conclusion is not altered even if one takes into consideration the individual adjudications that would follow. The fact of a number of individual adjudications of harm and causation did not render the action in Rumley unmanageable and does not do so here. Moreover, the CPA provides for great flexibility in the process. For example, s. 10 allows for decertification if, as the action unfolds, it appears that the requirements of s. 5(1) cease to be met. In addition, s. 25 contemplates a variety of ways in which individual issues may be determined following the common issues trial other than by the presiding trial judge. Thus at this stage in the proceedings, when one views the common issues trial in the context of the action as whole, there is no reason to doubt the conclusion that the class action is a manageable method of advancing the claim.

[91] Lastly, the respondents argue that Cullity J. was wrong because the class action is not preferable to other means of resolving class members' claims. They support this position with fresh evidence filed in this court describing the alternative dispute resolution system that has been put in place by Canada to deal with claims of those who attended native residential schools.

[92] Even if we were to admit this fresh evidence, I do not agree that this ADR system displaces the conclusion that the class action is the preferable procedure. It is a system unilaterally created by one of the respondents in this action and could be unilaterally dismantled without the consent of the appellants. It deals only with physical and sexual abuse. It caps the amount of possible recovery and, most importantly in these circumstances, compared to the class action it shares the access to justice deficiencies of individual actions. It does not compare favourably with a common trial.

[93] Thus I conclude that each of the respondents' attacks must fail and that Cullity J. was correct to find that the appellants have met the preferability requirement. ***[page425]***

The Workable Litigation Plan Requirement -- s. 5(1)(e)(ii)

[94] Although it was not strenuously pursued in oral submissions, the respondents also argue in their factums that the action cannot be certified because the appellants have not yet produced a workable litigation plan.

[95] I do not agree that the appellants' certification motion should fail on this basis. The litigation plan produced by the appellants is, like all litigation plans, something of a work in progress. It will undoubtedly have to be amended, particularly in light of the issues found to warrant a common trial. Any shortcomings due to its failure to provide for when limitations issues will be dealt with or how third-party claims are to be accommodated can be addressed under the supervision of the case management judge once the pleadings are complete. Most importantly, nothing in the litigation plan

exposes weaknesses in the case as framed that undermine the conclusion that a class action is the preferable procedure.

Conclusion

[96] I conclude that the appellants have shown that their action satisfies all the requirements of s. 5(1) of the CPA. It must therefore be certified and remitted to the supervision of the Superior Court judge assigned to manage the action.

[97] That judge will undoubtedly face significant challenges as this class action unfolds. If they prove insurmountable, the CPA provides remedies. However, the CPA also provides the judge with much flexibility in addressing these challenges and assessing them at this stage of the proceedings, I am not persuaded that they cannot be satisfactorily met within this form of proceeding.

[98] I would therefore allow the appeal, set aside the orders of the Divisional Court and the motion judge and substitute an order certifying the action consistent with these reasons.

[99] The parties have given us proposed bills of costs. However given the amounts at stake, I invite the parties to make written submissions as to the costs here and below. These submissions are to be exchanged and filed within six weeks of the release of these reasons and are not to exceed five pages, double spaced. Within a further two weeks, each party may then file a written reply not to exceed three pages, double spaced.

Order accordingly.

[page426]

Case Name:

Condominium Plan No. 0020701 v. Investplan Properties Inc.

In the Matter of Special Chambers application of Condominium Plan No. 0020701 v. Investplan Properties Inc., et al
Between
The Owners: Condominium Plan No. 0020701, plaintiff, and
Investplan Properties Inc., 852167 Alberta Ltd., 759826 Alberta Ltd., Michael Nugent, Michael Whitehead, Gary W. Grab, Gary Hartwell, Kari Thompson, Manticore Engineering Ltd., Brian Lester and John Doe 1 to 5, Butler Cabin Capital Corporation, and John Doe 6 to 12, defendants

[2006] A.J. No. 368
2006 ABQB 224
Docket: 0401 13503

Alberta Court of Queen's Bench
Judicial District of Calgary
Martin J.

Heard: October 12, 2005.
Judgment: April 4, 2006.
(111 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Application by a condominium corporation for certification of an action as a class proceeding against a developer allowed — There were individual issues but it was best to decide the common issues together as it was more efficient and was not unfair.

Application by a condominium corporation for certification of an action as a class proceeding against a developer — The condominium corporation consisted of a hundred residential suites located in the same building — The corporation complained of various construction deficiencies relating to the conversion of the building from an apartment to a residential condominium project in 1999 and 2000 — The statement of claim alleged that the developers and sales agents committed fraudulent and negligent misrepresentations, breached a common law and statutory duty to warn the purchasers of problems with the building and a breach of fiduciary duty in respect of failure to hold in trust, monies needed to effect repairs and restorations to the common property — HELD: Application allowed and class certified — The fact that the condominium corporation was not a member of the class was not fatal to the application — The amended statement of claim disclosed numerous causes of action — Common issues might arise in misrepresentation claims in respect of what was said on various occasions, whether it was accurate, and whether it was said negligently and those were the common misrepresentation issues claimed by the corporation — There were individual issues but it was best to decide the common issues

together as it was more efficient and was not unfair — The class action was preferable as the defendants already faced the collective claims of the corporation and it was desirable to deal with the personal claims at one time and for all affected.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Alta. Reg. 390/68, Rule 38(2), Rule 42, Rule 159(2)

Class Proceedings Act, S.A. 2003, c. C-16.5 s. 1(e), s. 2, s. 2(1), s. 2(2), s. 2(4), s. 2(6), s. 5, s. 5(1), s. 5 (1) (c), s. 5(1)(d), s. 5(1)(e), s. 5(2), s. 5(3), s. 5(4), s. 8, s. 9, s. 12(1), s. 20, s. 28, s. 29, s. 41, s. 42, s. 42 (1) (a), s. 42(2)

Condominium Property Act, R.S.A. 2000, c. C-22 s. 1(1) (f), s. 1(1)(j), s. 11, s. 13, s. 13(b)(i), s. 13(b) (ii), s. 14, s. 14(5), s. 25, s. 25(2), s. 25(3), s. 25(3)(a)

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Edward Bresky, Yuzda Schuster & Bresky LLP for the Defendant Brian Lester

Cam McIntosh for the Defendant Butler Cabin Capital Corporation

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MEMORANDUM OF DECISION

MARTIN J.:—

Introduction

¶ 1 This is an application by a condominium corporation for certification of this action as a class proceeding pursuant to the *Class Proceedings Act*, S.A. 2003, c. C-16.5 ("*CPA*") .

¶ 2 No findings of fact need be made on this application but it is necessary to outline the allegations made and denied to determine whether the requirements of the *CPA* have been met.

Facts

¶ 3 The Plaintiff, Condominium Corporation No. 0020701 (the "Corporation"), is the condominium

corporation for a residential condominium project commonly known as "The Residence" consisting of 100 residential suites located in Edmonton, Alberta. The Corporation complains of various construction deficiencies relating to the conversion of The Residence from an apartment building to a residential condominium project in 1999 and 2000. The refurbishing and construction occurred from February 24, 1998 to March 9, 2000 and the sale of the condominium units occurred from March 9, 2000 to March 1, 2003.

¶ 4 The Corporation was created under the *Condominium Property Act*, R.S.A. 2000, c. C-22 ("*Condo Act*") and was registered at the Land Titles Office on March 9, 2000. It is a not for profit corporation and the Board members are volunteers elected by the condominium unit owners at their annual general meeting.

¶ 5 The powers of the Corporation and its relationship with unit owners are governed by the *Condo Act*. Under s. 25(2), a condominium corporation consists of all those persons who are the owners of units in the parcel to which the condominium plan applies or who are entitled to the parcel when the condominium arrangement is terminated pursuant to legislation. That corporation is a creature of the *Condo Act,* is unknown to the common law, and is unlike other corporations. A condominium corporation is the statutory manager of the common property, which belongs to the individual owners.

¶ 6 The original Statement of Claim was filed September 1, 2004; an Amended Statement of Claim was filed on November 12, 2004. The Amended Statement of Claim makes numerous allegations in respect of the condominium conversion, its preparation for sale and the marketing and sale of units in The Residence. All claims and deficiencies advanced by the Corporation in this action concern "common property" as defined in s. 1(1)(f) of the *Condo Act*. The claims against the Defendants concern common law and statutory obligations owed by persons who develop a residential condominium project and sell residential units to the public. By way of overview, it is alleged that after control of the Corporation was turned over to the unit owners, the Board of the Corporation became aware of serious problems and deficiencies in respect of the common property. Extensive work was required to repair severe deterioration of the parkade, post-tension cables, the building envelope (including mechanical lines), parkade service de-laminations, climate control issues and fire code deficiencies.

¶ 7 In the Amended Statement of Claim, the Corporation claims to act as the "representative of all unit holders of The Residence having a common interest in the subject matter of this action, namely the obligation to bear, through the Condominium Corporation No. 0020701, a portion of the cost of repairing or remedying the defects described hereafter", pursuant to statute and the by-laws of the Corporation.

¶ 8 Each of the Defendants is alleged to have been involved in the conversion of The Residence from an apartment building to a residential condominium project, in the sale of units to members of the public and in the management of the Corporation prior to the date on which control of the Corporation was transferred from the developers to the owners of the units. Michael Nugent, Michael Whitehead, Kari Thompson, Gary Grab, Gary Hartwell, Brian Lester and John Does 1-5 all are alleged to have been directors of one or more of the Defendant Investplan Properties Inc. ("Investplan"), the Defendant 759826 Alberta Ltd. ("759826"), the Defendant 852167 Alberta Ltd. ("852167") or the Corporation during the period prior to the transfer of control of the Corporation from the developers to the unit owners. The alleged owners and developers of the condominium project (the "Alleged Developers") include Investplan, 759826, 852167, Mr. Whitehead, Mr. Nugent, Mr. Lester, Mr. Hartwell, Mr. Grab and Ms. Thompson. The alleged sales agents ("Alleged Sales Agents") are Butler Cabin Capital Corporation ("Butler") and John Does 6-12.

¶ 9 The Corporation claims it was a requirement of the *Condo Act* for the Alleged Developers to

obtain a reserve fund study ("RFS") prior to selling the units of The Residence and, based on that study, adequately to fund a reserve fund (the "Reserve Fund"). The purpose of the RFS is said to be to evaluate the condition of the common property and to estimate the anticipated time of replacement. This information is then used to assess the cash flow requirements for the Reserve Fund and to determine the condominium owners' annual contributions to the Reserve Fund. The RFS is used to amortize major capital costs that will be the responsibility of the Corporation and, ultimately, of the unit owners.

¶ 10 The Alleged Developers hired the Defendant Manticore Engineering Ltd. ("Manticore"), an engineering firm, to prepare both the RFS and a post tension review ("PTR"). Manticore reached various conclusions and made numerous recommendations concerning the column spandrel beam connections, the post-tensioned Cowan Slab pad and the post tension system. Its RFS analysis and cash flow projections were based on the assumption that the Alleged Developers had completed or would complete a list of repairs and replacements, which included common area carpeting, tiling, interior paint and trim, elevator cabs, major siding repairs, penthouse wall repairs, new exterior windows, elevator safety inspection, new sealants, new roof including penthouse, patch non-structural concrete, pavement overlay, wood fencing, parking garage restoration, new window guards, and new windows and sliding doors.

¶ 11 The Corporation claims that the Alleged Developers did not complete any of the recommendations set out in either the RFS or the PTR. Further, the Alleged Developers did not disclose the PTR or the full RFS to purchasers of the condominium units. Instead, they are alleged to have provided only select cash flow projection sheets that were premised on completion of repairs that did not occur.

¶ 12 Other claims against the Alleged Developers include negligence in proper design and construction, failure to adhere to the Fire Code Regulations (AR 52/98), concealing patent defects, failing to disclose latent defects, failing to remedy defects they knew or ought to have known existed and failing to disclose such defects to eventual purchasers.

¶ 13 The Corporation also alleges: that developers owe fiduciary obligations to purchasers and to present and future owners of units in a condominium complex; that directors of a condominium corporation owe a fiduciary duty to the corporation; that a developer cannot use the developer's control of the condominium corporation prior to the transfer of control to the unit owners to advance the developer's interests at the expense of the common property or the individual unit owners; and that developers are liable for withholding obligations for completion of common property pursuant to s. 14 of the *Condo Act*.

¶ 14 The Corporation relies on various provisions in the *Condo Act* that regulate the sale of condominium units to the public. S. 11, which applies after September 1, 2000, imposes a duty of fair dealing. Ss. 13(b)(i) and (ii) impose certain disclosure obligations for "all major improvements to the common property located within a building" and "all major improvements to the common property", respectively. S. 14 requires that sufficient monies be held in trust to complete the common property, when it is not completed. A "developer", as defined in s. 1(1)(j), includes a person who sells or offers to sell residential units to the public for the first time. A broader definition of developer applies for the purposes of s. 14. This Court determined in *Bare Land Condominium Plan 8820814 v. Birchwood Village Greens Ltd.* (1998), 235 A.R. 217, 1998 ABQB 1023 that the obligations created by s. 14 extend not only to the developer but also to realtors and to legal counsel of the developer. In addition to *Bare Land*, the Corporation cites *Condominium Plan Number 752-1207 v. Terrace Corp. (Construction)* (1983), 43 A.R. 386 (C.A.), which establishes that developers of condominiums owe fiduciary obligations.

¶ 15 A useful summary of the claims against some or all of the Defendants is contained in paragraphs 55 and 57 of the Corporation's Amended Statement of Claim:

> 55. By virtue of the common law and the *Condominium Property Act,* as amended, at all material times, the Defendants, or any of them, excepting Manticore, had a duty, which they breached;
>
> (a) Of fair dealing, to act in good faith and disclose to the Plaintiff defects in the Project, including:
> - the existence of post-tensioned cables, and the fact that such cables had not been repaired or replaced, nor had further examinations been undertaken, which had been recommended in the Manticore PTR;
> - that the major repairs and restoration assumed to have been completed in the Cash Flow Projection had not been completed;
>
> (b) To disclose to the Plaintiff, the Manticore RFS, and the Manticore PTR;
> (c) To prepare a Reserve Fund Study, assess and pay fees based thereon;
> (d) To undertake the further examinations as recommended in the Manticore PTR;
> (d) (sic) To pay condominium fees and assessments to the Plaintiff;
> (e) To determine the amount of the monthly unit contribution on a "reasonable economic basis", as required in section 13 of the *Condominium Property Act,* as amended;
>
> 57. The Defendants, Whitehead, Lester and John Doe 1 to 5, as Directors of the Plaintiff up to September 27, 2002, had both common law and statutory duties to the Plaintiffs pursuant to the *Condominium Property Act,* as amended, which they breached, to:
>
> (a) Act in good faith and disclose to the Plaintiff the defects in the Project, both latent and patent;
> (b) Disclose to the Plaintiffs the results of the Manticore RFS and PTR;
> (c) Disclose to the Plaintiffs the existence of post-tension cables in the Parkade;
> (d) Prepare a Reserve Fund Study and assess fees based thereon;
> (e) Give appropriate instructions to Manticore with respect to preparing a Cash Flow Projection that was accurate and not misleading;
> (f) To determine and collect condominium fees and assessments from the Owners of the units from March 9, 2000 up to September 27, 2002.

¶ 16 Three claims are made against the Alleged Developers and Alleged Sales Agents. First, there are claims of fraudulent and negligent misrepresentations, relied upon by the purchasers and causing damage, in respect of the following alleged statements:

> * that each suite had been extensively renovated;
> * that the exterior and common area of the building had undergone a complete renovation;
> * that the returns from investing in The Residence would be 17%;
> * that comprehensive engineering, reserve fund and environmental studies had been conducted to ensure the integrity of the project; and
> * that the cash flow projections accurately and completely assessed the needs of The Residence in the future.

¶ 17 Second, the Alleged Developers and Alleged Sales Agents are said to have breached a common law and statutory duty to warn the purchasers of problems with The Residence, including repairs to the post-tension system to restore it to a non-dangerous state.

¶ 18 Third, the Corporation alleges a breach of fiduciary duty in respect of failure to hold in trust monies needed to effect repairs and restorations to the common property. There is also a claim that certain parties improperly gave out estoppel certificates.

¶ 19 Manticore is said to be negligent in three primary respects. First, it completed the RFS as if the repairs and restorations were complete, in breach of proper engineering standards and practices. Second, the Corporation argues that it was reasonably foreseeable that, if Manticore based its report on assumptions of repair and restoration, the eventual purchasers would rely on such representations to their detriment and might suffer damage if the Alleged Developers failed to complete the repairs, replacements and recommendations. Third, Manticore allegedly failed to advise in the PTR of the severe deterioration of the post-tension system.

¶ 20 The Plaintiff claims damages for the costs of repair and replacements, including for hidden defects and undeclared deficiencies. The Corporation also seeks an award sufficient to properly fund the Reserve Fund and to cover unpaid condominium fees and other costs to the Corporation.

¶ 21 The Defendant Ms. Thompson filed a Statement of Defence on February 10, 2005 and defends on the basis that she was not a director of Investplan or of 852167, was not an owner or developer, did not have any responsibilities in respect of the refurbishment or construction of The Residence, did not have any responsibilities in respect of the RFS or PTR, owed no duty to disclose or warn purchasers and made no misrepresentations to the Corporation.

¶ 22 Ms. Thompson brought a motion for summary judgment under Rule 159(2), which was dismissed on May 5, 2005.

¶ 23 At the time this application for certification was heard, no other Statements of Defence had been filed.

Issues

¶ 24 The sole issue in this case is whether this action should be certified as a class proceeding.

Analysis

1. Introduction

¶ 25 This application involves the interpretation and application of both the *Condo Act* and the *CPA*.

¶ 26 The *Condo Act* creates a statutory regime to regulate the unique property law issues associated with condominiums. It allows private ownership of individual units and shared ownership of common property. Common property is owned by the unit holders as tenants in common and is managed by a condominium corporation. The condominium corporation is the body authorized to act on behalf of a group of individuals in relation to certain matters.

¶ 27 In particular, s. 25(3)(a) of the *Condo Act* states that " without limiting the powers of the corporation under this or any other Act, a corporation may sue for and in respect of any damage or

injury to the common property caused by any person, whether an owner or not". Under this section, the condominium corporation has a well-recognized right to sue to recover monies it expends to correct deficiencies and defects in the common property. No party before the Court disputed that the Corporation, as statutory manager of the common property of The Residence under the *Condo Act*, may advance such collective claims without a class action.

¶ 28 The *CPA* became law on April 1, 2004. It establishes a statutory regime for class action proceedings. Previously in Alberta, class action practice was governed by Rule 42 of the Alberta *Rules of Court*, Alta. Reg. 390/68, as interpreted by the Supreme Court of Canada in *Western Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46. The *CPA* now provides statutory factors and criteria for certification and detailed provisions regulating the conduct of class proceedings. A helpful source of background information on the *CPA* is the Alberta Law Reform Institute's Final Report on *Class Actions*, Report No. 85 (Edmonton: Alberta Law Reform Institute, December 2000) (the "Report"). Guidance may also be had from the experience of other jurisdictions with similar legislation.

¶ 29 Under class action proceedings, issues common to multiple parties are determined together through a representative and all individuals in the class are bound by the decision. Class action regimes are procedural tools intended to provide a fair, simple and efficient mechanism to deal with a large number of claims involving common issues of fact or law. As certification relates to procedure, my task is not to address the merits of these claims but merely to determine how such claims should proceed. This was made clear by the Supreme Court of Canada in *Hollick* v. *Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68 at para. 16 where the Court held that "... the certification stage is decidedly not meant to be a test of the merits of the action".

¶ 30 McLachlin C.J. in *Dutton* at paras. 26-29 enumerated three objectives of class actions: to serve judicial economy by avoiding unnecessary duplication in fact finding; to improve access to justice; and to ensure that actual and potential wrongdoers do not ignore their obligations to the public. The Alberta Law Reform Institute (the "Institute") at para. 113 of the Report adds that other goals include avoiding inconsistent results and, with the assistance of case management and alternative dispute resolution, reducing adversity and increasing the likelihood of reaching a fair and equitable result. In short, the Institute posits at para. 149 of the Report that plaintiffs should be permitted to bring deserving claims and that defendants should be protected from unreasonable claims using a process that is certain and efficient.

¶ 31 The Corporation seeks certification of a class described and identified as "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants and owners of units in the Plaintiff". The Corporation seeks certification of this class because of perceived limitations on the powers of a condominium corporation to sue for all of the claims put forward in the Amended Statement of Claim. Specifically, the Corporation seeks to ensure that it may pursue personal claims of class members, such as fraudulent and negligent misrepresentation and certain statutory obligations, that it may assert personal and collective claims on behalf of prior unit holders and that it may distribute any funds recovered in the lawsuit to such parties.

¶ 32 This certification application is unusual as the Corporation effectively seeks the Court's approval to act in two capacities under the one Amended Statement of Claim already filed in its name. Most certification applications are taken in relation to free-standing actions, rather than joining, consolidating, or ratifying common issues which are already co-mingled with other claims in a Statement of Claim. Further, this application is predicated on the Corporation's inability to advance the causes of action in its Amended Statement of Claim. The *CPA* is therefore called in aid to secure the Corporation's power to sue and its ability to distribute any damages recovered.

¶ 33 The Corporation relies on its Amended Statement of Claim and on the Affidavit of Margaret Mah filed May 10, 2005, which adopts the Affidavit and Supplementary Affidavit of Judith Christensen both filed April 7, 2005. Ms. Mah is the President of the Corporation. She deposes that the Corporation has taken steps to repair deficiencies and defects in The Residence and has assessed owners for the costs of doing so. The owners have ratified the actions of the Board of the Corporation in commencing this litigation.

¶ 34 The Supplemental Affidavit of Judith Christensen attaches excerpts from four reports prepared at the request of the Corporation by A. D. Williams Engineering Inc. ("Williams"). The report dated November 2003 on the RFS concludes that the Reserve Fund is underfunded. It states that the metal sidings and soffits are in poor condition and that the parkade, built up roof, emergency power system and exit lighting are in fair to poor condition. The report on the building envelope inspection provides findings from a review of various parts of the building and recommendations for short- and long-term remediation to address identified problems, including insufficient fasteners for high rise cladding, loose and detached concrete blocks, air infiltration, water entry and the freezing of mechanical systems. The parkade evaluation dated February 2, 2004 explains the fieldwork conducted and suggests restoration within the next twelve months for a variety of perceived deficiencies, with a cost estimate of $530,000.00. The restoration project outline dated February 2005 outlines the construction extras and associated costs for the 2004 building restoration program and anticipated costs for 2005.

¶ 35 At the certification hearing, only certain Defendants took a position on whether this action should proceed as a class action. The Defendants Investplan, 852167, Mr. Nugent and Mr. Whitehead, who were represented by the same counsel, stated that if there is a need for certification, they were not opposed in principle to the application. However, these Defendants characterized the Amended Statement of Claim as an action for damages for the cost to repair and replace common property and for unpaid condominium fees, which they say is within the Corporation's powers, with the result that certification is unnecessary. The Defendant Ms. Thompson agreed or at least assumed that the Corporation needs the additional authority of a class action to pursue the full range of the claims in the Amended Statement of Claim. She filed a brief in opposition to certification and argued that the statutory requirements for a class action were not satisfied. The Defendant Manticore joined in the objections made by Ms. Thompson but did not file its own brief.

¶ 36 The first set of issues concerns whether this action falls within the purview of the *CPA* and whether the Corporation may commence this action. The second set of issues concerns whether the Corporation has satisfied the requirements for certification set out in s. 5 of the *CPA*.

2. Does this action fall within the Class Proceedings Act?

¶ 37 Section 42(1)(a) of the *CPA* states that the *CPA* does not apply to a proceeding that may be brought in a representative capacity under any other Act. None of the parties raised the relationship of this section to s. 25(3) of the *Condo Act,* which authorizes a condominium corporation to sue for and in respect of any damage or injury to the common property. Without the benefit of argument, I will not make any finding on this point. It may well be that s. 42(2) of the *CPA* may not apply at all or it may not preclude a condominium corporation from addressing claims presumed to be outside of s. 25(3), whether taken alone or as part of a broader action.

¶ 38 However, I would like to comment on the Corporation's belief that uncertainty in the law prevents it from pursuing personal claims on behalf of current unit holders. It states as follows in its brief:

> The common issues in this context arise from the representations and obligations of the developers in respect of the common property. The extent of these obligations is a developing area of the law in respect to both the legislation and decisions of the courts. The scope of remedies and the inter-relationship between corporate and individual remedies is not yet fully settled. For instance, the Court of Appeal of Alberta has held that actions in respect of common property deficiencies are properly brought by a corporation, but actions for misrepresentations in respect of the common property must be brought by individual purchasers.

¶ 39 The Corporation cites the Alberta Court of Appeal's decision in *Terrace* in support of the proposition that negligent misstatement is a personal claim that cannot be pursued by a condominium corporation. In *Terrace,* the Court of Appeal set aside a lease entered into by the developer of the condominium project in breach of its obligations. Allegations based on misrepresentations were dismissed at para. 2 because the trial judge had found that no-one was influenced by any misrepresentations and that finding was "fatal". The alleged misrepresentations conflicted with the written terms of the contract, counsel conceded that the misrepresentations merged in the conveyances, the representations were not representations of fact and liability for making the false statements was neither pleaded or proved. The Court of Appeal then said at para. 2:

> "Finally, all these claims were individual, not corporate. It is doubtful that they could properly be the subject of a class action and, in any event, the pleadings do not support claims by anyone other than the condominium corporation."

¶ 40 On the strength of this dictum, the Corporation and the Defendant Ms. Thompson accept that the Court of Appeal has decided that a condominium corporation cannot pursue claims for negligent misstatement and, by extension, for fraudulent misrepresentations.

¶ 41 The weight to be assigned to this dictum promises to be an open issue before a trial judge. It is the last in a list of other flaws in the appellant's case in *Terrace*, one of which was acknowledged to be fatal. The statement is qualified by the word "doubtful". It remains to be seen how it will apply in the case at bar in which, unlike *Terrace*, fraudulent and negligent misrepresentations were plead. Further, the *Condo Act* at issue in *Terrace* contained the same provision as is currently found in s. 25(3) but the Court neither referred to it nor explained how a provision that concerns the nature of the property, by allowing suit for "any damage or injury to the common property", fits within the *CPA* to create a distinction between collective and personal claims.

¶ 42 It is also my understanding that *Terrace* has not been applied in support of the proposition that actions for misrepresentation in respect of the common property must be brought by individual purchasers. In *Condominium Plan No. 992 5205 v. Carrington Developments Ltd.* (2004), 36 Alta. L.R. (4th) 381, 2004 ABCA 298, the Alberta Court of Appeal referred to *Terrace* but only in relation to fiduciary obligations. Subsequent cases in which *Terrace* has been mentioned or followed pertain either to whether the condominium corporation is a proper party to an action to preserve the common property or to the analogy drawn in that case between a condominium corporation and a trustee. See *Tymchuk v. Carrington Properties Ltd.* [2000] A.J. No. 979, 2000 ABQB 583 at para. 9; *Ang v. Spectra Management Services Ltd.,* [2002] B.C.J. No. 2506 at para. 8 (S.C.); *Strata Plan 1261 v. 360204 B.C. Ltd.*, [1996] B.C.J. No. 955 at para. 16 (S.C.); *Strata Plan 1261 v. 360204 B.C. Ltd.* (1995), 50 R.P.R. (2d) 62 at para. 64 (S.C.); *Strata Plan 1229 v. Trivantor Investments International Ltd.* (1995), 4 B.C.L.R. (3d) 259 at para. 48 (S.C.); *Dinicola v. Huang & Danczkay Properties* (1996), 29 O.R. (3d) 161 at 199 (Gen. Div.), aff'd (1998), 40 O.R. (3d) 252 (C.A.); *Ceolaro v. York Humber Ltd.* (1994), 37 R.P.R. (2d) 1 at para. 176 (Gen. Div.); *Condominium Plan No. 86-S-36901 v. Remai Construction (1981) Inc.* (1992), 84 D.L.R. (4th) 6 at 8 (Sask. C.A.).

¶ 43 The Corporation also assumes, and is joined in that assumption by Ms. Thompson, that the obligations imposed by s. 14 of the *Condo Act* can be enforced only by individual unit owners. S. 14 is a recent addition to the *Condo Act* and its interpretation will also be an issue before the trial judge. The obligations imposed on developers under s. 14(5) do not expressly delineate who may enforce them and s. 25(3) permits a condominium corporation to sue for and in respect of *any* damage or injury to the common property. Further, the cases of *Bare Land* and *Condominium Plan No. 822 2630 v. Danray Alberta* (2005), 33 R.P.R. (4th) 110, 2005 ABQB 455 appear to allow recovery by a condominium corporation under predecessor provisions.

¶ 44 I understand that the absence of definitive authority on these points is problematic because the Corporation does not want to assume that it can sue for personal claims only to find out at trial that it cannot. It seeks to have all parties and claims joined at the outset. As the certification judge, I am not called upon to determine the limits of the Corporation's capacity to sue and should, for the purposes of this application, accept the assumption of the Corporation and of Ms. Thompson that a condominium corporation cannot sue for these personal claims.

¶ 45 Similarly, the analysis on certification will proceed on the basis that the Corporation could not otherwise put forward both the collective and personal claims of prior unit holders. Under s. 25(2) of the *Condo Act*, a condominium corporation consists of "the owners of units", which according to the definition in s. 1 means the registered owners. The Corporation and Ms. Thomspon base their position that the Corporation does not represent prior unit holders on s. 25(2) and on *Terrace* in which, at para. 13, the Court of Appeal stated that past owners may no longer have an interest in the common property and that their economic interests are different from those of present owners.

¶ 46 The Corporation also argues that it is prevented under the *Condo Act* from distributing any damages recovered. The Corporation does not own the common property; it is owned by the unit holders who pay the maintenance expenses. The Corporation manages it on their behalf and may assess amounts against unit holders to make any requisite repairs and to pursue litigation. Any monies recovered through litigation cannot be distributed by the Corporation, but may only provide for a "holiday" for condominium fees to then-current unit holders. In short, the Corporation cannot return money to a former owner who is no longer a member of the Corporation. A class action would permit reimbursement to class members who paid the assessment for the repairs or otherwise suffered loss.

3. Can the Corporation commence this proceeding?

¶ 47 The Corporation has commenced this action and Ms. Thompson argues that, because it is not a member of the class, the certification application must fail. The relevant portions of s. 2 of the *CPA* are:

> 2(1) One member of a class of persons may commence a proceeding in the Court on behalf of the members of that class.
>
> (2) A person who commences a proceeding under subsection (1) must make an application to the Court for an order certifying the proceeding as a class proceeding and, subject to subsection (4), appointing that person, or another person who on certification will be a member of the class, as the representative plaintiff.
>
> (4) Notwithstanding subsection (2), the Court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding but may do so only if, in the opinion of the Court, to do so will avoid a substantial injustice to the class.
>
> (6) The Court may, where it considers it appropriate, appoint as a representative

plaintiff a non-profit organization that is incorporated.

¶ 48 Ms. Thompson says that while s. 2(6) may allow the appointment of the Corporation as a representative plaintiff, it does not relieve against the requirement of s. 2(2). She argues, therefore, that although a non-profit incorporated organization like the Corporation could be appointed as a representative plaintiff, it can commence this proceeding only if it is a member of the class, which she claims it is not.

¶ 49 The Corporation invokes its particular status as a condominium corporation to argue that it is part of the class because it represents the unit holders and they are part of the class. The unique nature of a condominium corporation is supported by history and by the statute but it goes too far to say that the Corporation is a member of a class defined in relation to unit holders.

¶ 50 On a plain reading of the *CPA*, s. 2(1) deals with who may commence an action, s. 2(2) provides that the person who commences a proceeding must make application to the Court for certification and s. 2(4) deals with the separate issue of who may be appointed a representative plaintiff. I agree with Ms. Thompson to the extent that it is generally preferable for a class member to commence the proceeding and to bring the certification application. However, I do not accept that the fact that the Corporation is not a member of the class is fatal to the application. At the certification hearing, the Corporation asked to add an unspecified unit holder as a plaintiff *nunc pro tunc* to resolve any issue concerning compliance with s. 2(1) and such request is granted.

¶ 51 Under s. 41 of the *CPA*, the *Rules of Court* continue to apply where not inconsistent with the *CPA*. S. 2(1) of the *CPA* is permissive, providing that "one member of a class *may* commence a proceeding" (emphasis added). As a strict matter of logic, this wording does not preclude a non-class member from commencing a proceeding. The section may have been intended to be merely facilitative and to address the number of persons necessary to commence suit. In any event, I favour an interpretation of the *CPA* which grants discretion to the Court to accommodate a myriad of different circumstances, to respond to practicalities and to permit a full consideration of the certification application. As a result, I am of the view that, in these circumstances, it is open to the Court to exercise its discretion under Rule 38(2) of the *Rules of Court* to add or substitute any other person as plaintiff. I note that the Corporation was entitled to commence the proceeding in respect of the collective claims so this is not a case of an unrelated party attempting to sue on behalf of others. As a practical matter, it does not make sense to reject a certification application on this ground when the *CPA* permits amendment of pleadings to have the representative plaintiff named as the plaintiff after certification.

4. The Criteria for Certification

¶ 52 The party seeking certification bears the burden of establishing that the action should be a class proceeding based on the five criteria outlined in s. 5 of the *CPA*. According to ss. 5(3) and 5(4), respectively, all the requirements of subs. 5(1) must be met in order for the Court to grant certification of a class proceeding and, if all of the requirements of subs. 5(1) are met, the Court has no discretion to refuse to grant certification. Section 5(1) provides as follows:

> **5(1)** In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
> (b) there is an identifiable class of 2 or more persons;

(c) the claims of the Prospective Class members raise a common issue, whether or not the common issue predominates over issues affecting only individual Prospective Class members;
(d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
(e) there is a person eligible to be appointed as a representative Plaintiff who, in the opinion of the Court:

(i) will 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, in respect of the common issues, an interest that is in conflict with the interests of other Prospective Class members.

¶ 53 A ffidavit evidence in support of a certification application must provide sufficient information, particulars and specificity with respect to the requirements for certification. Similarly, those who oppose certification should put forward their supporting evidence.

a. The pleadings disclose a cause of action

¶ 54 The purpose of this criterion is to weed out obviously frivolous actions and the threshold a plaintiff must meet is not high. I am satisfied that the Amended Statement of Claim discloses numerous causes of action, including negligence, negligent misstatement, fraudulent misstatement, breach of fiduciary duty, breach of trust and breaches of various statutory duties imposed by the *Condo Act*. There is affidavit evidence from Ms. Mah and Ms. Christensen supporting the claims. Ms. Thompson noted that certain causes of action could not be brought by the Corporation alone, which is why the Corporation seeks certification, but she does not question that the pleadings disclose personal causes of action. The Defendant Manticore suggested in a brief oral statement that there was no cause of action against it but it had not filed a Statement of Defence at the time of the certification hearing and did not file a brief or affidavit evidence in support of this assertion. As a result, its position cannot be addressed at this time.

b. Identifiable Class of 2 or More Persons

¶ 55 The Corporation must establish the definition, existence and scope of the class with certainty. Class definition is critical because it identifies those individuals entitled to notice and to any relief granted in the lawsuit; it also identifies those who will be bound by the judgment. A class is identifiable if it is sufficiently defined such that the parties and the Court can determine who is and is not a member of the class by reference to clearly defined criteria.

¶ 56 Viewed through the lens of s. 25 of the *Condo Act*, the Amended Statement of Claim outlines three different types of claims. First, the current unit holders have collective claims which all parties agree may be pursued by the Corporation in its own right. S econd, the current unit holders have personal claims. And third, the prior unit owners have both collective and personal claims. It is the second and third types of claims that the Corporation argues should be pursued by way of a class proceeding. Under the *CPA*, the focus is on the definition of an identifiable class, and while the overlay of the type of claim arising from the *Condo Act* may complicate the inquiry, it should not confuse it.

¶ 57 The class proposed by the Corporation is "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants, and owners of units in the Plaintiff." Theoretically, this class would be made up of current unit holders who purchased from the Defendants, current unit holders who purchased from a prior unit holder (i.e., second-hand purchasers), prior unit holders who purchased from the Defendants and prior unit holders who purchased from another prior unit holder (also second-hand purchasers).

¶ 58 The Defendant Ms. Thompson argues that this class is over-inclusive because it includes second-hand purchasers who likely had no direct relationship with any or all of the Defendants. I agree. The Corporation has stated eleven common issues, all purporting to affect both direct and second-hand purchasers. While the latter persons may have suffered damage in relation to the common property, inclusion in the class would require a relationship of proximity between the Defendants and the second-hand purchasers; such a relationship does not exist. The statutory definition of developer is wide but does not extend this far. S. 1(j) of the *Condo Act* defines "developer" as follows:

> a person who, alone or in conjunction with other persons, sells or offers for sale to the public units or proposed units that have not previously been sold to the public by means of an arm's length transaction.

Therefore, a person is a developer only in a transaction with a new purchaser. S. 14 of the *Condo Act* widens the definition by adding a person who:

> on behalf of a developer, acts in respect of the sale of a unit or proposed unit or receives money paid by or on behalf of a purchaser of a unit or a proposed unit pursuant to a purchase agreement.

The words "in respect of the sale of a unit or a proposed unit" are not, when properly interpreted, intended to cover all sales, including second-hand sales because to act "on behalf of a developer" refers to a developer as defined in s. 1(j). S. 14 expands the definition of "developer", but does not alter the requirement that the developer on whose behalf the person referred to in s. 14 acts is selling units that have not previously been sold to the public.

¶ 59 A class which includes second-hand purchasers is not only overbroad, it has the potential to generate conflict between class members and is to be avoided on this ground also. The interests in the common property of the current owners who are second-hand purchasers may be pursued as part of collective claims of the Corporation.

¶ 60 Therefore, the class will consist of "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants".

c. *Common Issues*

¶ 61 Section 5(1)(c) requires a consideration of whether the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members. The relationship between common issues and individual issues is addressed further under s. 5(1)(d), where the question is whether the class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. A "common issue" is defined in s. 1(e) as "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 facts".

¶ 62 The Supreme Court of Canada held in *Dutton* that common issues need not be determinative of liability and do not have to dispose of an entire action, or even a particular claim. The Court stated at para. 39 that the underlying question is "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis." An issue will be common "only where its resolution is necessary to the resolution of each class member's claim." An issue will not be "common" in the requisite sense unless that issue is a "substantial...ingredient" of each of the class members' claims.

¶ 63 The Ontario legislation corresponding to the *CPA* sets a low bar for common issues and courts in that jurisdiction have held that certification should be ordered if the resolution of the common issues would advance the litigation. In *Carom* v. *Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236, [2000] O.J. No. 4014 (C.A.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660, the Ontario Court of Appeal at para. 41 quoted with approval this passage from *Campbell v. Flexwatt Corp.* (1997), 15 C.P.C. (4th) 1 (B.C.C.A.) at para. 53:

> When examining the existence of common issues it is important to understand that the common issues do not have to be issues which are determinative of liability; they need only be issues of fact or law that move the litigation forward. The resolution of a common issue does not have to be, in and of itself, sufficient to support relief. To require every common issue to be determinative of liability for every plaintiff and every defendant would make class proceedings with more than one defendant virtually impossible.

¶ 64 The underlying question is a practical one based on fairness and efficiency in the sense that allowing the action to proceed as a class proceeding will avoid duplication of fact finding or legal analysis and will advance the litigation.

¶ 65 At the time of the certification hearing only the Defendant Ms. Thompson had filed a Statement of Defence, leaving the issues to be framed largely by the pleadings and evidence of the Corporation.

¶ 66 The Corporation contends that the common issues are:

a. Who was the developer within the meaning of the *Condo Act* and common law?
b. What representations were made in respect of the common property during the process of conversion and marketing of the units? By whom were the representations made?
c. What, if any, representations were incomplete, untrue or misleading? If so, were the misrepresentations made innocently or did they constitute negligent or fraudulent misstatement?
d. To what extent did the Alleged Developers have a duty to hold in trust, for the benefit of purchasers, the money necessary substantially to complete the repairs and restoration of the common property?
e. Did the Defendants who were directors of the Corporation prior to the transfer of control to the owners of units breach their fiduciary duty to the purchasers of the units?
f. Did the Defendants have either a common law or statutory duty to disclose the actual state of the property to prospective purchasers? If yes, was the duty breached?
g. What was the actual condition of the common property when the units were sold to purchasers?
h. Did the cash flow projections given to prospective purchasers accurately or fairly reflect the RFS that has been done and did they accurately reflect the

condition of the common property?

i. To what extent did each of the Defendants owe a duty of fair dealing under s. 11 of the *Condo Act?*

j. What damages were suffered in relation to the common property? Was the need for the repairs to the common property done by the Corporation occasioned or contributed to by the Defendants' conduct?

k. Generally, what common law and statutory duties did each of the Defendants owe to purchasers of units in the condominium project? Were these duties breached?

¶ 67 Ms. Thompson argues these issues are more individual than common.

¶ 68 Issues relating to the actual condition of the common property, the damages suffered in relation to the common property, and whether the need for repairs was occasioned or contributed to by the Defendants' conduct are common issues. They are a substantial part of each class member's claim and also arise in relation to the collective claims made by the Corporation. In my view, it makes sense to build this factual foundation once and to broadcast the findings to all concerned parties.

¶ 69 Ms. Thompson argues that s. 14 of the *Condo Act* is based on personal relationships and has multiple individual elements: the question of who is a "developer" is based on the particular facts of each individual purchase; the respective closing date of each purchase; the nature and extent of any relationship between the parties varies from purchaser to purchaser; and the condition of the common property at the date of each purchase would have to be determined to assess whether the holdback was adequate. It is true that the determination of who is a developer is a substantial element of the claims made under ss. 11, 13 and 14 of the *Condo Act* and involves a consideration of the relationship between specific Defendants and unit holders. However, this does not, as contended by Ms. Thompson, make this a purely individual issue. Nor does the characterization of these statutory claims as personal to the unit holders under the *Condo Act* make them individual issues as contemplated by the *CPA*.

¶ 70 An assessment of the state of the project and of the monies held in trust at the date of each purchase must be undertaken before a claimant may establish a breach of s. 14 of the *Condo Act*. The ultimate proof of the claim will involve an individual determination. However, a common issue need not answer the claim completely, as long as its resolution materially advances the litigation. Class members share an interest in knowing what amounts were held in trust at various times during the project. It is efficient to establish a time line for monies held in trust for the benefit of all. The same is true for evidence concerning the completion schedule for the renovations and work on the building. Information on the completion status and trust amounts is necessary for all class members, although particular dates involving individual transactions will be essential to s. 14 claims. When the focus is on the actions of the Defendants, common factual and legal issues arise.

¶ 71 Ms. Thompson relies upon three Ontario cases in support of the proposition that actions in misrepresentation should not be the subject of class proceedings: *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.); *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350 (Gen. Div.), aff'd. [2000] O.J. No. 379 (Div. Ct.) and *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Gen. Div.). These cases, as well as those cited by the Corporation, make it clear that there is no bar to certification in cases of negligent misstatement. Each case must be dealt with according to its own facts and issues. It is also important to note that the Ontario legislation does not have the proviso contained in s. 5(1)(c) of the *CPA* that the assessment of common issues is independent of whether the common issues predominate over issues affecting only individual prospective class members. Nevertheless, these authorities cited provide useful guidance on whether common issues arise and whether a class action is the preferable procedure for their resolution.

¶ 72 *Abdool* concerned a failed condominium real estate investment with approximately 150 named plaintiffs. The cause of action was based primarily in misrepresentation, although it included claims of breach of fiduciary duty and breach of statute. The proposed defendants included the promoters of the investment and the real estate brokers who had acted as intermediaries in selling the investments. Neither the promoters nor the intermediaries appeared on the application and the certification was opposed only by the defendant lawyers and accountants of the promoters and by the trust company which provided the financing. The claim against the accountants depended on an alleged misrepresentation made by the accountants and contained in a single letter.

¶ 73 The chambers judge held that misrepresentation cases could not be pursued as class actions because reliance is an essential part of a misrepresentation action and is an individual issue. All members of the Divisional Court were of the view that the need to prove reliance, though an individual issue, did not preclude certification as there was clearly a common issue as to whether the letter contained a misrepresentation and, if so, whether it was negligently made. The Court specifically recognized that misrepresentations actions could be the subject of class proceedings in the right situation but found that those proceedings did not disclose a cause of action. The Court also found that it was difficult to identify any significant common issues against the lawyers, the accountants and the finance company. Further, each plaintiff claimed approximately $300,000.00 and the individual claims were thought to be large enough to prosecute economically. Apparently, the action proceeded as a multi-party action on behalf of the 150 named plaintiffs, but not on behalf of the unnamed members of the proposed class.

¶ 74 In *Controltech,* there were multiple misrepresentations to different parties on different occasions during a relatively complex three-stage bidding process. The 51 proposed class members all had responded to a request for proposals from the defendant. Each bidder presented a separate proposal and dealt with the defendant on an individual basis. The defendant never did award a contract to any party and the plaintiffs sued for the costs incurred in preparing their proposals. The Court identified the cause of action as one sounding in misrepresentation. Sharpe J. accepted that certification in a case involving misrepresentation was possible and noted that the determination of whether there are elements of misrepresentation amounting to a common issue is made in the context of the facts of the particular action. In that case at para. 12, he denied certification because there was "... not a single specific representation that is common to all members of the proposed class". He also said at para. 16 that he did not see "... how the proposed common issues would resolve anything that would `move the litigation forward'".

¶ 75 *DeVry* concerned a class action on behalf of the students at a private educational institution. The allegation was that the defendant had misrepresented the nature and quality of its programs. The proposed class included approximately 17,000 unidentified students in two provinces. The alleged misrepresentations in *DeVry* numbered in the hundreds and were said to have been made by numerous field representatives and campus admissions officers, as well as through numerous different advertisements and publications. The Court declined to certify the class proceeding because the proposed class of all of the students at DeVry between 1990 and 1996 was not sufficiently cohesive. It included a number of students who had graduated and likely were quite satisfied with the education they had received. Others might not have seen or heard of any of the alleged misrepresentations. The combination of the divergent circumstances of the class and the hundreds of representations made the identification of common issues very difficult. The Court also found that individual issues, particularly reliance on the alleged misrepresentations, predominated and that, therefore, a class proceeding was not the preferable procedure.

¶ 76 The Corporation cites *Dutton, Bre-X* and *Metera v. Financial Planning Group* (2003), 332 A.R. 244, 2003 ABQB 326 as the current and preferable authorities.

¶ 77 *Dutton* involved a representative action in Alberta arising from a failed investment. It predated the coming into force of the *CPA*. Approximately 231 investors invested in what was to be a real estate company. It was alleged that the promoters of the real estate company took the funds and invested them instead in a gold mine. There were thirteen named defendants, all of whom played different roles in the investment. The gravamen of the complaint was that Dutton and various affiliates and advisors breached their fiduciary obligations by mismanaging or misdirecting the funds. The Supreme Court of Canada concluded that the action could proceed as a class action as the four conditions under Rule 42 of the Alberta *Rules of Court* were satisfied. While counsel for the plaintiff withdrew the claims based on misrepresentation, the Court recognized that a portion of the claim of breach of fiduciary duty might require proof of individual reliance. However, the differences between individual investors were not sufficiently important to prevent a class proceeding as there were many common issues to be decided. The defendants' contention that they would raise different defences against different members of the class did not create a sufficient level of uncertainty to foreclose class proceedings. C lass members need not be identically situated and wide differences between class members can be tolerated. The Court stated at para. 54:

> The Defendant's contention that there are multiple classes of plaintiffs is unconvincing. No doubt, differences exist. Different investors invested at different times in different jurisdictions, on the basis of different offering memoranda, through different agents, in different series of debentures, and learned about the underlying events through different disclosure documents. Some investors may possess recessionary rights that others do not. The fact remains, however, that the investors raise essentially the same claims requiring resolution of the same facts. While it may eventually emerge that different subgroups of investors have different rights against the Defendants, this possibility does not necessarily defeat the investors' right to proceed as a class. If material differences emerge, the court can deal with them when the time comes.

¶ 78 *Bre-X* was a suit against two corporations and various individuals who held senior positions with those corporations for monies lost on an investment in an operation represented to be a gold mine. The action was based on a series of 160 press releases and other statements made over a four-year period. The motions judge certified fifteen common issues, which included fraudulent misrepresentation, but refused certification for the claims in negligent misrepresentation. This refusal was appealed to the Divisional Court and then to the Ontario Court of Appeal. It is noteworthy that the seven other actions against the brokerage firms, the two engineering firms and various named individual analysts in those firms who provided professional services were not certified. The Court of Appeal had before it a much streamlined process: not eight lawsuits with three categories of defendants and almost three dozen defendants, but a single action with a single category of defendants and ten named defendants. The plaintiffs alleged a common misrepresentation that "gold was present in mineable quantities in the Busang". The Court found that it was an error in logic and principle to refuse certification for negligent misstatement when allowing it for fraudulent misrepresentation.

¶ 79 In *Metera*, the plaintiffs sued as representative plaintiffs for approximately 85 residents of Alberta who bought units in an investment from a mutual fund dealer and related corporations and claimed to have lost an average of $30,000.00 each. The allegations against the defendants included negligence, negligent misrepresentation, conflict of interest, breach of contract and breach of fiduciary duty. The defendants included the licenced mutual fund dealer who sold the investments and related, associated or successor corporations involved in the sale. Purchases were made through thirteen different mutual funds salesmen sponsored by one of the defendants. The allegation was that the defendants failed adequately to investigate and assess the investment units before they were sold to investors. The defendants proposed a multi-party proceeding arguing that this was a case of multiple representations by multiple persons at multiple times. They claimed that some representations were

made in an offering memorandum, some in other written materials, some at meetings in various cities and some by salesmen. The same thing might not have been said at all the meetings nor would all investors have heard all of the representations. Nevertheless, certification was granted despite individual issues of reliance, causation and damage and the need to determine the duties owed by the defendants on an individual basis.

¶ 80 Common issues may arise in misrepresentation claims in respect of what was said on various occasions, whether it was accurate, and whether it was said negligently. These are essentially the common misrepresentation issues as stated by the Corporation.

¶ 81 Ms. Thompson seeks to distinguish *Bre-X* and *Metera* on the basis that they are investment cases where the representations were well publicized and contained in public documents and where the relevant statute provided for deemed reliance. By contrast, it is claimed that in the case at bar there are individual representees who may or may not have been told anything, may or may not have been given documents and may or may not have read them. Given the Supreme Court of Canada's analysis and conclusion in *Dutton*, this argument cannot be given much weight.

¶ 82 There is merit in settling all at once the facts of who said what to whom, rather than facing the prospect of making proof on these issues time and again in separate proceedings. The facts before this Court also demonstrate that certain public documents were created and distributed by some Defendants and that there were common statements to the public. Furthermore, the level of complexity in the case at bar does not go beyond that accommodated by class proceedings in *Dutton, Bre-X,* and *Metera*. See also *Ayrton* v. *PRL Financial (Alta.) Ltd.* (2005) 370 A.R. 141, 2005 ABQB 311, aff'd [2006] A.J. No. 296, 2006 ABCA 88.

¶ 83 When common issues are stated in terms of "defendants", it can be easy to lose sight of how the complexity of proceedings may increase when multiple defendants are involved. Certain of the stated common issues do not apply to each Defendant, either at all or in the same way. For example, there is no allegation that the Defendant Manticore is a developer. Similarly, allegations of breach of fiduciary duty concern only previous directors of the Corporation. The purpose of class action proceedings is to provide a clear procedural mechanism to enable the courts to deal efficiently with a large number of claims being made by many aggrieved persons who have all suffered injuries from the same event. In *Bre-X*, the Ontario Court of Appeal held at para. 45 that there were two core issues to the litigation - was there gold in mineable quantities and, if not, what knowledge did the various defendants have of the true state of affairs. Similarly, in this litigation, the two core issues are what, if any, deficiencies existed in this project and what knowledge did the Defendants have of the true state of affairs. The Court in *Bre-X* recognized that the answers to the questions it posed might be different for each defendant but still allowed certification concerning alleged negligent misrepresentations. The Court's reasoning applies equally to the case at bar.

d. Preferable Procedure

¶ 84 Section 5(1)(d) of the *CPA* requires the court to find that a class action is the preferable procedure for the "fair and efficient resolution of the common issues". In Alberta, unlike Ontario and certain other provinces, the analysis of whether a class proceeding is the preferable procedure is governed by an express provision. S. 5(2) outlines five further factors for mandatory consideration, as well granting as a residual discretion to the court to consider any matter it considers relevant in determining whether a class action is the preferable procedure. In weighing countervailing factors under the preferable procedure criteria, the court is to take a practical approach and strike a balance between efficiency and fairness.

¶ 85 S. 5(2) of the *CPA* sets out the five factors as follows:

> 5(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> (a) whether questions of fact or law common to the Prospective Class members predominate over any questions affecting only individuals Prospective Class members;
> (b) whether a significant number of the Prospective Class members 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.

¶ 86 The court is required to take a purposive approach to the interpretation and application of these factors, meaning that they are to be read with and tested against the objectives of the legislation. This approach was adopted by the Supreme Court of Canada in *Hollick* and is further reinforced by the wording of the section which provides that the class proceeding be the preferable procedure, not merely for the resolution of the common issue, but for the "fair and efficient" resolution of the common issues.

¶ 87 In *Metera* at para. 89, Slatter J. cited with approval the following passage from *Bre-X*:

> The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where is presents a fair, efficient and manageable method of determining the common issues which arise from the claims of the multiple Plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoings.

¶ 88 In assessing whether certification will advance the proceedings in accordance with its goals, the starting point must be that Alberta now has a comprehensive legislated regime for actions involving multiple parties, common claims and individual claims. The *CPA* was intended to articulate rules and to provide certainty in a way that Rule 42 did not. In some ways, the very existence of expressly delineated processes and legal standards for certification, the conduct of class proceedings, notice and discovery, the nature of class action orders, awards, related procedures, and costs, fees and disbursements, may support the preferability of a class action in appropriate cases.

¶ 89 The Institute at para. 164 of the Report noted that the determination of whether a class proceeding is the preferable procedure necessarily will involve a balancing of all the interests of the parties and of the Court and may involve an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative

means available for adjudicating the dispute.

¶ 90 As required by the *CPA*, I will address each mandatory statutory factor in turn, having regard to the purpose of the legislation and all of the individual and common issues arising from these claims and their factual matrix.

(i) Whether common questions of fact or law predominate

¶ 91 In contrast to the procedure under Rule 42, the *CPA* does not treat predominance of common issues over individual issues as a threshold requirement, but only as one factor to be weighed in the balance. Where the common issues are overwhelmed by the individual issues, certification is not appropriate as the litigation will inevitably break down into individual proceedings.

¶ 92 Ms. Thompson argues that there are too many individual issues here for a class action to be the preferable procedure because different buyers will have received different materials at different times, containing varying statements and representations. Certainly, there are individual issues, including reliance, date of sale, and proof of damage, but s. 8 of the *CPA* specifically provides that certification is not to be withheld solely because of the need to have individual assessments of damage.

¶ 93 In *Metera,* Slatter J. warned against over-emphasizing the importance of individual issues; the question is always whether a class proceeding is the preferable way to resolve what common issues there are. Individual assessment will be a factor regardless of whether the claim is prosecuted as a class action, a multi-party action or a series of individual actions. The focus should be on how the common issues can best be decided and, even when the individual issues overwhelm the common issues, the courts must still ask "how is it best to decide those common issues?".

¶ 94 It is also important to recognize that class action proceedings usually involve both common and individual issues in a bifurcated process. S. 12(1) of the *CPA* provides that, as a general rule, common issues will be determined together for members of a class and/or subclass and individual issues will be determined in accordance with ss. 28 and 29. S. 28 grants broad powers to the court to determine individual issues in relation to individual class or subclass members, including the authority to hold further hearings and to appoint persons to conduct inquiries under the *Rules of Court* into the individual issues and to report upon them. S. 29 regulates the individual assessment of liability.

¶ 95 A class proceeding may be the preferable procedure even if the common issues are somewhat preliminary. In *Metera,* Slatter J. held at para. 71 that "whatever the shortcomings of class proceedings in misrepresentation claims, they appear preferable to deciding the common issues time and time again in separate litigation." There are still economies to be had in deciding the common issues together and building the factual platform once, rather than many times.

¶ 96 The Corporation argues that access to justice is served by certification in this case as it would be expensive for individual purchasers to hire experts to assess the common property. The Defendant Ms. Thompson argues that the Corporation already has done some of this work and would share its findings in relation to current and future expert reports. The key point, however, is not whether the information is shared but how, and how often, even shared information will need to be presented to the Court on common issues.

¶ 97 The Corporation argues that it seeks a fair and efficient manner to combine collective and personal claims of current and prior unit holders into one action so that findings of fact may be broadcast between categories of claimants. I accept this argument and, while I appreciate that there are individual

issues, it is still best to decide the common issues together as it is more efficient and is not unfair to the Defendants.

> (ii) *Whether a significant number of prospective class members have a valid interest in individually controlling the prosecution of separate actions and whether the class proceeding would involve claims that are or have been the subject of any other proceedings*

¶ 98 These factors from ss. 5(2)(b) and (c) of the *CPA* favor certification. The evidence of Ms. Mah is that a significant number of the prospective class members support the litigation undertaken by the Corporation. In this case, the class proceeding would involve claims that are the subject of a current proceeding, but given that there is but one Amended Statement of Claim, it is the same proceeding. In these circumstances, joining the class action for personal claims with the collective claims action pursued by the Corporation generates further efficiencies as all damage relates to common property. I am satisfied that it is sensible and desirable to place both types of claims on the same litigation track.

> (iii) *Whether other means of resolving the claims are less practical or less efficient and whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means*

¶ 99 It is both mandatory and helpful to ask what alternative procedures there are to decide the common issues and to canvass their relative benefits and drawbacks. Ms. Thompson argues that it would be preferable to have a multi-party proceeding in which those individuals who feel aggrieved come forward and file suit on their own behalf. However, adding all interested parties in a multi-party action procedure would not significantly change the face of this litigation and would be cumbersome. The determination of the common issues in any test case would not necessarily be binding on other plaintiffs and the prospect of a class settlement would be lost. In *Metera,* Slatter J. observed at para. 94 that "the only advantage of a multi-party action would appear to be that some plaintiffs might be discouraged and walk away, which is an advantage only to the Defendants, and which is not a legitimate reason to refuse certification given the goal of `access to justice.'"

¶ 100 If alternatives are pursued, the same range of issues against the multiple Defendants will need to be determined. Too much should not be made of the need for some individual assessment as that will be a factor regardless of whether the claims are prosecuted as a class action, a multi-party action or a series of individual actions.

¶ 101 Further, the starting point in this case is that the Defendants already face litigation for the collective claims of the Corporation. The complexity of the action stems in part from the nature of the claims that all acknowledge the Corporation may pursue alone. The conversion and sale of The Residence raises many issues against different people and certification will not change that. The key issue is whether the addition of the personal claims as a class action is fair to the Defendants and is manageable. The Defendants Investplan, 852167, 759826, Mr. Nugent and Mr. Whitehead do not oppose certification. The Defendants Mr. Grab, Mr. Hartwell, Mr. Lester and Butler took no part in the certification proceedings. Ms. Thompson opposed certification and filed a brief and Manticore opposed but did not file a brief.

¶ 102 I find that a class action is preferable; it is a fair and efficient method of addressing the common issues in this case. The Defendants already face the collective claims of the Corporation and it is desirable to deal with the personal claims that arise from the conversion and sale of The Residence at

one time and for all affected.

e. *Representative Plaintiff*

¶ 103 There are three requirements in s. 5(1)(e) of the *CPA*. First, the representative plaintiff must, in the opinion of the Court, fairly and adequately represent the interests of the class. Ms. Mah deposed that, as statutory manager, the Corporation has taken steps to repair defects and deficiencies in the building and has assessed owners for the cost of doing so. It has in its possession all of the relevant records related to the investigation and remediation of the building deficiencies. It has an existing or prior relationship, governed by law, with the proposed members of the class and the litigation has been ratified by the owners.

¶ 104 Second, the Corporation must have produced a plan for proceeding that sets out a workable method of notice and advancing the action. The plan proposed here is sparse but sufficient for the purposes of the certification motion.

¶ 105 Third, there must be no conflict of interest between the prospective representative plaintiff and other prospective class members. No potential conflict of interest was raised.

¶ 106 As the Corporation is not a class member, it must also satisfy the Court that it meets the requirements of s. 2(4) of the *CPA*, namely that its appointment will avoid a substantial injustice to the class. The Institute noted at para. 221 of the Report that this exception "could be useful in cases where a particular individual or organization possesses special ability, experience or resources that would enable it to conduct the case on behalf of all class members".

¶ 107 The Corporation has demonstrated both its willingness to undertake the necessary research and its experience in commissioning studies concerning alleged deficiencies and their correction. The Corporation has also demonstrated that it has the resources to pursue this matter. The Court must also consider the ability of the proposed representative plaintiff to be discovered on matters having to do with the class. The Corporation is obliged to select an individual who is in a position to address the personal claims and I am satisfied that it can and will do so.

Conclusion

¶ 108 The requirements for certification have been met and the *CPA* therefore requires me to certify the proceedings. The class will consist of "all those persons who purchased a condominium unit in Condominium Plan 0020701 directly from any one of the Defendants" and the common issues will be as stated by the Corporation. The parties will appear before me to settle the terms of the certification pursuant to ss. 9 and 20 of the *CPA*.

¶ 109 Ms. Thompson asked that, in the event certification was granted, the claims against her be stayed pending the determination of the common issues under s. 14 of the *CPA*. It is an open question whether s. 14, which allows the Court to stay or sever any proceeding related to the class proceeding on any terms or conditions that the Court considers appropriate, provides authority to stay part of the class proceeding itself. I need not answer that question today. While she admits that she was a realtor, Ms. Thompson is also alleged to have been a Director of Investplan and a developer. Her application for summary judgment was dismissed and has not been appealed. This request invites a consideration of the merits of the claims against her, which is not the role of the certification judge, and in some respects may be seen as a collateral attack on the Court's decision on summary judgement. For those reasons, I decline to order a stay.

¶ 110 As a final matter, it is to be hoped that the trial judge will determine the limits, if any, on a condominium corporation's power to sue for collective and personal claims concerning common property. A clear statement of the law will assist in future cases and will help to delineate the proper relationship between the *Condo Act* and the *CPA*.

¶ 111 If necessary the parties may speak to me concerning costs.

MARTIN J.

QL UPDATE: 20060407
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Dabbs v. Sun Life Assurance Company of Canada

[Indexed as: Dabbs v. Sun Life Assurance Co. of Canada]

40 O.R. (3d) 429
[1998] O.J. No. 2811
Court File No. 96-CT-022862

Ontario Court (General Division)
Sharpe J.

July 3, 1998

Civil procedure — Class proceedings — Certification — Approval of settlement — Action against insurance company for damages arising from alleged misrepresentation that within specified number of years dividends would pay premiums — Action satisfying test for certification as class proceeding — Class Proceedings Act, 1992, S.O. 1992, c. 6.

Civil procedure — Class proceedings — Approval of settlement — Standard for approval not perfection and involving element of compromise — Action against insurance company for damages arising from alleged misrepresentation that within specified number of years dividends would pay premiums — Defendant and representative plaintiff signing settlement agreement and seeking court approval — Under settlement agreement, class members having right to receive certain defined benefits without proof of any misrepresentation or having choice of alternative claims resolution procedure that required them to provide evidence of misrepresentation — Settlement approved — Class Proceedings Act, 1992, S.O. 1992, c. 6.

The plaintiff brought a proposed class proceeding against the defendant insurance company. In the action, the plaintiff alleged that agents of the defendant misrepresented to purchasers of policies that within a specified number of years dividends would pay the premiums. Similar actions were commenced in British Columbia and Quebec. There were approximately 141,000 class members in Ontario and approximately 400,000 class members in Canada. All the actions were settled by written agreement dated June 16, 1997 subject to court approval in all three provinces. The settlement was approved in British Columbia and Quebec. The plaintiff and the defendant together moved for certification of the action as a class proceeding and for approval of the settlement. There were 14 objectors.

Under the settlement agreement, all class members could choose to receive certain defined benefits without proof of any misrepresentation or it could choose to receive certain defined benefits under an alternative claims resolution procedure that required the class member to provide evidence of the misrepresentation. Depending on the nature of their policies, the benefits available without proof of the misrepresentation (a "no proof" benefit) included annual dividend improvements and reduced cost of term insurance. Under the alternative claims resolution procedure, there were five categories of claims and the availability of benefits depended upon whether the class member provided written or oral evidence of the misrepresentation and upon whether the agent confirmed the misrepresentation, neither confirmed nor denied the misrepresentation, denied the misrepresentation, or provided evidence of a contradictory written statement that had been given to the class member at the time of sale of the policy.

Under the settlement agreement, a class member could immediately opt out and sue on their own behalf and there was an additional right to opt out under the alternative claims resolution procedure if

the class member's proof was denied by an agent. In this circumstance, the class member also had the right to re-elect for a "no proof" benefit.

Held, the motion should be granted.

The action should be certified as a class proceeding since the statement of claim disclosed a cause of action, there was an identifiable class that would be represented by the representative plaintiff, there was a common issue, and a class proceeding was the preferable procedure for the resolution of the common issues. Further, the representative plaintiff had no conflict of interest to the class and had produced a proper plan for the resolution of this proceeding. The objection based on the absence of a subclass for class members with a complaint for having been improperly induced to replace an existing policy did not justify denying certification and any class members with such a complaint were protected by the provisions in the settlement agreement for opting out.

Considering the points in favour of and against approval of the settlement, it should be approved. The standard for approval is not perfection. While class action settlements must be seriously scrutinized, all settlements are the product of compromise and fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation. In this case, that the settlement was recommended by experienced class counsel and that it had been approved in British Columbia and Quebec were factors favouring its approval. The legal risk of failing to prove the misrepresentation claim was real, and there were practical and financial risks that favoured a settlement. The alternative claims resolution process, which was at the core of the settlement, provided a fair and efficient process. The plaintiff and the defendant satisfied the burden of showing that the proposed settlement was fair, reasonable, and in the best interests of those affected by it.

Cases referred to

London and South Western Rail Co. v. Blackmore (1870), L.R. 4 H.L. 610; Podmore v. Sun Life Assurance Co. of Canada, Que. S.C., Tannenbaum J., January 16, 1998; Romanchuck v. Sun Life Assurance Co. of Canada, B.C.S.C., Brenner J., November 28, 1997

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5

MOTION for a certification of an action as a class proceeding and for approval of a settlement under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Michael A. Eizenga, Michael J. Peerless and Charles M. Wright, for plaintiff.
H. Lorne Morphy and Patricia D.S. Jackson, for defendant.
Michael S. Deverett, for three objectors.
Gary R. Will and J. Douglas Barnett, for 11 objectors.

SHARPE J.: —

1. Nature of Proceedings

This action is a proposed class proceeding pursuant to the Class Proceedings Act, 1992, S.O. 1992, c. 6. The claim arises from the sale of so-called "vanishing premium" life insurance policies. The plaintiff alleges that in marketing these policies, the defendant Sun Life Assurance Company of Canada ("Sun Life") and its agents represented to purchasers that dividends to policy holders would pay the required premiums within a specified number of years. Sales illustrations projected a "premium offset date" after which no further premiums would be required. In fact, in the plaintiff's case and in a large number of similar cases, dividends have been lower than projected and policy holders have been or will be required to pay premiums for a longer period than the projected premium offset date. The defendant Sun Life has made it clear that it denies the allegations of misrepresentation.

Together with similar Quebec and British Columbia actions, this action was settled by written agreement, dated June 16, 1997. The settlement is subject to and conditional upon court approval in all three provinces. The settlement has been approved in Quebec and British Columbia. On this motion, the plaintiff and defendant seek certification of the action as a class proceeding and approval of the settlement.

Following my earlier ruling on the procedure to be followed on this motion, released February 24, 1998, further material was filed by the plaintiff and by certain of the objectors. The motion was then heard over three days in accordance with the terms set out in my procedural ruling. I am now in a position to rule on certification and the request for approval of the settlement.

2. Certification

The test for certification is set out in the following terms in the Class Proceedings Act, s. 5:

> 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
>
> (a) the pleadings or the notice of action discloses a cause of action;
> (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
> (c) the claims or defences of the class members raise common issues;
> (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
> (e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members.

The defendant supports the motion for certification, but only on the condition that the settlement be approved at the same time. Subject to certain submissions relating to the subclass issue discussed below, the objectors focused their attention on the settlement and did not seriously contend that this was not a case for certification.

(a) Cause of action

I am satisfied that the statement of claim discloses a cause of action. The plaintiff asserts claims on his

own behalf and on behalf of a proposed class for alleged breach of contract and negligent misrepresentation arising out of the manner in which whole life participating insurance policies with a premium offset option were sold. The allegations in the action primarily concern the use of sales illustrations, combined with oral and written representations made by the defendant and its agents with respect to the date upon which dividends would be sufficient to fully pay up the policies. While it is clear from the position it has taken on this motion that the defendant would deny these allegations if the action were to proceed, the plaintiff does plead a tenable cause of action.

(b) Identifiable class

> The plaintiff proposes that the class be defined as follows:
> . . . all owners of Class Policies purchased in Ontario, or who are resident in Ontario on April 30, 1997 and whose Class Policy(ies) were purchased outside Quebec or British Columbia.
> "Class Policy" is defined as
> . . . any participating whole life policy issued by Sun Life in Canada between January 1, 1980 and December 31, 1995 which is in force as of April 30, 1997 (a "Current Class Policy") or which has become a Lapsed Policy between January 1, 1990 and April 30, 1997 (a "Lapsed Class Policy"), except those policies in respect of which the owners have released Sun Life from claims related to premium offset or to the sale of the policies.

The proposed definition of the class does, I find, represent an identifiable class of two or more persons that would be represented by the representative plaintiff. It is common ground that there are approximately 141,000 members of the proposed class in Ontario and approximately 400,000 class members in Canada.

(c) Common issue

I also find that the statement of claim does raise a common issue, namely the following:

> Did the use of illustrations and/or any representations, in writing or verbal, create an obligation on the part of Sun Life with respect to a specified offset date despite the terms of the policy itself and the terms of any illustration?

(d) Preferable procedure

I find that a class proceeding is the preferable procedure for the resolution of the common issue. As already noted, there are approximately 141,000 class members in Ontario and approximately 400,000 class members in Canada. The litigation of these claims on an individual basis would be costly and time consuming. Indeed, if these claims had to be litigated on an individual basis, few members of the class would be able to present their claims because of the costs, risks and delays involved. I have no doubt that a class proceeding is the most efficient manner to deal with these claims from the perspective of both the litigants and the court, and that a class proceeding will result in increased access to justice.

(e) Representative plaintiff

Mr. Dabbs filed an affidavit on this motion and was cross-examined before me. Mr. Dabbs impressed me as being an honest and informed lay person with a genuine perception of having been misled by an agent as to the number of premiums he would have to pay. I am satisfied on the basis of all the evidence that he has made a sincere and genuine effort to represent the interests of the proposed class and that he

has no conflict of interest with other members of the class. I find as well that the representative plaintiff has produced a proper plan for the resolution of this proceeding.

(f) Subclass

Mr. Deverett submitted that certification should be denied on the ground that the agreement failed to provide for a subclass for those who have claims for "twisting", a practice whereby a policy holder is improperly induced by an agent to replace an existing policy with a new policy of less value to the policy holder. In my view, there is no evidence that would indicate that there has been a significant problem with "twisting" among Sun Life policy holders. Class counsel did not ignore the issue. The statement of claim contains an allegation that would deal with twisting. However, Mr. Ritchie testified that from class counsel's interviews with over 200 policy holders, there emerged no evidence of a systemic problem. In my view, in the absence of any evidence or reasonably supported belief that twisting may be a wide-spread problem among class members, there is no basis for denying certification on the ground that there is no subclass for "twisting". The right to opt out provides adequate protection to any class member who wishes to pursue a claim for "twisting".

3. Terms of the Settlement

The settlement agreement is a document of some considerable complexity, but it will facilitate analysis to provide a simplified explanation of its main features.

(a) Right to opt out

Under the terms of the settlement, all class members retain the right to opt out of the settlement and sue on their own behalf for whatever claim they wish to assert. The right to opt out arises at two stages. A class member may opt out immediately and have nothing to do with the settlement. There is also a right to opt out that arises in one area of the alternative claim resolution process, discussed in greater detail below.

(b) Global benefits

The proposed settlement contains two types of benefits for class members. First are global benefits. These might be described as "no-proof" benefits. They are available to all class members without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. All members of the class are automatically entitled to an annual dividend improvement of 50 basis points (1/2 per cent) higher than would otherwise apply for a period of three years. For a special category of policies known as "enhanced policies", there is a further benefit of a 25 per cent reduction in the cost of term insurance for the enhanced term of such policy.

A member of the class may also elect the optional dividend benefit. This is also a "no-proof" benefit, available without inquiry as to the nature of the representations that were made to the class member at the time he or she purchased the policy. This benefit entitles the policy holder to an annual dividend interest rate that is 75 basis points (3/4 per cent) higher than would otherwise apply for the term of the policy. However, to obtain this benefit, the policy holder must waive the special maturity dividend. The special maturity dividend is not a right secured by any policy, but an enhancement the defendant has voluntarily provided to its policy holders. It represents an enhanced cash value or payment on death determined by the length of time the member has held the policy. To determine the relative values of the optional dividend benefit and the special maturity dividend the policy holder must give up, it is necessary to examine the policy holder's individual circumstances. The plaintiff and the defend ant

submit that in most cases, the value of the optional dividend benefit will greatly exceed the value of the special maturity dividend. I will return to the question of the value of the optional dividend benefit below.

(c) Alternative claims resolution process

The second type of benefit is that available through the alternative claims resolution process ("ACRP"). The ACRP provides a mechanism whereby a policy holder presents evidence of the nature of the actual misrepresentation made at the time of sale of the policy. A class member who elects to submit an ACRP claim is, subject to an exception described below, not entitled to receive the "no-proof" benefits just described. The ACRP provides for submission of a claim on the basis of affidavit from the policy holder and certain documentary evidence.

The settlement agreement contemplates that a policy holder who submits an ACRP claim will be placed in one of five categories. These are described in greater detail and with more precision in the agreement, but for present purposes, the following simplified definitions will suffice:

> Category 1: the member provides evidence showing that the defendant or its agent made a written representation that the policy would be fully paid-up after a specified number of premiums had been paid.
> Category 2: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and the agent confirms that such representation was made.
> Category 3: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent neither confirms nor denies that such representation was made.
> Category 4: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid but the agent provides an affidavit denying that such representation was made.
> Category 5: the member provides affidavit evidence that the defendant's agent made an oral representation that the policy would be fully paid-up after a specified number of premiums had been paid and there is evidence that a written statement was provided at the time of sale which contradicts the member's version of the misrepresentation.

The rights and benefits attaching to these classifications is as follows. Categories 1 and 2 claimants are entitled to the same premium offset entitlement that was represented to them. Category 3 claimants are entitled to a premium offset date which is half-way from the premium offset date represented at the time of sale to the premium offset date shown as applicable on the first policy anniversary date after March 1, 1997. Categories 4 and 5 claimants are entitled to no relief. However, Category 4 claimants have two options available after their claims have been classified as falling into Category 4. First, they have the right to opt out of the settlement entirely, thereby preserving any common law action right they may have. Second, Category 4 claimants have the right to re-elect and take either of the "no-proof" benefits described above.

The settlement agreement provides for a summary and mechanical process whereby claims are to be assessed and classified. The ACRP does not allow for viva voce evidence, nor does it permit a right to cross-examine and or include any right to make oral representations. The defendant Sun Life is required to establish a claims administration facility which bears primary responsibility for determining the claims. The claims administration facility is, however, subject to audit by class counsel and rejected

claims are subject to review by a review panel consisting of a lawyer designated by Sun Life and a designated member of settlement class counsel. In the event of disagreement between the members of the review panel, there is further review by the "designate", defined as a retired judge or comparable individual.

The agreement requires the parties to provide to the court for approval a list of statements which are to be considered to constitute clear and unqualified guarantees as contemplated for Categories 1 and 2 claims. To protect the integrity of the ACRP, the lists are filed with the court under seal, but I have reviewed them. I find that they represent a useful, fair and reasonable collection of the sort of statement that would meet the standard required under the agreement.

Sun Life is also required to provide a toll-free telephone information line on which class members may make inquiries and obtain policy status information. Class counsel are required to monitor that "hot line" to ensure that appropriate information is given to class members. I note as well that class members who opt for the ACRP are entitled to access to the Sun Life file. Counsel for Sun Life stated to the court that before having to decide whether to accept the global benefits, elect the optional dividend benefit or pursue a claim under the alternative resolution process, a class member would be able to obtain from Sun Life a print-out setting out information as to the class member's policy that would include the value of the special maturity benefit.

(d) Value of the optional dividend benefit

The value of the "optional dividend benefit" is of considerable significance. It is available to all policy holders on a "no-proof" basis and it provides the fall-back position available to those policy holders who swear that a misrepresentation was made but who are denied any relief under the ACRP when met with a sworn denial by the agent.

I asked for further evidence of the value of this benefit. The plaintiff answered this request with a further affidavit from an actuary who had been retained to provide an expert opinion on the overall worth of the settlement. It is apparent that the actuary's opinion is based upon background information with respect to policies, dividends and benefits provided by the defendant. While neither of the groups of objectors showed any concern about the value of the optional dividend benefit until I raised the point, both counsel submitted that there should be a more searching inquiry into the background information that had been provided to Mr. Huff. The defendant takes the position that this information is of a confidential nature and that if it were to be made a matter of public record, the defendant would suffer thereby. Upon Mr. Huff depositing with the registrar of the court copies of the material and information he had been provided by the defendant, I reserved my decision on the appropriate course to foll ow.

My ruling on this point is that the question I asked has been answered by Mr. Huff's evidence and that without looking at the material provided by the defendant to Mr. Huff, I have been provided sufficient information to permit me to assess the fairness of this settlement. I reach this conclusion for the following reasons. First, Mr. Huff impressed me as a reliable witness who took his role as an independent expert seriously. He did not exaggerate or use the witness stand as a platform to advocate the cause of the party that retained him. His evidence was measured and balanced. He indicated that by its very nature, virtually all of the information he needed to formulate his opinion had to come from the defendant. There is simply no independent source for the number and types of policies, the rights attached to those policies and the formulae for calculation of benefits. To the extent possible, he was able to verify that the information provided by the defendant was internally consistent and the necessary ac tuarial calculations were tested.

I was urged by the objectors represented by Mr. Deverett to question the reliability of data supplied by the defendant because of an adverse credibility finding made against a senior officer of the defendant by another judge of this court in another action. In my view, it would be entirely inappropriate to accept such a submission. Each case falls to be decided on its own merits and on the evidence presented and the information at issue here is not the same as the evidence rejected in that other proceeding.

I am satisfied that an honest and significant effort has been made to respond to the question I asked. Mr. Huff and his associates devoted over 100 hours of professional time, 50 hours of para-professional time and 30 hours of clerical time, the greater part of which was related to the verification of offset dates. No further review is required. I would add that inherent in the approval of a settlement is the need to assess issues on a less than complete factual record. To require proof of all relevant facts to the standard required at trial would defeat the very notion of a settlement where the parties ask the court to approve an arrangement reached on a less than perfect record.

Mr. Huff's evidence is that over 90 per cent of policy holders would achieve offset reductions of between 30 per cent and 70 per cent through the optional dividend benefit. The weighted average reduction for policies he tested with meaningful offset reductions (i.e., excluding those where the current offset was the same as that indicated at the time of issue) was 56 per cent. It is apparent that these are averages and that to assess the situation of any individual policy holder, it would be necessary to consider the particulars of that individual's situation. Mr. Huff confirmed that the examples provided by Sun Life in the question and answer booklet provided to class members are accurate.

(e) Lapsed policies

The agreement also makes provision for lapsed policies. The holder of a lapsed policy who is able to provide evidence of insurability is entitled to a new policy similar to the lapsed policy with a 50 per cent reduction in the first annual premium. The holder of a lapsed policy may also apply under the ACRP. If the member's claim is classified as Category 1, 2 or 3, the policy may be reinstated without evidence of insurability upon payment of past due premiums, loans and interest.

4. Analysis of the Proposed Settlement

(a) The standard for approval

In my previous ruling I indicated that the standard to be met by the parties seeking approval of the settlement is whether in all the circumstances the settlement is fair, reasonable and in the best interests of those affected by it. A settlement of the kind under consideration here will affect a large number of individuals who are not before the court, and I am required to scrutinize the proposed settlement closely to ensure that it does not sell short the potential rights of those unrepresented parties. I agree with the thrust of Professor Watson's comments in "Is the Price Still Right? Class Proceedings in Ontario", a paper delivered at a CIAJ Conference in Toronto, October 1997, that class action settlements "must be seriously scrutinized by judges" and that they should be "viewed with some suspicion". On the other hand, all settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want. Fairness is not a standard of perfection.

Reasonableness allows for a range of possible resolutions. A less than perfect settlement may be in the best interests of those affected by it when compared to the alternative of the risks and costs of litigation.

I have had the benefit of three full days of cross-examination of deponents on affidavits filed in support of the settlement and submissions by counsel representing the parties and the objectors. I have

received answers to certain questions I posed to the parties. After considerations of the points that have been made both in favour of and against approval of the settlement, for the reasons that follow, I have reached the conclusion that this settlement should be approved.

(b) Recommendation of class counsel

The fact that this settlement is strongly recommended by experienced class counsel is certainly a factor in its favour. The recommendation of class counsel is clearly not dispositive as it is obvious that class counsel have a significant financial interest in having the settlement approved. Still, the recommendation of counsel of high repute is significant. While class counsel have a financial interest at stake, their reputation for integrity and diligent effort on behalf of their clients is also on the line. Moreover, in the case at bar, the settlement was not the result of a solo effort. As there were proceedings brought in British Columbia and Quebec as well, there was a team of class counsel from three different provinces. Moreover, class counsel also sought and obtained the advice of counsel from the United States who have experience in "vanishing premium" litigation.

(c) Risks of proceeding to trial

While the plaintiff presents an arguable case, there is no doubt that there is a risk that if the case went to trial, the common issue would be resolved against the class. Misrepresentation is often difficult to prove. Here, the standard sales illustration which forms the basis of most claims contains an explicit waiver which the members of the class would have to overcome. While the specific terms vary, typical language is: "This illustration assumes a continuation of the current scale of dividends and Special Maturity Dividends (SMD). Dividends may be higher or lower; they will be based on Sun Life's interest, expense, and mortality experience." The policies themselves typically contain language indicating that the premium is payable throughout the term of the policy: "Total Premiums payable by owner due [month, day and year] and yearly thereafter while life insured lives." It is certainly possible that the defendant might persuade a court that such language provided class members with a clear statement that the dividends might or might not be sufficient to fulfil the hoped-for result of the illustration. In addition to the legal and factual risks are certain practical concerns. The case would be factually, legally and procedurally complex. It would almost certainly take several years to get to trial and to then exhaust appeals.

(d) Fairness of the ACRP

The ACRP is at the core of this agreement. It plainly does not offer the procedural guarantees of a trial as there is no right to cross-examine, present oral evidence or to make oral submissions. On the other hand, there would be no point to the settlement if it did not provide for some form of summary resolution of claims. The provision of a cost-free process to claimants who would otherwise be forced to abandon their claims or bear the costs of litigation represents a significant benefit.

In my view, there can be little doubt that the ACRP offers a fair and reasonable resolution of claims falling in Categories 1 and 2 which afford the claimant precisely the offset date that was represented. I would also find it difficult to question the fairness of the result of a Category 3 claim where the claimant is given half-way relief on the basis of nothing more that the claimant's own sworn statement that an oral representation was made. Similarly, I see no reason to question the fairness of a Category 5 claim where there is evidence that a written statement was provided at the time of sale which contradicts the claimant's version of the misrepresentation. It is only fair that there be some control on the extent to which a class member can secure a benefit in the strength of his or her own affidavit. I note here that in answer to a question I posed, it was stated to the court that it was not intended that language of the

explicit waiver in the standard sales illustration quoted above would be suffici ent to bring the claim within Category 5.

The contentious issue is the fairness of Category 4. Mr. Will focused his attention on this point and submitted that, in effect, the agent was given a veto over the rights of the policy holder. It was his submission that there should be some control or constraint on the extent to which agents could defeat a claim by simple denial. The right to confront and cross-examine the agent could be granted, or there could be a points system that would discount agent denials where the same agent denied more than one claim.

In my view, there are a number of factors which have to be considered here. First is the fact that the agent must make the denial on oath. This means that the agent who lies is subject to the threat of perjury. Second, it is not apparent that all agents will perceive it to be in their interest to favour the interests of Sun Life over their clients. Third are the very significant options that remain to a class member whose claim is denied by the agent. The class member has, at that point, the right to opt out and sue the defendant with full knowledge of the case he or she will have to meet. In that sense, the class member loses nothing because of the settlement but gains advance discovery of the case to be met. The class member also has the very significant right to abandon the ACRP and elect the "no-proof" benefits which, as noted, will frequently result in achieving half-way relief. In my view, when considered in light of the balance of the settlement, it cannot be said that the situation of the Category 4 claimants renders this settlement unfair.

It is my view, that considered as a whole, the ACRP does provide for an efficient and fair process.

(e) Approval in British Columbia and Quebec

Another factor which favours approval of the settlement is that the same agreement has been approved by the courts of British Columbia and Quebec. In the companion case in British Columbia, Romanchuck v. Sun Life Assurance Co. of Canada, November 28, 1997, Brenner J. found that:

> . . . the settlement is reasonable, fair and adequate. A considerable degree of creativity has been demonstrated by the parties in putting in place, among other things, a form of alternative dispute resolution to allow a cost effective method of resolving the claims in this case . . .

In the Quebec case, Podmore v. Sun Life Assurance Co. of Canada, January 16, 1998, Tannenbaum J. of the Quebec Superior Court found that the agreement was "raisonnable, équitable, approprié et dans le meilleur intérÛt du groupe visé".

(f) Absence of statement of defence and discovery

This settlement was reached at a very early stage of the proceedings. No statement of defence was filed and there has been no discovery. The position of the defendant has not been put formally on the record and has been known to class counsel only through the settlement process. In my view, this is not a reason for refusing approval. It is clearly not the law that a settlement requiring court approval cannot be made at such an early stage of the proceedings. Moreover, I am satisfied that class counsel did adequately consider the position of the defendant. There is evidence before me that before recommending the settlement, class counsel interviewed hundreds of potential class members and a number of Sun Life agents. I am satisfied that a serious and diligent effort has been made to determine the facts. This is by no means the first "vanishing premium" case litigated in North America and class

counsel took advice from others with experience in the area.

(g) Exclusion of other possible claims

I have already dealt with the matter of "twisting" in relation to certification. It is unnecessary to add anything here except that the settlement preserves the right of any class member to opt out and pursue any such claim.

Mr. Deverett also suggested that the failure of the Sun Life policies to perform as indicated in the standard sales illustration might be the fault of Sun Life itself as it has the unfettered right to determine the dividends that are to be paid. Again, I find that the evidence before me fails to show that there is any serious prospect that this is a potentially valid source for a claim by class members. Sun Life does business in a competitive market. The failure of life insurance policies of the kind at issue here to perform was not restricted to Sun Life. There was an industry-wide problem which has been linked to the collapse of the unusually high interest rates of the 1980s and which produced a number of actions in North America against a long list of insurance companies.

A related issue concerns the question of how Sun Life, a mutual insurance company, would pay for the benefits to be conferred upon the policy holders. While that issue was not dealt with in the agreement itself, Mr. Ritchie testified that an understanding was reached during the negotiation of the settlement that future dividend scales would not be affected. That understanding was confirmed by a letter to Mr. Ritchie dated August 29, 1997 from counsel for Sun Life stating:

> I confirm the information provided during the negotiation process.
> Sun Life has specified that future dividend scales will be determined as if the settlement had never taken place. No attempt to recoup the costs of the settlement will be made in any manner affecting the existing participating policy holders (including Class Members).

That undertaking was confirmed by counsel for Sun Life before me at this hearing. In light of possible demutualization by Sun Life, a further letter from Sun Life's counsel to Mr. Ritchie dated May 1, 1998 repeats the above undertaking and states:

> Given the possibility of demutualization, Sun Life has instructed us to advise that the statements made earlier are still true, with the (obvious) clarification that the costs of the agreement may have an impact on the value of the company, which value will be distributed to all eligible policyholders in the event that demutualization proceeds.

Another point made in relation to the prospect of other potential claims is that the terms of the release to be given to Sun Life under the agreement are broad. Sun Life and its agents are to be released "from any liability or damages for representations, omissions or other conduct . . . that occurred during the purchase or sale of any Settled Class Policy, or in connection with the offering of Global Benefits, the Optional Dividend Benefit, or other benefits or resolutions pursuant to the Agreement". A release in these terms consequent upon a settlement is not unusual or unexpected, and in any event, is subject to being interpreted in accordance with recognized legal principles. It is well established that a release must be interpreted with reference to the context in which it was drafted and that a release will not be construed as applying to facts not known to the claimant at the time the release was drafted: London and South Western Rail Co. v. Blackmore (1870), L.R. 4 H.L. 610. These princi ples, together with the right of any policy holder who now believes he or she has a claim against Sun Life that is not embraced by the settlement to opt out, provide an adequate answer to this objection.

(h) Analysis of the proposed settlement -- Conclusion

I find that the plaintiff and the defendant have satisfied the burden of demonstrating that the proposed settlement is fair, reasonable and in the best interests of those affected by it. The global benefits afford significant relief to class members on a "no-proof" basis. The ACRP provides for a summary but fair disposition of claims advanced on the basis of representations that were made.

4. Conclusion

For these reasons, there shall be an order for the relief requested in paras. (a) to (i) of the notice of motion appointing Paul Dabbs as a representative plaintiff, certifying this action as class proceeding, approving the proposed settlement and for the further related orders requested.

In my February 24, 1998 ruling, I made reference to the issue of costs. Any party who wishes to claim costs shall serve and file a concise written brief within 20 days of the release of these reasons outlining the claim that is made and the basis for the claim. Reply submissions are to be made ten days thereafter. A date for a hearing of any such claims will be arranged. Failing any such submissions, there shall be no order as to costs of this motion.

I will remain seized of this matter for the purpose of any further approvals that are required, including the approval of the arbitration award relating to the fees and disbursements of class counsel.

Order accordingly.

Indexed as:

Endean v. Canadian Red Cross Society

Between
Anita Endean, as representative plaintiff, plaintiff, and
The Canadian Red Cross Society, Her Majesty the Queen
in Right of British Columbia, and the Attorney General
of Canada, defendants, and
Prince George Regional Hospital, Dr. William Galliford,
Dr. Robert Hart Dykes, Dr. Peter Houghton, Dr. John Doe,
Her Majesty the Queen in Right of Canada, and Her Majesty
the Queen in Right of the Province of British Columbia,
third parties
(Vancouver Registry No. C965349)
And between
Christopher Forrest Mitchell, plaintiff, and
The Canadian Red Cross Society, the Attorney General of
Canada, and Her Majesty the Queen in Right of the
Province of British Columbia, defendants
(Vancouver Registry No. A981187)

[2000] B.C.J. No. 1254
2000 BCSC 971
Vancouver Registry Nos. C965349 and A981187

British Columbia Supreme Court
Vancouver, British Columbia
K.J. Smith J.

Heard: December 8 - 10, 1999 and January 18 - 20, 2000.
Judgment: June 22, 2000.
(103 paras.)

Barristers and solicitors — Compensation — Agreements, contingent fees — Review and approval — Calculation of (incl. multiplier) — Measure of compensation — Class actions.

Application by lawyers in a class action for court approval of their fees. The lawyers represented British Columbia claimants in a national action against the Canadian Red Cross. The claimants formed two groups, the Endean group and the Mitchell group. The Endean group comprised British Columbia hemophiliacs who contracted hepatitis C because of Red Cross practices. The Mitchell group comprised others in the province who contracted the disease by transfusion. Nationally, lawyers reached a settlement totalling $1.6 billion, with legal costs to be paid out of the trust fund established to handle the award. The parties agreed that legal fees were not to exceed $52.5 million. All lawyers involved across Canada agreed to a global fee of $45 million for the Endean-type claimants and $7.5 million for the Mitchell-type. The Endean lawyers themselves sought $15 million plus disbursements and the Mitchell lawyers sought $500,000. The lawyers had engaged in extremely complex litigation as well as research into medical topics and public health care. One of the Endean lawyers was the first in the country to

achieve certification of a class in the action, energizing the litigation nationally. He also served on a committee overseeing the structuring of the compensation. The Endean group's fee request amounted to a multiplier of 3.75. The multiplier for the Mitchell lawyers' request, on a somewhat more favourable result per claimant, was 5.5, although the Mitchell lawyers agreed that the bulk of the work on their case had been performed in Ontario.

HELD: Application allowed. Fees were approved as requested. Concerning the Endean group, counsel went far beyond the scope of services usually rendered by lawyers. They devoted a large percentage of their time to the case and turned down other retainers because of it. The litigation was highly complex and important, involving the largest settlement of a personal injury claim in Canadian history. Counsel were of high standing, acting for claimants who could not otherwise have paid for their services. They achieved excellent results against substantial risk of no recovery. Contingent fees were meant to reflect the risks involved, and British Columbia counsel sought reasonable fees commensurate with their participation in the result. Their requested fee represented only 4.26 per cent of the recovery. Many of the same considerations applied to the Mitchell group's counsel, whose requested fee represented only three percent of the result achieved for 11 per cent of the claimants nationally.

Statutes, Regulations and Rules Cited:

British Columbia Supreme Court Rules, Rule 8-4(2).

Class Proceedings Act, s. 38.

Class Proceedings Act, 1992, S.O. 1992, c. 6, s.33.

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Infants Act, R.S.B.C. 1996, c. 223.

Law Society of British Columbia Rules, Rule 8.

Legal Profession Act, S.B.C. 1998, c. 9, ss. 66(2), 68(2), 68(6).

Counsel:

J.J. Camp, Q.C., David P. Church, Sharon D. Matthews and Bruce W. Lemer, for the plaintiff, Anita Endean.
Marvin R.V. Storrow, Q.C., and David E. Gruber, for the plaintiff, Christopher Forrest Mitchell.
Gordon Turriff, D. Clifton Prowse and Keith Johnston, for the defendant/third party, Her Majesty the Queen in Right of the Province of British Columbia.
Gordon Turriff and John R. Haig, Q.C., for the defendant, the Attorney General of Canada and the third party, Her Majesty the Queen in Right of Canada.

¶ 1 **K.J. SMITH J.**:— This application raises the question of the proper approach to the compensating of plaintiffs' counsel in class actions brought in British Columbia.

I. INTRODUCTION

¶ 2 These are two of six parallel lawsuits commenced in British Columbia, Quebec, and Ontario on behalf of residents of Canada infected directly and secondarily with Hepatitis C virus ("HCV") by the Canadian blood supply between January 1, 1986, and July 1, 1990. The Endean action concerns those British Columbia residents whose claims result from transfusion and the Mitchell action deals with infected haemophilic residents of the province. The background of these actions is described in Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158, [1997] 10 W.W.R. 752, 36 B.C.L.R. (3d) 350, 37 C.C.L.T. (2d) 242, 11 C.P.C. (4th) 368, rev'd in part (1998), 157 D.L.R. (4th) 465, [1998] 9 W.W.R. 136, 106 B.C.A.C. 73, 48 B.C.L.R. (3d) 90, 42 C.C.L.T. 222 (C.A.), leave to appeal granted, [1998] S.C.C.A. No. 260 (S.C.C.) ("Endean No. 1"), wherein I certified the Endean action as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50.

¶ 3 A settlement was ultimately reached between the plaintiffs and the Federal, Provincial, and Territorial Governments (the "FPT Governments") in one pan-Canadian negotiation and was approved by orders granted in each of the British Columbia Supreme Court, the Ontario Superior Court of Justice, and the Quebec Superior Court. The terms of the settlement and the reasons for approval are described in my decision in Endean v. Canadian Red Cross Society (1999), [2000] 1 W.W.R. 688, 68 B.C.L.R. (3d) 350, the decision of Winkler J. in Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.), and the decision of Morneau J. in Honhon c. Canada (Procureur général), [1999] J.Q. no 4370 (S.C.).

¶ 4 The settlement agreement requires the FPT Governments to pay monies into a trust fund to be invested and managed for the benefit of the class plaintiffs. Payment of fees to class counsel is provided for in clause 13.03 of the agreement as follows:

> The fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel will be paid out of the Trust. Fees will be fixed by the Court in each Class Action on the basis of a lump sum, hourly rate, hourly rate increased by a multiplier or otherwise, but not on the basis of a percentage of the Settlement Amount.

Although it was not spelled out in the formal agreement, the parties agreed, as well, that the fees as approved by the courts shall not exceed $52,500,000 in total.

¶ 5 Counsel for the plaintiffs have agreed among themselves to seek approval of fees of $7,500,000 for those representing the haemophilic classes and $45,000,000 for those representing the transfused classes. Mr. Camp and Mr. Lemer, counsel for Ms. Endean and the class she represents, seek approval of a fee of $15,000,000 plus disbursements. From their fee, they will pay the fees of several other lawyers who acted for particular members of the British Columbia transfused class. Mr. Storrow, counsel for the plaintiffs in the Mitchell action, seeks approval of a fee of $500,000 plus disbursements. Each of the applicants has a contingent-fee contract with his representative plaintiff providing for payment of a lump-sum fee in the amount claimed and disbursements.

II. THE LAW

1. The Class Proceedings Act

¶ 6 The applications are brought pursuant to s. 38 of the Class Proceedings Act, which provides, in relevant part, as follows:

> 38. (1) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff must be in writing and must

(a) state the terms under which fees and disbursements are to be paid,
(b) give an estimate of the expected fee, whether or not that fee is contingent on success in the class proceeding, and
(c) state the method by which payment is to be made, whether by lump sum or otherwise.

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

. . .

(7) If an agreement is not approved by the court, the court may
(a) determine the amount owing to the solicitor in respect of fees and disbursements,
(b) direct an inquiry, assessment or accounting under the Rules of Court to determine the amount owing,
(c) direct that the amount owing be determined in any other manner, or
(d) make any other or further order it considers appropriate.

¶ 7 The agreements in question satisfy the requirements of s-s. 38(1). The issue is whether they should be approved pursuant to s-s. 38(2) and, if not, what disposition should be made pursuant to s-s. 38(7).

¶ 8 The Class Proceedings Act provides no guidance as to how the court should approach the approval. Accordingly, the statutory and common law of general application in respect of solicitors' fees must apply. I will return to this aspect of the discussion after considering the approach proposed by Mr. Turriff on behalf of the FPT Governments.

2. The approach proposed by the FPT Governments

¶ 9 I preface these comments by observing that I requested the assistance on this application of counsel for the FPT Governments. In my view, they are in a uniquely advantageous position to comment on the litigation risks run by plaintiffs' counsel and on the value of the contributions made by them to the ultimate settlement, which are the two issues upon which Mr. Turriff focussed his submissions. However, Mr. Turriff did not put before me any evidence of the opinions or observations of Messrs. Whitehall, Haig, or Prowse, who carried these actions for the FPT Governments and negotiated the settlement with plaintiffs' counsel. That is unfortunate, as I remain of the view that their opinions would have been helpful.

¶ 10 Mr. Turriff suggested a method of assessing lawyers' fees based on an approach that has been used in Ontario and in the United States, known in those jurisdictions respectively as the "base-fee/multiplier" approach and the "lodestar/multiplier" approach. In Mr. Turriff's submission, this method is grounded in economic theory and is a rational and scientific approach to the assessment of lawyers' fees. He contrasted this with the traditional approach in British Columbia, which he characterized as based on "intuition and impression."

¶ 11 As the multiplier method has a history in Ontario and in the United States, I will first consider the situation in those jurisdictions.

¶ 12 The Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6, provides, in s-s. 33(1), that lawyers for a representative plaintiff may enter into fee agreements providing for payment of fees only in the event of success. Sub-sections 33(3) to (8) provide for the multiplier approach advocated by Mr. Turriff. "Base fee" is defined in s-s. (3) as the product of the total number of hours worked by the solicitor and an hourly rate, and "multiplier" is defined as a multiple to be applied to the base fee. Sub-sections (4) through (8) enact that the solicitor may apply to have his or her fees increased by a multiplier and that, on such an application, the court must determine a "reasonable" base fee and may then apply a multiplier that "results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding."

¶ 13 However, contingent fees derived other than from a base fee/multiplier are not prohibited in class actions in Ontario: see Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523 (Gen. Div.) and Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83 (Gen. Div.). In the latter decision, Winkler J. approved a percentage contingent fee and observed, at p. 88, that percentage contingent fees may be desirable to promote the policy objective of judicial economy in that they encourage efficiency in the litigation and discourage unnecessary work that might otherwise be done by the lawyer simply in order to increase the base fee.

¶ 14 Mr. Justice Winkler's observation has support in the American experience, which is discussed in the decision of the United States Court of Appeals, District of Columbia Circuit, in Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261 (D.C. Cir. 1993). In that case, the Court observed, at pp. 1265-66, that the percentage-of-the-fund method of calculating fees was the most common approach in the United States until 1973. The rationale underlying this method is that plaintiffs' attorneys who create a common fund for a class of individuals should be paid a reasonable fee from the fund as a whole in order to avoid the unjust enrichment of class members who would not otherwise contribute to the legal costs [p. 1265].

¶ 15 The Court recounted that, in Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973), the Third Circuit introduced the "lodestar/multiplier" approach in reaction to a perception that percentage fees sometimes resulted in large fee awards. The lodestar, like the base fee in Ontario, is the product of the hours reasonably spent and a reasonable hourly rate. Under this approach, the lodestar is to be adjusted upward or downward by a multiplier to reflect such factors as the contingency nature of the case and the quality of the lawyers' work.

¶ 16 The Court went on to explain, at p. 1266, that the lodestar approach gained predominance in the United States until the Third Circuit appointed a task force to compare the respective merits of the two approaches. The task-force report described the lodestar method as a "cumbersome, enervating, and often surrealistic process of preparing and evaluating fee petitions that now plagues the Bench and Bar." The report enumerated several criticisms of the lodestar approach, which are summarized at pp. 1266-67 as follows:

> 1) it "increases the workload of an already overtaxed judicial system"; 2) the elements of the process "are insufficiently objective and produce results that are far from homogeneous"; 3) the process "creates a sense of mathematical precision that is unwarranted in terms of the realities of the practice of law"; 4) the process "is subject to manipulation by judges who prefer to calibrate fees in terms of percentages of the settlement fund or the amounts recovered by the plaintiffs or of an overall dollar amount"; 5) the process, although designed to curb abuses, has led to other abuses, such as "encouraging lawyers to expend excessive hours engag [ing] in duplicative and unjustified work, inflat[ing] their 'normal' billing rate[s], and includ[ing] fictitious hours"; 6) it "creates a disincentive for the early settlement of cases"; 7) it "does not provide the district court with enough

> flexibility to reward or deter lawyers so that desirable objectives, such as early settlement, will be fostered"; 8) the process "works to the particular disadvantage of the public interest bar" because, for example, the "lodestar" is set lower in civil rights cases than in securities and antitrust cases; and 9) despite the apparent simplicity of the lodestar approach, "considerable confusion and lack of predictability remain in its administration."

¶ 17 The task force concluded, as is set out at p. 1267, that the lodestar approach should be retained in "statutory fee" cases but that the percentage fee was the best approach for "common fund" cases. This distinction is significant for the present analysis, and is explained in In Re Prudential Ins. Co. of America Sales Litigation, 148 F.3d 283 (3d Cir. 1998) at p. 333:

> ... The percentage-of-recovery method is generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund "in a manner that rewards counsel for success and penalizes it for failure." ... The lodestar method is more commonly applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation.... It may also be applied in cases where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method....

Clearly, the actions presently under consideration are analogous to the common fund cases in the American jurisprudence.

¶ 18 Class actions are new to British Columbia: the Class Proceedings Act was enacted in 1995 and the Ontario Class Proceedings Act, 1992, from which it drew heavily, was enacted in 1992. In M. Eiezenga, M. Peerless, and C. Wright, Class Actions Law and Practice (Markham: Butterworths, 1999) at s. 1.12, p. 1.4, the authors noted that class actions for damages first became available in the United States in 1938 and observed:

> The American experience is thus more mature than its newer Canadian counterpart and was available as relevant background for Canadian legislators to draw upon.

Accordingly, there is much to be learned from the long experience of American courts with the methods of compensating successful class counsel, and the cases that I have just mentioned provide a valuable context in which to view the issue presently up for decision.

¶ 19 I reject Mr. Turriff's submission that the base-fee/multiplier approach should be imported into British Columbia as the method of assessing the fees of plaintiffs' class counsel pursuant to s. 38 of the Class Proceedings Act. The deficiencies in this methodology were identified by the Third Circuit task-force report, supra, and its introduction into our jurisprudence is undesirable and unnecessary. Its role should be confined to serving in appropriate circumstances as a tool for testing the court's initial assessment.

¶ 20 One of the disadvantages inherent in the multiplier approach is exemplified in this case, where Mr. Turriff applied for an order compelling production for his inspection of all plaintiffs' files and plaintiffs' counsels' billing records in the transfusion action and for leave to cross-examine Mr. Camp on his affidavit. I reserved judgment on the application to cross-examine Mr. Camp, and I will come to that shortly. I dismissed the application for production of records because it would have constituted an

unwarranted invasion by the defendants of the plaintiffs' solicitor-client privilege and, as well, because it was unnecessary.

¶ 21 I reiterate the opinion that I expressed in that oral ruling that the review of fees pursuant to s. 38 of the Class Proceedings Act is similar to the review of fees in an infant settlement conducted pursuant to the Infants Act, R.S.B.C. 1996, c. 223, and that the approach should therefore be similar. I referred to Harrington (Guardian ad litem of) v. Royal Inland Hospital (1995), 131 D.L.R. (4th) 15, 69 B.C.A.C. 1, 14 B.C.L.R. (3d) 201, 45 C.P.C. (3d) 105 (C.A.) and, in particular to the remarks of Finch J.A. at para. 253 to the effect that, except in unusual cases, it is not necessary to examine the lawyers' files and accounting records. In that case, the solicitor obtained approval of his fee from a judge of this Court after another judge had adjourned his initial application and requested further submissions. When this anomaly came to light, the second judge revoked her approval and the first judge embarked on an examination of the solicitors' files from which he concluded that the solicitor had grossly exaggerated the amount of time that he had claimed to have spent on the matter.

¶ 22 There has been no suggestion of any conduct of that sort here, and I remain of the opinion that the type of discovery sought by Mr. Turriff is not appropriate in this context. The course that Mr. Turriff was set upon would have resulted in a separate, lengthy, and complex proceeding to assess the reasonableness of the proposed fees and would set a precedent that is neither necessary nor contemplated by s. 38 of the Act.

¶ 23 As well, I give no weight to the evidence of the economist, Mr. Ross, which was offered by Mr. Turriff as expert opinion on, as Mr. Ross described it in his written report:

> ... the appropriate framework for determining the amount, if any, that should be added to what would otherwise be a reasonable market value fee for professional legal services provided by plaintiffs' counsel to ensure an economic incentive for competent lawyers to take on class action contingency work that should be taken forward.

¶ 24 Mr. Ross advocated formulae for the mathematical calculation of fees. They involved, at the first stage, an "earnings equivalent multiplier" to be used to calculate the base fee using "judgmental probability", that is, the probability that the action will succeed. At the second stage, a "risk aversion multiplier" was offered to measure such things as the particular lawyer's risk of erratic long-term income resulting from a series of unsuccessful contingency cases. The proper fee in any given case, according to Mr. Ross, is the result produced by the following formula:

> REASONABLE FEE = Reasonable hours worked X reasonable hourly rates X (earnings equivalent multiplier X risk aversion multiplier)

where the multipliers change as the risks change from time to time throughout the retainer.

¶ 25 The chance of success in a given lawsuit and the risks to be run by an individual lawyer in taking it involve a myriad of objective factors and many quintessentially subjective considerations. These chances and risks are incapable of scientific calculation. The proposal advanced by Mr. Ross gives the impression of mathematical precision but, at its heart, is no less arbitrary and subjective than the approach conventionally followed by the courts of this province. The economic opinion evidence is, therefore, not helpful.

¶ 26 As I understand Mr. Turriff's submission, his application to cross-examine Mr. Camp on his affidavit is not based on the usual ground that Mr. Camp's assertions of fact were put in issue by

contrary evidence from Mr. Turriff's clients. There was no such evidence. Rather, he wished to investigate Mr. Camp's actions and state of mind at various times throughout his retainer for the purpose of establishing a factual basis for the application of the formula offered by Mr. Ross. As I have rejected the formula, there is no need for the cross-examination. Moreover, any attempt to quantify changes in litigation risk as events transpired would likely be futile and would consume an unwarranted amount of time. Accordingly, the application to cross-examine Mr. Camp is dismissed.

¶ 27 Mr. Turriff's submissions on the effects of changing risks deserve comment. He identified a number of events that he characterized as "risk-reducing." All of them, but one, related to the evolving settlement agreement. It is true that the parties were moved along the path to settlement by such things as the publication in November 1997 of the Final Report of the Commission of Inquiry on the Blood System in Canada (the "Krever report") and the announcement in March 1998 by the FPT Governments of the availability of $1,100,000,000 to settle these actions. However, I cannot accept that these events reduced the risk of failure of the negotiations in any real or measurable way. The risk of failure continued to hinge on a multitude of factors any one of which could have aborted the negotiations, a danger that continued even after the settlement had received court approval.

¶ 28 The other "risk-reducing" factor identified by Mr. Turriff was the certification of the Endean action. However, it would be wrong to treat counsel's success on this application as justification for reducing the contingent fee on the theory that the skill and effort of counsel have made a successful result more probable. At the outset of the retainer, counsel and clients knew that the enterprise would fail if certification were denied. The chance of success or failure at this stage was therefore a factor in the percentage fee initially agreed upon and, as well, by reason of the settlement agreement, in the lump sum fee that was later substituted for it. It would be wrong to use hindsight to give different weight to that risk than the lawyers and clients gave to it at the outset.

2. The proper approach to assessing reasonableness

¶ 29 Mr. Turriff began his submission with the proposition that the courts of Quebec, Ontario, and British Columbia must consider and weigh the evidence presented in all jurisdictions in order to ensure "that no lawyer in any of the three jurisdictions becomes entitled to a fee which does not accurately reflect his or her relative contribution towards the pan-Canadian settlement agreement." In his submission, there is a possibility for conflicting judgments in this respect that, he contends, would impair the integrity of all three awards and would undermine the legitimacy of all three courts.

¶ 30 I agree that gross inconsistency between the fee awards in the three provinces should be avoided if possible. On the other hand, it cannot be forgotten that each province has its own laws and traditions in respect of solicitors' fees. I must act on the evidence presented in this Court and I must apply the laws of British Columbia to arrive at my decision. However, in doing so, I must have appropriate regard to the national context in which the legal actions have been resolved.

¶ 31 Section 66 of the Legal Profession Act, S.B.C. 1998, c. 9 governs contingent fee agreements. Sub-section 66(2) provides that the benchers may make rules respecting contingent fee agreements, including rules regulating the limits to lawyers' charges. By s-s. 68(2), the client has the right to have the registrar examine a fee agreement and, by s-s. 68(6), the registrar is empowered to modify or cancel the agreement if it is found to be unfair or unreasonable "under the circumstances existing at the time the agreement was entered into."

¶ 32 Part 8 of the Law Society Rules, entitled "Lawyers' Fees", sets up a standard of fairness and reasonableness. The relevant provisions say:

8-1 (1) A lawyer who enters into a contingent fee agreement with a client must ensure that, under the circumstances existing at the time the agreement is entered into,

(a) the agreement is fair, and
(b) the lawyer's remuneration provided for in the agreement is reasonable.

(2) A lawyer who prepares a bill for fees earned under a contingent fee agreement must ensure that the total fee payable by the client

(a) does not exceed the remuneration provided for in the agreement, and
(b) is reasonable under the circumstances existing at the time the bill is prepared.

¶ 33 In addition to the statute law, the court has inherent jurisdiction to review the reasonableness of solicitors' fees arising out of contingent fee agreements and, as well, inherent parens patriae jurisdiction to ensure the reasonableness of legal fees incurred on behalf of class members who are under legal disability: see Harrington (Guardian ad litem of) v. Royal Inland Hospital, supra at p. 264, para. 192 and pp. 266-67, paras. 197-99.

¶ 34 The meanings of the words "fair" and "reasonable" were considered in Commonwealth Investors Syndicate Ltd. v. Laxton (1990), 50 B.C.L.R. (2d) 186 (C.A.) ("Commonwealth No. 1"). There, the Court was considering a predecessor of s. 66 of the Legal Profession Act, namely, s. 99 of the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, which, for present purposes, did not differ in any material way. At pp. 198-99 of Commonwealth No. 1, the Court set out a two-step inquiry:

> The first step investigates the mode of obtaining the contract and whether the client understood and appreciated its contents. . . .
>
> The second inquiry, assuming the contract is found to be "fair" involves an investigation of the "reasonableness" of the contract. On this investigation, extending from the time of the making of the contract until its termination or its completion, all of the ordinary factors which are involved in the determination of the amount a lawyer may charge a client are to be considered . . . .

Thus, "reasonableness" relates to the amount of the fee.

¶ 35 In a second appeal in the Commonwealth case, reported as Commonwealth Investors Syndicate Ltd. v. Laxton (1994), 94 B.C.L.R. (2d) 177 (C.A.), app. for leave to appeal dis'd, [1994] S.C.C.A. No. 427, March 30, 1995 ("Commonwealth No. 2"), the Court dealt with the meaning of "reasonableness". McEachern C.J.B.C., speaking for the Court, referred to the oft-cited decision in Yule v. Saskatoon (1955), 1 D.L.R. (2d) 540 (Sask. C.A.) and to the factors set out therein, namely: the extent and character of the services rendered; the labour, time and trouble involved; the character and importance of the litigation; the amount of money and the value of the property involved; the professional skill and experience called for; the character and standing of counsel in the profession; the results achieved; and, to some extent at least, the ability of the client to pay. He observed, at pp. 183-84, para. 25, that further considerations apply in respect of contingent fees including, at least, the risk of no recovery at all and the expectation of a larger fee based upon the result than would be warranted in non-contingency cases.

¶ 36 However, the assessment is not produced by simply summing the results of the considerations of each factor. McEachern C.J.B.C. made that clear at p. 187, para. 47, where he said:

> All the circumstances must be considered, including the Yule factors, the risks and

> expectations, and the terms of the bargain which is the subject matter of the inquiry. With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession?

¶ 37 Mr. Laxton's contingent fee agreement in the Commonwealth cases related to a conventional lawsuit, not to a class action. In my view, the approval of counsels' fees in class actions involves additional considerations that are not present in the ordinary case.

¶ 38 First, the rationale for using percentage fees in "common fund" cases in the United States is relevant. Class actions differ from conventional actions in that the beneficiaries of the action do not participate actively in it, leaving the instruction of counsel to the representative plaintiff. As was observed in Swedish Hosp. Corp. v. Shalala, supra at p. 1265, fees in these cases must be shared by the beneficiaries of the fund in order to avoid their unjust enrichment. American courts have recognized that this approach shifts the emphasis from the fair value of the time expended by counsel, or what we would refer to as a quantum meruit fee, to a fair percentage of the recovery: see Swedish Hosp. Corp. v. Shalala, supra at p. 1266.

¶ 39 In my opinion, the equitable sharing of fees by the recipients of the award or settlement is a proper consideration in assessing the reasonableness of lawyers' fees in class actions. What is a fair fee for the work done by the lawyer is important, but equally important is that each member of the class should share in payment of a fair fee for the result achieved, as viewed from his or her perspective. This notion has been recognized as a proper consideration in the approval of class counsel fees in British Columbia. In Harrington v. Dow Corning Corp. (1999), 64 B.C.L.R. (3d) 332 (S.C.), at para. 18, E.R.A. Edwards J. observed that the factors that ought to be considered include "the individual claimants' contribution to the fee as a portion of their recoveries." This passage was applied by Brenner J. (as he then was) in Sawatzky v. Soci t Chirurgicale Instrumentarium Inc. (8 September 1999), Vancouver C954740 (B.C.S.C.) at para. 8 and by Williamson J. in Fischer v. Delgratia Mining Corporation, [1999] B.C.J. No. 3149, (7 December 1999), Vancouver C974521 (B.C.S.C.) at para. 22. Accordingly, the proportion that the proposed fee bears to the recovery is prominent in the analysis.

¶ 40 A second consideration arises from the unique nature of class proceedings. In a conventional action, the causal relationship between the lawyers' work and the result achieved is normally unquestioned. That is not necessarily so in class actions where the extent of the benefit brought about by the lawyer's work must be ascertained. This concept is illustrated in In Re Prudential Ins. Co. of America Sales Litigation, supra, where a class action was brought on behalf of millions of policyholders alleging deceptive sales practices by a life insurer. The Court held that class counsel should not be given full credit for the result when it was based, in part, on a compensation scheme implemented as a result of an investigation by the New Jersey Insurance Commissioner, who recommended a remediation plan to compensate affected policyholders, to prevent future violations, and to restore public confidence in the insurance industry. In remarks that are apposite here, the Court said, at p. 337:

> While a party need not be the only catalyst in order to be considered a "material factor" and may be credited for extra-judicial benefits created, there must still be a sound basis that the party was more than an initial impetus behind the creation of the benefit. Allowing private counsel to receive fees based on the benefits created by public agencies would undermine the equitable principles which underlie the concept of the common fund, and would create an incentive for plaintiffs attorneys to "minimize the costs of failure . . . by free riding on the monitoring efforts of others."

¶ 41 As I have already remarked, the American experience with class actions is instructive. I adopt

that reasoning and conclude that it is necessary, in considering the reasonableness of the fee in relation to the results achieved, to consider the causal relationship between the efforts of class counsel and the benefits conferred on the class claimants by the resulting recovery.

¶ 42 I turn now to a consideration of the fees proposed in these actions.

III. ANALYSIS AND CONCLUSIONS

1. Fees in the transfused class action

¶ 43 While an examination of the factors identified as relevant to the inquiry is necessary and will be useful, it ought not to overwhelm the recognition of the "judgment, audacity and legal skill" of counsel, to adopt a descriptive phrase used by McEachern C.J.B.C. in Commonwealth No. 2, supra at p. 187, para. 46. In my view, Mr. Camp is one of only a few lawyers in this province with the combination of legal talent, experience, and boldness necessary to have achieved this outcome.

(a) The extent and character of the services rendered

¶ 44 The scope of the services rendered by counsel in this case extended far beyond what is normally encountered in the practice of law. Mr. Camp and Mr. Lemer had to deal with difficult legal issues pertaining to product liability, professional negligence, and public policy in the context of public blood-banking and infectious diseases. As well, they had to become familiar with the epidemiology and natural history of HCV, a disease about which little was known at the outset and about which medical opinion was evolving throughout the course of their retainer. Further, they had to learn and to understand the workings of the public health care system in Canada and the interplay between federal, provincial, and territorial governments in the administration of these matters. The medical and political issues were overarching and were, to a large extent, out of their control. They had to react to these things and to accommodate their approach as matters evolved. Throughout, they were faced with disagreements between groups of infected persons and with the changing political winds as these issues were debated in the public media and as governments and government officials changed. At the same time, they had to deal with the many class members who were understandably pressing them for a resolution of the matter. In short, the gravity and difficulty of the task they faced was of the highest order.

(b) The labour, time and trouble involved

¶ 45 It is necessary at this point to consider the duration of the retainer of class counsel.

¶ 46 The effective approval date for the settlement was January 22, 2000. Since that time, however, Mr. Camp and Ms. Matthews have expended considerable time, along with counsel in the other jurisdictions, in getting the settlement plan up and running to the point where benefits could be paid to class members. Much of that time was necessitated by the removal and replacement of the initial plan Administrator and, as well, considerable time was invested in preparing the many documents required for the processing of claims.

¶ 47 The issue arises because the terms of the settlement provide for the creation of a Joint Committee, comprised of three class counsel from the transfused class actions and one class counsel from the haemophilic class actions. The terms of the settlement invest the Joint Committee with the overall supervision of the administration of the plan, including the recommending of persons for appointment by the courts as plan Administrator and the preparation of all necessary protocols. The fees

of the members of the Joint Committee are to be submitted to the courts for approval from time to time throughout the life of the plan.

¶ 48 Mr. Camp is a member of the Joint Committee and, as I understand it, Mr. Turriff's position is that the time expended by Mr. Camp and Ms. Matthews since January 22, 2000, should be billed as Joint Committee fees and should not be taken into consideration on the approval of class counsel fees.

¶ 49 I cannot agree. Class counsel were retained to recover money for the class plaintiffs on account of their claims, and the work of counsel under their retainer agreements is not finished until that has happened. I understand that payments to class plaintiffs have begun this month. Accordingly, now is the appropriate time to measure the reasonableness of the proposed fees. It should be noted that Mr. Camp does not take the position that he should be entitled to charge for this work as Joint Committee work in addition to his fee as class counsel. Quite properly, in my view, he asks that his work to date be considered in relation to the reasonableness of his contingent fee.

¶ 50 A second preliminary issue concerns the relevance of the time and effort expended by counsel in preparing for and conducting the hearing of the application to approve class counsel fees. Mr. Turriff's position is that this time was not spent for the benefit of class plaintiffs and is therefore not relevant to the reasonableness of the proposed fee. However, s. 38 of the Class Proceedings Act requires class counsel to seek court approval of their fees. This requirement is an integral part of the statutory scheme for class actions. Moreover, it is a term of each of the fee agreements in issue that the agreed fee will be subject to court approval. Accordingly, the obtaining of court approval of their fees is part of the work plaintiffs' counsel were required to do and the time spent by them in doing so must be considered in the assessment of the reasonableness of their fees.

¶ 51 In addition to their efforts in relation to the lawsuit and to the settlement, members of Mr. Camp's firm have spent a great deal of time over the past four years dealing with the questions and concerns of class claimants. As well, much time was devoted to meeting with HCV support groups across the country and with the media. As of June 12, 2000, Mr. Camp's firm has docketed approximately $3,200,000 in work in progress on this file. Mr. Camp and Ms. Matthews have devoted the majority of their time to this action since it was commenced and, as a result, they have declined many other retainers. For his part, Mr. Lemer has recorded more than $500,000 in time on this file since its inception and has spent a large proportion of his professional time on it at the expense of turning down remunerative work.

(c) The character and importance of the litigation

¶ 52 The character of the litigation and its importance to the plaintiffs bear mentioning. As a class action, this action involved many procedural and practical difficulties not encountered in conventional litigation. As well, it was a highly complex product liability/medical negligence case attendant with great risk. The members of the plaintiff class are infected with a debilitating disease that will, in many cases, lead to a protracted and uncomfortable death. The events that precipitated this lawsuit constituted a national public-health disaster. This case was therefore of immense importance to the class plaintiffs and was important, as well, to the Canadian public for the light that it shed on the problems that gave rise to this national tragedy.

(d) The amount of money involved

¶ 53 The total value of the settlement, in present-value terms, is in the order of $1,600,000,000. So far as I am aware, this is the largest settlement of a tort claim for damages for personal injuries in

Canadian history.

(e) The professional skills and experience called for

¶ 54 Mr. Turriff conceded that the work done by plaintiffs' counsel required a high level of skill; that it was complex, difficult, and well-done; and that the result achieved was excellent. These points cannot be understated. To handle all of these matters and to persevere through to the settlement ultimately achieved involved a quality of representation by counsel that is uncommon. As was observed by McEachern C.J.B.C. in Commonwealth No. 2, supra at p. 185, para. 36:

> ... Because of the breadth of their experience, and their special adversarial skills ... senior counsel are quick learners who master the details, understand the issues, conceptualize the difficulties, and figure out how to achieve the desired result. The problems faced by Mr. Laxton were complex and formidable.

Those remarks aptly describe Mr. Camp and the difficulties he faced. This view is shared by Jack Giles, Q.C., a highly-regarded barrister of some forty years experience. In his opinion letter, which was filed in evidence, he said that the result was:

> ... a truly remarkable achievement. It was obtained in the face of daunting obstacles and grave risks. It called for a high degree of experience, skill, courage and determination.

(e) The character and standing of counsel

¶ 55 Mr. Giles commented, as well, that Mr. Camp was uniquely fitted by his experience and standing for the role of lead counsel in this matter. The evidence supports that view. Moreover, Mr. Lemer has a wealth of experience in blood-related litigation and made good use of his knowledge and experience and, as well, of his relationships with experts in the related fields and with counsel of similar interests.

(f) The ability of the clients to pay

¶ 56 The class plaintiffs began with doubtful claims and it is highly unlikely that any of them could have afforded to pay for individual legal representation in this case. Certainly, Ms. Endean could not have done so. The cost of lawyers and experts, and the potential costs payable to the defendants in the event of failure, were simply prohibitive. These actions were able to go forward only because they were carried by counsel pursuant to contingent fee agreements.

(g) The results achieved

¶ 57 The class members will recover full and generous benefits as a result of the settlement and they will do so through a simple, administrative procedure without the necessity of engaging lawyers. Moreover, their costs of claiming compensation are to be covered by the settlement fund. The results achieved can only be described as excellent.

(h) The Risk of No Recovery

¶ 58 The risk of no recovery at all was substantial.

¶ 59 A demonstration of that proposition is the fact that the other two law firms consulted by the prospective class plaintiffs were unwilling to take the case on a pure contingency. One was prepared to take it only if paid hourly rates, with the plaintiffs to pay disbursements, and the other, although prepared to act for a contingent fee, insisted that the plaintiffs pay the disbursements. Of the three candidates for the action, only Messrs. Camp and Lemer were willing to undertake the action on a contingent fee at no cost to the plaintiffs.

¶ 60 The plaintiffs' best chance of establishing liability was against the Canadian Red Cross, but those hopes were dashed when this action was stayed against that organization and it was granted protection from its creditors pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, leaving minimal assets available for satisfaction of any judgment. As well, the stay impeded the ability of counsel for the plaintiffs to obtain important evidence from the Canadian Red Cross through pre-trial discovery. On the other hand, the risk of failure on liability against the FPT Governments was real and significant.

¶ 61 It was not only the risk of failure in the lawsuit that counsel had to contend with. There were also political risks. The danger existed throughout that the FPT Governments might establish a no-fault compensation scheme that would undermine these actions. This risk was heightened when the Krever Commission recommended in November 1997 that a no-fault compensation scheme be implemented by government for all those infected with HCV. Had that happened, these actions would have been for naught and plaintiffs' class counsel would have had to absorb the considerable costs they had incurred in carrying them.

¶ 62 There was also a significant risk that the settlement negotiations might fail. This was a matter of grave concern because the prospects of achieving comparable recovery through a trial were poor. Throughout the negotiations, counsel were frequently faced with potentially deal-breaking issues. As well, there were disputes between the class plaintiffs and other groups of infected persons that threatened to thwart a comprehensive settlement. There was, further, the risk that the courts would not approve the settlement. After that obstacle was overcome, the risk of the settlement negotiations aborting continued because of the modifications suggested by the courts. The FPT Governments initially took the position that these modifications were material, which would have allowed them to withdraw from the settlement, and it was only through further arduous bargaining that they were persuaded to accept the changes.

¶ 63 Accordingly, the risk of no recovery was a substantial and omnipresent risk that did not diminish over the course of the retainer but continued until the FPT Governments finally accepted the court-suggested modifications to the settlement agreement.

¶ 64 Moreover, the consequences of failure to Mr. Camp and Mr. Lemer would have been devastating. Mr. Camp correctly described this enterprise during his submission as "bet-your-firm-litigation."

(i) The expectation of a larger fee than in a non-contingency case

¶ 65 It is the nature of contingent fees that counsel and client expect that the fee, if success is achieved, will exceed what would otherwise be appropriate for the work done. Counsel shoulder the risk of failure in these cases and they and their clients legitimately expect that they will recover an enhanced fee for doing so. The evidence of Ms. Endean on this application bears this out.

(j) The contribution of counsel to the result

¶ 66 I do not think that it can be said that counsel are seeking to take advantage of any "extra-judicial" benefit to the class plaintiffs, as was the case in In Re Prudential Ins. Co. of America Sales Litigation, supra. The first indication of a willingness by the FPT Governments to pay compensation was on March 27, 1998, after the transfused class actions in British Columbia and Quebec had been certified on behalf of residents of those provinces and after the action on behalf of all other class members resident in Canada had been commenced in Ontario. Moreover, the announcement of the available $1,100,000,000 limited the potential recipients to the claimants in the class actions. In my view, the pre-eminent cause of the recovery in the context of this discussion was the effort of class counsel, and it would not be proper to give them less than full credit for the result.

¶ 67 As already noted, Mr. Turriff argued that I must measure the relative contribution of class counsel in each province to the pan-Canadian settlement so that there will be no chance of counsel in one province being credited in fees for value contributed by counsel in other provinces. However, it is impossible in hindsight to unravel the many factors that influenced the ultimate outcome in this case. The efforts of counsel in the other provinces undoubtedly played a large role. As well, the voices of lobby groups and others heard through the media likely entered into the deliberations of the FPT Governments. It is not necessary to identify the discrete causal contributions and to measure their respective force. It is sufficient to ascertain whether the efforts of Mr. Camp and Mr. Lemer were a material cause of the result achieved to the extent that they should receive full credit in their fees for the outcome. I have concluded that they were.

¶ 68 In that regard, it should be noted that Mr. Camp and Mr. Lemer were the first to obtain class-action certification. Although the Quebec action had been commenced, it had not been certified at that time. The Ontario action had not yet even been commenced. The certification was no small accomplishment given the vigour with which the application was contested and the fact that the only previous Canadian attempt to obtain certification for a mass tort action involving infected blood had met with failure: see Sutherland v. Canadian Red Cross Society (1994), 17 O.R. (3d) 645 (Gen. Div.). Whether the actions in the other provinces would have gone forward otherwise or not, it appears that the certification in British Columbia was the catalyst that gave them life.

¶ 69 The certification also energized plaintiffs' counsel nationally and Mr. Camp played a role in bringing approximately twenty of them together to form a coalition for the purpose of advancing their clients' claims. He made other significant contributions, as well. He was the chair of the coalition's first negotiating committee and, when that committee became unwieldy, he was one of three counsel delegated to negotiate for the transfused class, along with Mr. Strosberg of Ontario and Mr. Lavigne of Quebec. Mr. Camp was the first to bring representatives of the FPT Governments to the bargaining table when he met with Mr. Whitehall and Mr. Prowse, representing the federal and British Columbia governments respectively, on February 11, 1998. This meeting led to the further meetings that ultimately resulted in settlement. Mr. Camp and Ms. Tough, Ontario counsel for the haemophilic classes, were instrumental in bridging the differences between the transfused class members and the haemophilic class members. This accommodation resulted in their bargaining jointly with the FPT Governments, which was critical to the success of the negotiations. Mr. Camp's judgment and tactical decisions from time to time throughout the negotiations were important to their success.

¶ 70 Mr. Lemer and Ms. Mathews made significant contributions as well. Both served on the subcommittees formed by the coalition of lawyers for the purpose of facilitating negotiations and moving the lawsuits forward. I have already commented on Mr. Lemer's depth of knowledge and his value as a resource in relation to blood-related litigation.

¶ 71 I am satisfied that British Columbia class counsel made a substantial contribution to the result and that their efforts were at least as valuable as those of class counsel in the other provinces. It would

not be proper in the circumstances to give them less than full credit for the result in the assessment of the reasonableness of their proposed fees.

(k) The integrity of the legal profession

¶ 72 Next, Mr. Turriff submitted that the fee proposed here is "simply too much". He suggested that a fee of this magnitude would "impair the integrity of the legal profession". That phrase appears in the remarks of McEachern C.J.B.C. in Commonwealth No. 2, supra, where, at p. 187, para. 47, in a passage that I have already quoted, he said:

> . . . With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? . . .

¶ 73 Esson C.J. (as he then was) commented on this concept in Richardson (Guardian ad litem of) v. Low (1996), 23 B.C.L.R. (3d) 268 (S.C.) at paras. 29-30. I think that what he envisaged in using the phrase "integrity of the profession" was the decency, honour, and high-mindedness of the profession, both in substance and in public perception. He referred, for example, to the willingness of lawyers to readily reduce the amount payable under a contingent fee agreement when circumstances are such that the agreed fee would be disproportionate to the amount of effort, risk, and cost involved; that the lawyer will be able to fill with other remunerative work the time set aside to try a case that was settled; and that the client needs the funds and cannot really afford to pay them to the lawyer despite the agreement.

¶ 74 Here, the fees proposed are very large. The total value of the time docketed by all plaintiffs' counsel for the transfused class, including those who acted for individual plaintiffs and who will be paid their fees by Mr. Camp, amounts to approximately $4,000,000. Accordingly, the proposed fee is roughly 3.75 times the value that they have ascribed to their work. However, that is not necessarily a reliable measure, as I have already noted. Moreover, it must be remembered that good counsel can often achieve with a minimal effort what it might take less skillful counsel a great deal of time to achieve, as was seen in Commonwealth No. 1 and Commonwealth No. 2. Good counsel should not be penalized for their acuity and efficiency by basing their fees only on the amount of time that it took them to accomplish their clients' objectives.

¶ 75 Mr. Camp and Mr. Lemer do not seek approval of a percentage fee in this case. However, percentage contingent fees have long been common in British Columbia and have been approved in class proceedings in this province: see Harrington v. Dow Corning Corp., supra, Campbell v. Flexwatt Corp. (22 February 1996), Victoria 2895/95 (B.C.S.C.), and Fischer v. Delgratia Mining Corporation, supra. A comparison between the proposed fees as a percentage of the settlement amount and percentage fees approved in previous class actions will therefore be informative, although I must not lose sight of the principle identified by Esson C.J. (as he then was) in Richardson (Guardian ad litem of) v. Low, supra at para. 35:

> The question "what is the reasonable fee?" must be answered, not as a percentage, but in dollars.

¶ 76 There is evidence that British Columbia has approximately 22% of the transfused HCV-infected cohort. On that basis, for purposes of rough estimation, approximately $352,000,000 of the $1,600,000,000 settlement can be notionally credited to the clients represented by Mr. Camp and Mr. Lemer, and their proposed fee of $15,000,000 is 4.26% of the recovery.

¶ 77 A contingent percentage fee of that magnitude in an action for damages for personal injuries is virtually unheard of in British Columbia. Rule 8-4(2) of the Law Society Rules permits a maximum percentage of 40% in cases such as this. The vast majority of percentage contingent fees in British Columbia range between 15% and 33 1/3%. In Harrington v. Dow Corning Corp., supra E.R.A. Edwards J. observed that class counsel fees in the United States commonly range between 15% and 50%, and that a "presumptively reasonable rate" is 30%. He approved a contingent fee of 15%, which produced a fee in the order of $6,000,000 for plaintiffs' class counsel. In Sawatzky, supra a contingent fee of 20% amounting to $760,000 was approved. In Fischer, supra a fee of 30% of shares in a public company issued in settlement was approved, although the value of the fee in monetary terms is not apparent.

¶ 78 The fee proposed here compares favourably in percentage terms with contingent fees approved in Ontario and Quebec, as well. In Nantais, supra Brockenshire J. approved a percentage fee of 30%, which yielded a fee of approximately $6,000,000. In Doyer v. Dow Corning Corp. (1 September 1999), Montreal 500-06-000013-934 (Q.S.C.) a percentage of 20% was approved yielding a fee of $10,400,000. In Pelletier v. Baxter Health Care Corp., [1999] Q.J. No. 3038 (S.C.), a percentage of 16.9% yielding $3,648,000 in fees was approved.

¶ 79 I note, as well, the observation of McEachern C.J.B.C., speaking for the Court in Commonwealth No. 2, supra at p. 188, para. 49, that he saw nothing unreasonable or threatening to the integrity of the profession in a fee of 25% "for the skillful recovery of $6.5 million." Further, Mr. Giles, who is an experienced Vancouver barrister, as I have already noted, does not appear to consider that Mr. Camp's proposed fee is unseemly: he expressed the opinion that it is reasonable in all the circumstances.

¶ 80 I accept that a percentage fee should generally be lower where the recovery is higher. However, 4.26% is modest by any standard.

¶ 81 Another important factor in this connection is that the fees are not to be deducted from the compensation payable to the individual plaintiffs, as the settlement agreement provided for an allocation of $52,500,000 for legal fees in addition to that compensation. It could be said that this observation is illusory, as the $52,500,000 could have been allocated in part to plaintiffs' claims. However, two facts cannot be overlooked. First, the individual compensation awards provided for in the fund are full and generous and are available to the class members without further legal proceedings. Secondly, the FPT Governments tacitly agreed to fees up to this amount when they agreed upon the structure of the settlement fund.

¶ 82 Another perspective can be gained by considering the fee from the point of view of each member of the class. It appears that there are approximately 22,000 class members in British Columbia and the fee therefore works out to about $682 each. This is a modest fee for individual awards ranging from a minimum of $10,000 in non-pecuniary compensation to a maximum of $225,000 for non-pecuniary compensation plus loss of income, cost of care and home services, and other expenses, particularly when the fee is not deducted from the award.

¶ 83 It is also important to note that the representative plaintiff, Ms. Endean, considers the fee to be reasonable and urges the court to approve it.

¶ 84 While public perception is difficult to gauge, there is some interesting anecdotal evidence here. On July 11, 1999, Mr. Camp appeared on a "hot line" radio show in Vancouver, on a station that has coverage throughout the province, to discuss the $52,500,000 allocated for plaintiffs' lawyers' fees in this case. After Mr. Camp explained his justification of that amount, the host took several calls from

listeners. The majority of callers supported Mr. Camp's position and, of those who were not supportive, none were overly critical. I do not give this evidence any weight as a measure of public opinion on this matter, but it does suggest that at least some members of the public would not think less of the profession if the fee proposed in this case should be approved.

¶ 85 In my opinion, to say that the fee is "simply too much" invites a completely arbitrary assessment, one that depends upon the subjective opinions and whims of the particular judge hearing the application. If the proposed fees are to be reduced on the ground that they impair the integrity of the profession, some principled basis must be suggested for doing so. None has been suggested and I cannot agree that the proposed fee should be reduced by an arbitrary amount ostensibly to protect the integrity of the profession.

(l) Public policy

¶ 86 Mr. Turriff also advanced a public policy argument. He said that his clients want this Court to establish an upper limit for fees in class actions generally. One of his clients, the Province of British Columbia, enacted the Class Proceedings Act just a few years ago, in 1995, but did not impose any upper limit on fees at that time. Under our system of government, the introduction of a public policy of this nature is a matter for our elected representatives, not for this Court, and I decline Mr. Turriff's invitation to judicially legislate an upper limit.

¶ 87 There is, however, an aspect of public policy that is relevant. It was captured by Professor Garry D. Watson Q.C. in a paper entitled Class Actions: Uncharted Procedural Issues. In discussing the issue of compensation for plaintiffs' class counsel in the context of the Ontario statute, he said this:

> This is a vitally important subject, not just because it determines what will go into class counsel's pocket but because it will determine whether or not the legislation is successful. In the final analysis whether or not the Class Proceedings Act will achieve its noble objectives will largely depend upon whether or not there are plaintiff class lawyers who are prepared to act for the class and hence bring the actions. This in turn depends on two factors (a) the level of monetary reward given to class counsel, and (b) the predictability and reliability of the award. In the final analysis, both of these aspects are crucial. Class actions will simply not be brought if class counsel are not adequately remunerated for the time, effort and skill put into the litigation and the risk they assume (under contingency fee arrangements) of receiving nothing. Equally important is that such remuneration be reasonably predictable, i.e., that class counsel can take on class actions with a reasonable expectation that in the event of success they will receive reasonable remuneration. It is vital to the viability of class actions that class counsel not be met on "judgment day" with judicial pronouncements (issued with the "benefit" of hindsight) that class counsel "spent too much time, had hourly rates that were too high and in any event were conducting a case which was not really risky at all" and awarded a low base fee and a niggardly multiplier - except in very clear cases.

¶ 88 These comments flow from the objectives of the class action legislation, which include the improvement of access to the courts for those whose actions might have merit but who would not otherwise pursue them because the legal costs of proceeding are disproportionate to the amount of the individual claims: see Endean No. 1, supra at para. 23. Given that objective, the courts must ensure, first, that plaintiffs' lawyers who take on risky class actions on a contingent basis are adequately rewarded for their efforts and, second, that hindsight is not used unfairly in the assessment of the reasonableness of their fees.

¶ 89 On a consideration of all of the circumstances in this case, I am satisfied that the contingent fee contract was fair at the time it was made and that the fee of $15,000,000 proposed by Mr. Camp and Mr. Lemer is reasonable.

2. Fees in the haemophilic class action

¶ 90 I turn now to the fee proposed by Mr. Storrow in the haemophilic class action.

¶ 91 Actions were commenced on behalf of the haemophilic claimants in Ontario, Quebec, and British Columbia in 1998. The Ontario action was commenced by Ms. Tough, then of the firm of Blake, Cassels & Graydon, who coordinated and supervised the actions in Quebec and British Columbia as well. On May 1, 1998, the Vancouver office of that firm commenced the Mitchell action in this Court. The nature and extent of the work done in the Vancouver office of the firm is described in the following extract taken from Mr. Neaves' affidavit:

> 4. Blakes Vancouver delegated to Ms. Tough the responsibility of acting as national lead counsel on behalf of each plaintiffs' class in the British Columbia, Ontario and Quebec Hemophiliac Class Actions. However, I spent a considerable amount of time preparing for and participating in negotiation sessions with the FPT governments on behalf of the Representative Plaintiff in this action and in support of Ms. Tough's efforts. As a member of the Blakes Vancouver team, I provided advice to senior personnel in the Canadian Hemophilia Society and to members of the steering committee [of plaintiffs' class counsel]. I frequently consulted with and took instructions from the Representative Plaintiff. Mr. Gruber spent a considerable amount of time preparing for the hearing to approve the settlement that was ultimately reached and dealing with subsequent matters. Throughout our involvement, Mr. Storrow provided the Blakes Vancouver team with direction and advice and supported Ms. Tough in her national efforts.

¶ 92 Counsel for the haemophilic classes agreed to seek a collective fee of $7,500,000 and to share it in proportion to the amount of work done in each province. According to Mr. Neaves, the $7,500,000 "primarily represents the work of Ms. Tough". In Mr. Neaves' words, the Vancouver office did "the least amount of work on its own." As lawyers in the Vancouver office spent most of their time assisting Ms. Tough, they agreed to seek $500,000 for their fees and Mr. Mitchell executed a contingent fee contract with Blake, Cassels & Graydon in that amount on June 2, 1999.

¶ 93 Counsel for this group ran similar risks to counsel for the transfused group, including the risks that for political reasons the FPT Governments would institute a no-fault compensation scheme and that negotiations would fail. These risks had heightened consequences for counsel for the haemophilic classes because of the greater litigation risk arising out of the grave difficulties they would necessarily encounter in attempting to prove causation. In the case of the transfused plaintiffs, it would be possible to identify a discrete transfusion as the source of the infection. However, haemophilic plaintiffs have been receiving blood and blood products regularly, many since before 1986, and the blood products were manufactured from pooled blood donations, making proof of causation at a trial very difficult if not impossible. The settlement was therefore particularly valuable for this group.

¶ 94 The compensation plan for these claimants is very similar to that agreed upon for the transfused class. However, haemophilic plaintiffs have a better result than transfused plaintiffs in some respects. First, haemophilic plaintiffs will not have to establish that their infection occurred within the

class period. This is a critical provision because of the inability of most haemophiliacs to identify the source of their infection. Second, haemophiliacs will not be required to submit to liver biopsies for the purpose of identifying the relevant stage of their illness for compensation purposes. This is important because of the danger of uncontrollable bleeding from such an invasive procedure. Next, estates and family members of haemophiliacs who died prior to January 1, 1999, and who were infected with both HIV and HCV at the time of death may elect to receive a payment of $72,000 without proof that HCV was the cause of death. Finally, haemophilic plaintiffs infected with both HIV and HCV may avoid the stress and anxiety of participating in the long-term compensation program by electing to take a lump sum payment of $50,000.

¶ 95 It is apparent that, in comparison to Mr. Camp and his colleagues, British Columbia counsel for the hemophilic class made a smaller contribution to the outcome. The weight of the following factors accrues largely to Ms. Tough: the extent and character of the services rendered, the professional skills and experience called for, the character and standing of counsel, the results achieved, and the contribution of counsel to the result. On the other hand, although Ms. Tough deserves the lion's share of credit for the result, there is no doubt that the efforts of British Columbia counsel assisted her significantly in her efforts.

¶ 96 Other factors involved in the assessment of reasonableness are directly applicable to the claim by British Columbia counsel. The risks of failure of the action and of the negotiations were assumed by Mr. Storrow and his colleagues, though the consequences of failure were of a much lesser order of magnitude to them than to Mr. Camp and Mr. Lemer. As well, it must be remembered that the risk of failure in the litigation was far higher for this class than for the transfused class. The litigation was profoundly important to the haemophilic class members, the amount recovered is generous, and the plaintiffs would not have been able to achieve the settlement without the assistance of class counsel acting on a contingent fee agreement. Moreover, the character and standing in the profession of Mr. Storrow and his colleagues is undisputed.

¶ 97 It must be noted that the Vancouver office of Blakes docketed no time on this matter until March 28, 1998, the day following the announcement on behalf of the FPT Governments that they would make $1,100,000,000 available to settle the actions. In pointing this out, Mr. Turriff suggested that there was no significant risk run by British Columbia counsel. There is an initial appeal to this assertion, but it does not tell the whole story. As I have already observed elsewhere in these reasons, the risk that negotiations might founder was a real and present risk until well after the judgments granting conditional approval of the settlement. Thus, the time invested by British Columbia counsel was at risk of being valueless. As well, the Toronto arm of the firm had invested substantial time and effort, through Ms. Tough, on behalf of haemophiliacs in the preceding years. The thoroughness and quality of Ms. Tough's work stands out clearly on the evidence. While her agreement to a fee of $500,000 for her Vancouver colleagues may seem generous, it is undoubtedly an expression of her view of the value of their work to the overall result and of the extent of the risk that they ran. As such, I consider it to be evidence supporting the reasonableness of the proposed fee.

¶ 98 Of the total amount of the settlement, it is estimated that approximately $150,300,000 should be allocated notionally to the haemophilic classes. Of the approximately 1,650 haemophilic plaintiffs nationally, approximately 180 are residents of British Columbia, or roughly 11%. If it is assumed that the total recovery for British Columbia haemophilic plaintiffs is 11% of the $150,300,000, that is, $16,533,000, the $500,000 share of the fee allocated to British Columbia counsel is 3% of the recovery. That is a manifestly reasonable percentage.

¶ 99 Assuming a cohort of 180 plaintiffs resident in British Columbia, the fee represents a charge of approximately $2,800 per plaintiff. While these are rough estimations, that is a reasonable amount for

each claimant to pay in relation to the benefits recovered for them.

¶ 100 If the matter is examined from the base fee/multiplier approach, the proposed fee does not fare as well. A rough estimate of the value attributed to the time docketed by the Vancouver office of Blakes is $90,000. The proposed fee therefore represents a multiplier of 5.5, which is at the high end of the range of permissible multipliers using this approach.

¶ 101 The sorts of checks on reasonableness that I have just performed are useful as guides but, at bottom, the question is whether the proposed fee is reasonable having regard to all of the relevant circumstances. Having considered the circumstances, I conclude that this proposed fee of $500,000 meets the test for reasonableness.

3. Disbursements

¶ 102 As I understand it, Mr. Camp claims disbursements in the amount of $75,376 and Mr. Turriff, having scrutinized the items comprising that total, agrees that the amount claimed is reasonable and that the disbursements involved are properly payable. Accordingly, the claim for disbursements totalling that amount is approved.

¶ 103 Mr. Storrow advised during his submission that the disbursements for which he claims reimbursement total approximately $35,000. Mr. Turriff indicated that he wished to have some time to review the disbursements claimed and to make a written submission if he should think it necessary. I have not received anything further from counsel in this regard. Accordingly, if counsel can agree on the disbursements, they may insert the agreed amount in the order to be drawn up consequent on these reasons. There will be liberty to apply in the event that there are disbursement items requiring adjudication.

K.J. SMITH J.

QL Update: 20000627
cp/i/qldrk/qltlm

Indexed as:

Enge v. North Slave Metis Alliance

Between
William A. Enge, Robert Sholto Douglas, and William A. Enge,
as a representative of that class of individuals who were
expelled from membership in the defendant, North Slave Metis
Alliance, plaintiffs, and
North Slave Metis Alliance, defendant

[1999] N.W.T.J. No. 139
1999 NWTSC 24
Docket No. CV 08431

Northwest Territories Supreme Court
Yellowknife, Northwest Territories
Vertes J.

Heard: December 16 and 17, 1999.
Judgment: filed December 22, 1999.
(18 paras.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class or representative actions — Members of class.

Application by Metis Alliance to strike out portions of Enge's statement of claim. The plaintiffs, Enge and Douglas, alleged that they were members of Metis Alliance but were wrongfully expelled from membership and denied entry to a special general assembly. Metis Alliance was an incorporated society whose purpose it was to represent the Metis people of the North Slave region, and to implement a land claim and self-government agreement on behalf of its members. Enge and Douglas sought a declaration that their memberships were wrongfully cancelled and that the board of Metis Alliance was operating without lawful authority, and injunctive relief prohibiting Metis Alliance from carrying on its business. The statement of claim also sought an order that other members who were wrongfully expelled should be reinstated in their membership.

HELD: Application dismissed. The requirements for a representative action were met in this case. The class was capable of clear definition, the principal issues of fact and law were the same, success for one plaintiff meant success for all plaintiffs, and no individual assessment of the claims of individual plaintiffs needed to be made. The class was all those individuals who were members of the Metis Alliance but were no longer members because of the unlawful conduct of the organization in expelling them. The factual dispute as to whether Enge or any other claimants were in fact members was something that could only be resolved at trial.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 42.

Northwest Territories Rules of Court, Rules 62, 129(1).

Counsel:

Sarah A.E. Kay, for the plaintiffs.
Austin F. Marshall, for the defendants.

REASONS FOR JUDGMENT

¶ 1 **VERTES J**:— The defendant moves to strike out those portions of the Statement of Claim relating to the representative claim brought by the plaintiff Enge.

¶ 2 These proceedings were commenced on August 18, 1999. The named plaintiffs allege that they were members of the defendant organization but were wrongfully expelled from membership and denied entry to a special general assembly held by the defendant in September, 1998.

¶ 3 The defendant Alliance is an incorporated society whose purpose is to represent the indigenous Metis people of the North Slave region. One of its primary objectives is to negotiate and implement a land claim and self-government agreement on behalf of its members. The plaintiffs allege that their membership in the Alliance were cancelled without notice and contrary to the constitution and by-laws of the Alliance. They are seeking a declaration that their memberships were wrongfully cancelled and that the defendant's board is operating without lawful authority. They also seek injunctive relief prohibiting the defendant from carrying on its business.

¶ 4 The representative claim is brought by the plaintiff Enge on behalf of all other individual members of the Alliance who, like him, were expelled from membership in or about September, 1998. The Statement of Claim alleges that other members were also refused entry to the Special General Assembly and had their membership wrongfully cancelled. The prayer for relief also seeks a declaration that these unnamed individuals remain as members of the defendant Alliance. Insofar as the representative action is concerned, I read the Statement of Claim as saying that there are others who, just like Enge, were members who were wrongfully expelled from the Alliance and thus, just like Enge, should be reinstated in their membership.

¶ 5 The Statement of Defence, however, denies that the plaintiff Enge was ever a member of the Alliance (no matter what he may have thought) and therefore is unable to represent anyone else. The defendant maintains that the plaintiff Enge was not eligible for membership. The defendant also denies that any members were expelled from membership in September, 1998, or at all. Thus there is a distinct dispute of fact.

¶ 6 The type of claim advanced by the plaintiff Enge is referred to as a "representative" action or sometimes a "class" action. I prefer the term "representative" action since "class" action has come to mean something very specific relating to actions in those jurisdictions that have comprehensive class action legislation. The Northwest Territories does not have such legislation so one must look to the Rules of Court for guidance.

[para7] The foundation for a representative action is Rule 62:

> Where numerous persons have a common interest in the subject of an intended action, one or more of those persons may sue or be sued or may be authorized by the Court to defend on behalf of or for the benefit of all.

The rule is identical in wording to Alberta Rule 42 and similar to the rule in some other jurisdictions.

¶ 8 The classic formulation of the rationale behind the rule was given in Duke of Bedford v. Ellis, [1901] A.C. 1, a decision of the House of Lords dealing with the original English version of the rule. The rule is intended as a rule of convenience where there is a common interest, a common grievance, and where the relief sought would be beneficial to all. The purpose of the rule was succinctly stated by Nemetz J.A. in Shaw v. Real Estate Board of Greater Vancouver, [1973] 4 W.W.R. 391 (B.C.C.A.), at p.402:

> Manifestly, the purpose of the rule is not only to avoid multiplicity of actions and to allow the orderly disposition of litigation in a convenient manner but also to provide an inexpensive means of preventing the frustration of justice by costly and piecemeal litigation.

¶ 9 The jurisprudence also recommends a pragmatic approach. Some caution has to be exercised when considering previous decisions because the particular facts of each case are important in determining whether a representative action is appropriate. This was reflected in comments by Bull J.A. in his concurring judgment in the Shaw case (supra) at p. 395:

> It appears to me that the many passages uttered by judges of high authority over the years really boil down to a simple proposition that a class action is appropriate where, if the plaintiff wins, the other persons he purports to represent win too, and if he, because of that success, becomes entitled to relief whether or not in a fund or property, the others also become likewise entitled to that relief; having regard, always, for different quantitative participation.
> My consideration of the authorities satisfies me that whether or not the necessary "common interest" has existed depended on the analysis of the facts in each case.

¶ 10 Rule 62 is not only a provision that allows representative actions, it is also the provision whereby a representative action may be struck out. It is an independent power that is not dependent on some other rule, such as Rule 129(1), to strike out pleadings. Rule 62 states the criteria for a representative action so if a claim does not meet those criteria then the court may strike it out. However, the standard applied to that question is similar to that applied in applications to strike a pleading under Rule 129(1). The defendant must establish that it is "plain and obvious" or "beyond doubt" that the representative claim fails to meet the criteria of Rule 62: Western Canadian Shopping Centres Inc. et al v. Dutton et al (1996), 41 Alta. L.R. (3d) 412 (Q.B.), aff'd (1998), 228 A.R. 188 (C.A.).

¶ 11 The requirements for a representative action to fit into Rule 62 were set out in Korte v. Deloitte, Haskins & Sells (1993), 8 Alta. L.R. (3d) 337 (C.A.), at p.342:

(a) the class must be capable of clear and definite definition;
(b) the principal issues of fact and law must be the same;
(c) success for one of the plaintiffs will mean success for all; and,
(d) no individual assessment of the claims of individual plaintiffs need be made.

¶ 12 In my opinion, this case satisfies these requirements.

¶ 13 Here, assuming that the facts alleged in the Statement of Claim can be proven, the class can be defined. It is all those individuals who were members of the Alliance but are no longer members because of the unlawful conduct of the Alliance in expelling them. The claim is based on wrongful expulsion

from membership. If the claim were based on denial of membership then I may agree with defendant's counsel that each individual claimant's eligibility must be examined separately. But, here the allegation is that all of these claimants were already members and then expelled from membership in a manner contrary to the defendant's constitution or by-laws. In many ways this action is similar to that in Balsdon v. Good Shepherd Shelter Foundation (1984), 9 D.L.R.(4th) 298 (B.C.C.A.), where a representative action was allowed which alleged expulsion from a society of the plaintiff and other members. Since ultra vires acts of the society were alleged, it was held that a representative action was appropriate so that all members would be bound by the result.

¶ 14 The principal issues of fact and law are the same: Were the claimants members? Were they wrongfully expelled from membership? It seems undoubtable that if one (such as Enge) succeeds in the claim then all others will succeed. The factual dispute as to whether Enge or any other claimants were in fact members is something that can only be resolved at trial. Where the question of whether a representative action is proper involves issues of fact intertwined with legal issues, it is inappropriate to dispose of the question on a summary basis: Wilkes v Teichmann (1985), 50 C.P.C. 151 (Ont. C.A.), leave denied 11 O.A.C. 144. This question about whether an application to strike a representative action is best left to a trial judge was also addressed by the majority in the Western Canadian Shopping Centres case (supra) at p. 191 (A.R.):

> In 353850 Alta. Ltd. v. Horne & Pitfield Foods, [1989] A.J. No. 652 (Q.B. Master) (Alta. M. 31 July '89) JDE 8803 26537, M. Funduk was of the view that an application to strike out a class action should not be left to the trial judge. However, that decision appears to have been overruled in Pasco v. C.N.R. [1989] 2 S.C.R. 1069; 102 N.R. 76: Stevenson & Côté, Civil Procedure Guide (1996), vol. I, p.298.
> In Pasco 36 Indian chiefs each commenced an action on behalf of himself and all other members of his band. They then sought amendments to permit them to advance those claims on behalf of the members of three Indian nations as well. The appellants objected on the grounds that the proposed amendments were communal in nature whereas the action was framed as a personal one. McLachlin, J. stated at p. 1071:
> In our opinion, the issue of authority to bring the claims, like the issue of the personal entitlement, if any, of the members of the Band or Nations is a question of fact or mixed fact and law which is best determined by the trial judge...

¶ 15 Finally, this case would not require an individual assessment of the claims of individual plaintiffs. No damages are claimed for the unnamed members of the class. The relief centres on the disputed claim to membership. This distinguishes this case from that relied on by defendant's counsel, Naken v. General Motors of Canada Ltd. (1983), 144 D.L.R. (3d) 385 (S.C.C.). In that case not only was it held that identification of members of the class would be difficult, but damage assessments would have to be done on an individual basis with an extremely wide range of circumstances. I think this just illustrates the importance of taking a fact-specific approach.

¶ 16 For these reasons the application to strike out portions of the Statement of Claim is dismissed.

¶ 17 Defendant's counsel raised the spectre of difficulties in conducting examinations for discovery, particularly in knowing who claims to be a member. Counsel agree that there may be merit in issuing some directions requiring notice to be given to those people who claim to be part of the class represented by the plaintiff Enge. This was done in Olsen v. Alberta Hail & Crop Insurance (1995), 37 C.P.C. (3d) 390 (Alta. Q.B.), and it may alleviate some of the procedural concerns expressed by defendant's counsel. Therefore I direct that the plaintiffs give notice of these proceedings, to be published in two consecutive issues of a newspaper of general circulation in Yellowknife, inviting anyone who may allegedly be part of the class represented to identify themselves to counsel for the plaintiffs. The notice will also provide

that at the expiry of 60 days from the date of the second publication the class will be closed. This does not preclude the plaintiffs from issuing any additional notices but, forthwith after the deadline for closure of the class, the plaintiffs will notify the defendant of the names and addresses of all interested persons who claim to be members of the class. If further directions are required, counsel may speak to me or they may want to consider requesting the appointment of a case management judge.

¶ 18 Costs will be in the cause.

VERTES J.

QL Update: 20000118
cp/s/qljpn/qlcdc

Case Name:

Fakhri v. Alfalfa's Canada, Inc. (c.o.b. Capers Community Market)

Between
Helen Fakhri and Ady Aylon as representative plaintiffs, plaintiffs, and
Alfalfa's Canada, Inc. carrying on business as Capers Community Market, defendant

[2005] B.C.J. No. 1723
2005 BCSC 1123
Vancouver Registry No. L02398

British Columbia Supreme Court
Vancouver, British Columbia
Gerow J.

Supplementary hearing: July 12, 2005.
Supplementary judgment: July 29, 2005.
(32 paras.)

[Editor's note: Original reasons for judgment were delivered January 24, 2005. See [2005] B.C.J. No. 393.]

Civil procedure — Parties — Class or representative actions — Settlements — Approval.

Approval of a settlement of the class proceeding brought by the representative plaintiffs, Fakhri and Aylon, against the defendant, Alfalfa's Canada, c.o.b. Capers Community Market. The plaintiffs sought damages for injuries and losses caused by a Hepatitis A outbreak at Capers Community Market. The class was comprised of individuals who either contracted or were exposed to the virus as a result of consuming food products sold by Capers. The parties reached a comprehensive settlement and sought approval of its terms, the counsel fees, and a payment of $5,000 to Aylon for time expended on the case. The settlement provided for four levels of compensation that corresponded to the relative severity of the alleged claims.

HELD: Settlement approved. The proposed settlement was fair, reasonable, and in the best interests of the class members. The benefits of the settlement outweighed the possible benefits of continued litigation. The proposed compensation was within a reasonable range of similar cases. The proposed class counsel fee was approved as reasonable, and the payment to the representative plaintiff, Aylon, was approved on a quantum meruit basis.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 35, s. 35(1), s. 35(3), s. 35(5), s. 38, s. 38(2)

Counsel:

Counsel for the Plaintiffs: David A. Klein

Counsel for the Defendant: Elaine J. Adair Warren B. Milman and
Michelle S. Lawrence

¶ 1 **GEROW J.**:— The plaintiffs' action is for damages for injuries and losses as a result of a Hepatitis A outbreak at Capers Community Market in March 2002. The action was certified as a class proceeding pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50 in November 2003. The class consists of individuals who either contracted Hepatitis A virus (HAV) or who could have been exposed to HAV as a result of consuming food products sold by Capers. The majority of class members are individuals who did not contract HAV, but who obtained a shot of Immune Serum Globulin (ISG) because they were exposed to food products listed in news releases from the Vancouver Coastal Health Authority.

¶ 2 The parties have reached a comprehensive settlement and on July 12, 2005 sought court approval of the settlement, counsel fees and payment of $5000 to the representative plaintiff, Mr. Aylon, which I granted. At the time I approved the settlement I advised the parties I would provide these additional reasons.

¶ 3 The issues are:

1. Should the settlement be approved?
2. Should the class counsel fee be approved?
3. Is it appropriate to compensate the representative plaintiff, Mr. Aylon, for the time he expended on the case on a quantum meruit basis?

Background

¶ 4 The action was certified as a class proceeding on November 17, 2003 and the certification was affirmed by the Court of Appeal on October 27, 2004. After the certification the parties took steps to move the case toward the common issues trial. Document discovery took place and the parties engaged in a without prejudice information sharing. The plaintiffs brought a summary trial application on one of the common issues. After the summary trial application the parties agreed to attend mediation. The plaintiffs provided an expert's report to the defendant for the mediation. The parties attended a mediation at which a comprehensive settlement was achieved and they have finalized the terms of a Settlement Agreement.

The Settlement

¶ 5 The settlement provides four different levels of compensation to class members which are referred to Tiers 1 to 4. Each level of compensation depends on the relative severity of the alleged claims. The settlement agreement requires objective documentary proof from class members to safeguard against false claims, but does so in a cost effective, simple manner, consistent with the modest nature of the claims asserted. The settlement is designed so that class members will be able to file claims and obtain compensation with a minimum amount of effort. The letter to the class members from the Vancouver Coastal Health Authority notifying them of the claim also serves as proof for each class member that they qualify as a Tier 1 claimant, thereby simplifying the claims process.

¶ 6 The terms of the settlement including the levels of compensation and description of each tier are set out in the Settlement Agreement:

1. Tier 1 is for class members who received ISG injections during the HAV outbreak. They are entitled to $250 in-store credits or $150 cash;
2. Tier 2 is for class members who received ISG injections and submit documentary proof that they had a medical condition which heightened the risk for complications from being exposed to HAV. They are entitled to $500 in-store credits or $300 cash;
3. Tier 3 is for class members who received ISG injections and submit documentary proof that they received medical attention for having suffered an adverse reaction to the injection. They are entitled to $750 in-store credits or $450 cash;
4. Tier 4 is for class members who contracted HAV and who have not already settled with the defendant. Their compensation will be negotiated or subject to mediation/arbitration;
5. All tiers will be entitled to out-of-pocket expenses, loss of employment income claims and business loss claims;
6. The defendant will be credited for all payments made to a claimant;
7. Former and current employees are excluded from the settlement;
8. The defendant will pay the cost of administering the settlement and distributing compensation to class members. Crawford Adjusters, who has been hired to administer the settlement, is experienced in the administration of class action settlements;
9. The defendant will pay the class counsel fees of $570,000 inclusive of disbursements and tax;
10. The defendant will pay the representative plaintiff, Ady Aylon, $5,000 in compensation for his time and effort for the benefit of the class.

SHOULD THE SETTLEMENT BE APPROVED?

Test for approval

¶ 7 Settlement approval by the court is required under s. 35 of the Class Proceedings Act which provides:

> (1) A class proceeding may be settled, discontinued or abandoned only
>
> (a) with the approval of the court, and
> (b) on the terms the court considers appropriate.
>
> ...
>
> (3) A settlement under this section is not binding unless approved by the court.
>
> ...
>
> (5) In dismissing a class proceeding or in approving a settlement, discontinuance or abandonment, the court must consider whether notice should be given under section 20 and whether the notice should include

(a) an account of the conduct of the proceeding,
(b) a statement of the result of the proceeding, and
(c) a description of any plan for distributing any settlement funds.

¶ 8 The test for approval is whether the settlement is fair and reasonable and in the best interests of the class as a whole. Factors which courts have considered in making that determination include:

1. the likelihood of recovery, or the likelihood of success;
2. the amount and nature of discovery evidence;
3. settlement terms and conditions;
4. recommendations and experience of counsel;
5. future expense and likely duration of litigation;
6. recommendations of neutral parties, if any;
7. number of objectors and nature of objections;
8. presence of good faith and absence of collusion;
9. degree and nature of communications by counsel and the representative plaintiffs with class members during litigation;
10. information conveying to the court the dynamics of, and the positions taken by the parties during the negotiation.

See Sawatzky v. Societe Chirugicale Instrumentarium Inc. (1999), 71 B.C.L.R. (3d) 51, at [paragraph] 19 (S.C.); Haney Iron Works Ltd. v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 at [paragraph] 23 (B.C.S.C.); Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429 (Gen. Div.) affd (1998), 41 O.R. (3d) 97 (C.A.); leave to appeal to the S.C.C. refused, [1998] S.C.C.A. No. 372; Parsons v. Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.)

¶ 9 The court has the power to approve or reject a settlement, but may not modify or alter a settlement. The standard against which the settlement is judged is that it is within a range of reasonableness, not perfection. Sawatzky, supra, at [paragraph] 21, Haney Iron Works Ltd., supra, at [paragraph] 22; Dabbs, supra.

¶ 10 The purpose of applying the various factors that have been enunciated by the courts is to determine whether a settlement is fair and reasonable and in the best interests of the class as a whole by balancing the benefits of the settlement against the potential risks and benefits of continuing with the litigation. In assessing settlement courts have also looked at how the settlement was negotiated to ensure the settlement agreement is the product of good faith bargaining between the parties. After considering all of the circumstances the court must be satisfied that the settlement is fair, reasonable and in the best interests of those affected by it. Haney Iron Works Ltd., supra, at [paragraph] 24 - 27.

Do the benefits of settlement outweigh the potential benefits of continued litigation?

¶ 11 The proposed settlement is unopposed.

¶ 12 The benefits of the settlement outlined by the by the class counsel are:

1. The proposed compensation for non-pecuniary damages is likely equivalent to or more than what class members would receive at trial. As well, class members receive full compensation for out-of-pocket expenses, lost income and business income losses. They would receive no greater compensation under those heads of damage if the matter proceeded to trial.

2. If litigation continued the legal fees and disbursements would reduce the recovery available to class members in that class counsel fees and disbursements for the common issues would be deducted from class member damage awards. In the settlement the defendant has agreed to pay class counsel fees over and above the compensation to class members.
3. There is a risk that the representative plaintiffs would be unsuccessful at the common issues trial. The defendant denies wrongdoing and argues that the public health alert was a purely precautionary move and not related to any breach of alleged duty.
4. Even if the representative plaintiffs won at the common issues trial, challenges would exist in resolving the remaining individual issues. If individualized hearings were necessary the costs might deter class members from pursuing their individual claims.
5. The resolution of the matter would be delayed.

¶ 13 I was referred to two American cases involving food vendors and HAV outbreaks in which settlements have been proposed to assist me in determining whether the proposed amounts for the non-pecuniary losses are reasonable. In Foster v. Friendly Ice Cream Corporation, a case in the Superior Court of Massachusetts, approximately 3000 class members who had been exposed to HAV at a restaurant operated by the defendant obtained ISG injections. The proposed settlement involved a payment of $200 U.S. per class member. In Lucca v. Delops, Inc. d/b/a D'Angelo's Sandwich Shop, another Massachusetts action, 1,728 class members received ISG injections as a result of being exposed to HAV. The proposed settlement was $200 U.S. per class member. Neither settlement proposal contained tiered compensation such as has been proposed in this settlement. Both cases indicate that the compensation being proposed in this case falls within a reasonable range.

¶ 14 The evidence that the settlement negotiation was in good faith resulting in a fair settlement includes:

1. The representative plaintiffs pursued the claim through a contested certification hearing, appeal of the certification and an application for summary judgment, which all demonstrate a resolve to litigate the case if the mediation was unsuccessful;
2. Document discovery and information sharing, including the plaintiffs obtaining an expert report, were conducted prior to the mediation;
3. The class was represented in the negotiations by an experienced class action counsel;
4. Mr. Aylon, the representative plaintiff, has been actively involved in the litigation, including attending the mediation. He recommends approval by the court of the settlement.

¶ 15 In the circumstances, and having considered the benefits of the settlement as opposed to continuing with the litigation, I am satisfied that the settlement falls within the range of reasonableness or fairness. As well, I am satisfied that the proposed administration of the settlement is satisfactory. Accordingly there will be an order approving the proposed settlement.

SHOULD THE CLASS COUNSEL FEE BE APPROVED?

¶ 16 Section 38 of the Class Proceeding Act requires court approval for class counsel fees:

(2) An agreement respecting fees and disbursements between a solicitor and a representative plaintiff is not enforceable unless approved by the court, on the application of the solicitor.

¶ 17 The purpose of the fee approval requirement is to ensure that the fee charged to the class is fair and reasonable, and that the class counsel is appropriately compensated. Class action litigation can be challenging and risky.

¶ 18 This risk has been recognized by both the Ontario Law Reform Commission on Class Actions and the courts. In Report on Class Actions (Toronto: Ministry of the Attorney General, 1982), the Commission indicated that it was essential that fee awards provide risk premiums to successful class counsel.

¶ 19 The Ontario Court of Appeal in Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 at 422-423 (C.A.) addressed the issue of risk premiums:

> Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false hope.

¶ 20 The defendant has agreed to pay the class counsel fee over and above any compensation paid to class members. In my view, the defendant's agreement is evidence of the reasonableness of the fees as the defendant will have a good idea of the work involved in bringing the litigation to this stage. As the fees are paid over and above any compensation the payment will not reduce compensation to the class members.

¶ 21 In assessing the reasonableness of fees courts have considered the extent of work done, the skill and competence of counsel, the complexity of the matter, the importance of the matter to the class, the result achieved, individual claimants' contribution to the fee as a portion of their recoveries and the fee expectation of the representative plaintiffs: see Fischer v. Delgratia Mining Corp., [1999] B.C.J. No. 3149 (S.C.); Killough v. Canadian Red Cross Society, 2001 BCSC 1745, [2001] B.C.J. No. 2631 (S.C.); Knudsen v. Consolidated Food Brands Inc., 2001 BCSC 1837, [2001] B.C.J. No. 2902 (S.C.)

¶ 22 There was a considerable amount of work done by class counsel. The matter was prosecuted through a contested certification hearing, the appeal of the certification, a motion for summary judgment, document discovery, preparation of an expert's report, conduct of the mediation and negotiation of the settlement agreement. As well, counsel prepared for the hearing regarding the manner in which the notice to the class was to be given.

¶ 23 The lead class counsel is experienced and has been recognized by courts in approving settlements in other class actions. As well, the material in this case was complex and well organized, and is indicative of both the difficulty of the work and skill of counsel.

¶ 24 That the matter was important to the class members is evident. The damages are small and it is unlikely that many of the class members would have prosecuted claims, absent a class action. The action

has provided a means of recourse to class members.

¶ 25 Class counsel has achieved a good result. Class members will receive compensation for their non-pecuniary losses and full compensation for their pecuniary losses. The fee award does not reduce the recoveries in this case.

¶ 26 The representative plaintiffs signed a 30% contingency fee agreement. It is difficult to calculate the value of the fees in proportion to the recovery, however, counsel have estimated the total value of the settlement as approximately $2.7 million. The fees sought are approximately 20% of the total recovery, which falls within the range of fees approved by courts in other class actions: see Endean v. Canadian Red Cross Society, 2000 BCSC 971, [2000] B.C.J. No. 1254 (S.C.) at [paragraph] 78.

¶ 27 Similarly, if another approach is taken and a comparison is made of the fees sought based on the amount of time expended on the file using a multiplier to reflect the risk involved, the multiplier is 2.5, which is also within the range approved by courts in other class actions.

¶ 28 Based on a consideration of the above factors, I am satisfied that the class counsel fees are reasonable and, accordingly, the fee is approved.

IS COMPENSATION FOR THE REPRESENTATIVE PLAINTIFF, MR. AYLON, APPROPRIATE?

¶ 29 The defendant has agreed to pay the representative plaintiff, Mr. Aylon, $5,000 to compensate him for the work he undertook for the class as a whole. The Class Proceedings Act makes no provision for compensation of a representative plaintiff.

¶ 30 In Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 at [paragraph] 28 (Ont. Gen. Div.) the court acknowledged at [paragraph] 28 that in circumstances where the representative plaintiff has participated in the litigation, providing necessary and active assistance, and the assistance results in success for the class, it may be appropriate to compensate the representative plaintiff for the time spent on a quantum meruit basis.

¶ 31 The evidence is that Mr. Aylon, as a representative plaintiff, took an active role in the litigation. He delivered multiple affidavits, reviewed pleadings, provided instructions, attended the mediation and court hearings, and helped shape the final settlement. His efforts on behalf of the class had an impact on the successful resolution of the proceeding. The defendant has agreed to pay the amount of $5,000 directly so it will not reduce the recovery of the other class members. In the circumstances it is appropriate that Mr. Aylon be awarded the amount of $5,000 as compensation for the time he has expended.

CONCLUSION

¶ 32 The proposed settlement is approved on the basis that it is fair and reasonable and in the best interests of the class members. The proposed class counsel fee in the amount of $570,000 is approved as reasonable and the payment to the representative plaintiff, Mr. Aylon, of $5,000 is approved on a quantum meruit basis.

GEROW J.

QL UPDATE: 20050805
cp/i/qw/qlemo

Indexed as:

Fischer v. Delgratia Mining Corp.

Between
Anne Fischer, Betty Lau, Peter Panos and Twana Harper,
plaintiffs, and
Delgratia Mining Corporation, J. Terrence Alexander,
Charles A. Ager, Eric X. Lavarack, David R. Manning,
Geoff Courtnall and Patrick J. Furlong, defendants

[1999] B.C.J. No. 3149
Vancouver Registry No. C974521

British Columbia Supreme Court
Vancouver, British Columbia
Williamson J.
(In Chambers)

Oral judgment: December 7, 1999.
(26 paras.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class or representative actions, for damages — Class actions, certification, considerations — Class actions, certification, appointment of representative plaintiff — Settlements — Judgment based on — Costs — Entitlement.

Application by the plaintiffs for orders to certify their action as a class proceeding, to appoint a representative plaintiff and to approve a settlement and a class counsel fee. The plaintiffs purchased shares in Delgratia based on representations that gold was found in its property. The shares were valued at $5. They rose to $30 after the claims were made. They declined to 12 and a half cents when the claims were alleged to be false. The plaintiffs commenced this action based on misrepresentation. Eight parallel actions were commenced in the United States. Five actions were dismissed. The other three actions were consolidated into one action in Nevada. The settlement was intended to settle all the litigation. The Nevada court approved the settlement. Delgratia's value declined substantially. The settlement took this into account. It involved the issuance of three million shares that would be available to claimants. Delgratia also set aside $500,000 to cover disbursements. Under the fee proposal, counsel would take 30 per cent of the new shares in Delgratia.

HELD: Application allowed. The action was certified as a class proceeding. The designated representative plaintiff was approved. She was not in a conflict with the other class members. The fee proposal was approved. This litigation involved a cause of action. There was a class of two or more persons. The plaintiffs' claims involved common issues. The class proceeding was the most fair and efficient way to deal with the claims. Many of the plaintiffs had a small amount of shares. Without this proceeding, they would not have the financial resources to pursue their claims. The settlement was better than continued litigation. The plaintiffs would receive their compensation faster than if the matter proceeded to trial. Even if they succeeded at trial, they would have to collect on a judgment where few assets were available. The fee proposal was appropriate based on the complexity of the case and the results achieved.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, ss. 4, 4.2, 35, 38.

Counsel:

D. Klein, for the plaintiffs.
J. Frank, for the defendant, Delgratia Mining, J. Alexander, G. Courtnall and P. Furlong.
D. Lunny, for the defendant, C. Ager.

¶ 1 **WILLIAMSON J.** (orally):— This is an application by the plaintiffs for a number of orders: first of all, an order certifying this action as a class proceeding and appointing one Betty Lau as representative plaintiff pursuant to s. 4 of the Class Proceeding Act; secondly, an order approving the settlement which has been reached by the parties and the details of which have been filed as required by s. 35 of the Act and are before me today; and finally, for an order approving a class counsel fee which is also pursuant to s. 38 of the Act.

¶ 2 This matter arises out of a an action that was commenced by a number of plaintiffs against a number of defendants, including the Delgratia Mining Corporation and a number of individuals. Without going into great detail about it, the statement of claim alleges that the plaintiffs, who purchased shares in the company, did so as a result of a number of representations that had been made about gold deposits on a particular property, I believe, in Nevada.

¶ 3 It is alleged in the statement of claim that the representations upon which these purchasers of shares relied were false and misleading, that they concealed or failed to disclose misleading or adverse material, that they inaccurately represented certain assay information and that they failed to disclose the relationship between some of the principals of some the companies that were involved.

¶ 4 I am told, and the material shows that in the period from November of 1996 to May of 1997, shares which were at one point valued at $5, plus or minus, rose to something over $30 and then after, it was alleged these misrepresentations had been misleading and false, the shares, of course, plummeted and I am told they went down to about twelve and a half cents. As a result, when one adds up the investments by a number of people who purchased shares, the losses become immense indeed.

¶ 5 There is one unusual aspect of this application and that is that there were parallel actions commenced in the United States of America. Evidently, there were eight actions commenced; five were dismissed and the three others were consolidated into one action in Nevada. As a result, the settlement that has been crafted as a result of lengthy negotiations, aside from being complicated as the settlements might be, has the added factor of having to satisfy the settling of this action in this Province of British Columbia, in Canada, as well as the action in Nevada one of the United States of America.

¶ 6 It is apparent from reading the material, as I have this afternoon, that counsel have taken great care to craft documents which indeed deal with the requirements of both jurisdictions. I also note that the settlement and precisely the terms which are before me has been approved by the court of competent jurisdiction in the State of Nevada. That is a factor which I must take into account. Nevertheless, the fact that that court has approved the settlement does not absolve me, or this court, of the statutory obligation which rests with this court when dealing both with a certification application and with the approval of a settlement.

¶ 7 Before I turn to the requirements for certification, I should say something about the companies because I did say that one of the allegations here is that there were a number of companies involved and there was a failure to disclose that certain changes of ownership were not at arm's length, I think, is the way to put it. It is described in an argument that has been put forward to me by the plaintiffs as follows.

¶ 8 On November 18, 1996, Delgratia announced that it had signed an agreement with Field Gold Investments Incorporated (phonetic) to purchase 40 per cent of Field Gold's wholly owned subsidiary, Nevada Gold Corporation. Nevada Gold owned all the shares of Valley Gold, which had title to certain mining claims located in Southern Nevada, referred to as the "Nevada Gold Project" or the "Josh Project". It was assay analysis from these properties, to which I referred earlier, in which it is alleged misleading information was distributed.

¶ 9 I add further, that counsel for the defendants, and there are two counsel for defendants here: one representing a number of defendants, including Delgratia and some of the individuals; and a second, Mr. Lunny, representing Dr. Ager. Mr. Lunny, in particular, has emphasized that something that I have to take into account here is that this is a settlement and that were settlement not reached, these allegations would be, I think, his words were "hotly contested." In other words, there is no suggestion that there would not be a hard-fought trial should this matter not settle.

¶ 10 I turn then to the requirements for deciding if an action should be satisfied as a class proceeding and, of course, they are set out in the statute in this Province. They are set out in s. 4 of the Act. They are that the pleadings must disclose a cause of action, that there is a identifiable class of two or more, that the claims of those class members raise common issues, that a class proceeding is the preferable procedure in the sense of it being a fair and efficient resolution of the common issues, and that there is a representative plaintiff available who would fairly and properly represent the other members of the class. That is a skeleton outline of those requirements.

¶ 11 It is clear to me that there is a cause of action here, although it is one, of course, that would be contested but for the settlement. But that is to say, the allegation that there was false and misleading information or representations made, that there was a failure to disclose the lack of arm's length dealings between the various companies, which I have mentioned, and also allegations of breaches of the United States Security Exchange Rules and the United States Exchange Act, so that aspect of the requirement for certification is answered.

¶ 12 In my view also, there is a class of two or more people. There are two classes described in the materials, one class are residents of B.C., a second class are non-resident; a distinction necessary, because those who reside out of the jurisdiction to be involved must opt in, whereas those that reside here are in, unless they opt out. Both classes are described. There is clearly a class of two or more people.

¶ 13 I am also satisfied that there is a common issue here. That is to say, there is an issue, or maybe a number of issues, but certainly the issue as to whether there were false and misleading representations is a common issue which, if it were resolved in favour of the plaintiffs, would advance the interests of the class.

¶ 14 Is this a fair and efficient way to proceed with these claims? I think if one takes into account the concept of judicial economy, takes into account the easier access for individual small shareholders who may not have the financial resources to pursue a claim in this court, and if one takes into account the modification of the wrongdoers' actions or the alleged wrongdoers' actions which are set out in the authorities, that one must inexorably come to the conclusion that this is a fair and efficient way to

proceed.

¶ 15 Section 4.2 of the Act lists five factors: whether the common issue is a dominant or predominant issue; whether there is evidence, and I have already commented on that - I think it is - whether there is evidence that there is some reason why individuals want might (phonetic) to assert control of this action, rather than the class.

¶ 16 I think the fact that of, I think, some 5,000 notices that have been sent out with respect to this application, with only nine people opting out and, I am told, only four of those in Canada, suggests there is no persuasive suggestion that individuals seek to control this. There are no other proceedings, except of course the one that I have mentioned in Nevada, and there may be other means to resolve this issue; notably, going to trial. But for obvious reasons, that does not seem to be the appropriate way to proceed in this case and, certainly, there is a representative shareholder here and no evidence that she is in a conflict of interest with other people in the class. In all of these circumstances, I take into account these matters, I am satisfied that this action should be certified as a class proceeding.

¶ 17 The settlement then, which I turn to now, takes into account the fact that as counsel has submitted, and the material discloses, that the value of the principal defendant, Delgratia Mining, has been declining precipitously over the last year. As a result, there is really very little cash left in the company and it is for that reason that this settlement is not a settlement for cash but is a settlement for shares.

¶ 18 The settlement includes the issuing of some 3,000,000 shares which will be made available to the claimants. I am told that that is about a 20 percent increase in the number of issued shares in the company and I have had some discussion with counsel that that is a dilution, of course, of the value of the shares, but in circumstances where there is really no money and given the possibility that once these actions are resolved that the company can recover to some extent, if it recovers at all, it would appear arguably that the claimants will be better off than if they simply pursue their action, which would probably result in the company becoming bankrupt, and even if they succeeded then they would have an empty judgment.

¶ 19 A second aspect of the settlement is that a fund of $500,000 has been set aside to cover the disbursements that must have been extensive in this matter to date. Of course, there are counsels' fees and that is a different issue and I will deal with that in a few moments. In any case, that is basically the nature of the settlement; each by virtue of a formula when each shareholder proves his or her, or its shareholdings, there would be a formula in which the 3,000,000 shares were to be divided among the shareholders and they would therefore have the potential to have some recovery should the shares increase in value from the relatively low value at which they presently are found.

¶ 20 What are the advantages of the settlement? It is argued by counsel that this settlement is advantageous to class members, when compared with the possibility of continuing with the litigation, because the class members will not have to face the uncertainty of proving liability which, as counsel for the defendants has pointed out, would not be easily done. Secondly, the class members will receive what compensation they will receive far more quickly than if this matter were put over for a trial. As well, even if they succeeded at that trial, they would have to face the problems of trying to collect on a judgment in circumstances where there are very few assets. I also note that, as I said, notice of this settlement has gone out to thousands of shareholders; only nine have opted out, and there is no objection to it. In my view, when I consider the class members as a whole, I am satisfied that this settlement is fair and reasonable and in the best interests of those effected and I would approve the settlement.

¶ 21 I turn to the other matter which is the subject of fees. The fee proposal, because as I have said there are little or no funds in this company, what is proposed for counsel is parallel to what is proposed for the shareholders; that is to say, rather than be paid in cash, counsel would also take shares in the company. In addition, as I have said, there is the $500,000 set aside for disbursements.

¶ 22 What are the factors that one should take into account when considering whether a fee is appropriate and should be approved? Those factors are not set out in the Act, but they have been considered by this court. In oral reasons pronounced on September 8, 1999, that is very recently, in the case of Sawatzky v. Societe Chirurgicale Instrumentarium et al, [1999] B.C.J. No. 1814 (phonetic), at page 4, Mr. Justice Brenner said that:

> In Harrington v. Dow Corning Corporation, [1999] B.C.J. No. 321 (phonetic), Mr. Justice E.R.A. Edwards set out, at paragraph 18, the factors which ought to be considered. These include the extent of the legal work done by class counsel, the skill and competence of class counsel, the complexity of the matter, the importance of the matter to the class, the result achieved, the individual claimants' contribution to the fee as a portion of their recoveries and the fee expectation of the representative plaintiff and others who signed the contingency agreements.

Mr. Justice Brenner agreed with that list put forward by Mr. Justice Edwards and I concur in that agreement.

¶ 23 I note that Ms. Lau, the representative claimant plaintiff, had a contingency agreement with counsel at 33 and one-third percent, which is just slightly more than the percentage of shares that would go to counsel, so there is some consistency there. I am satisfied it is apparent from the material, which is complicated, and, I might say very well organized, that it is evidence of the difficulty of the work and the skill and competence of counsel.

¶ 24 There is no doubt that this is a very important matter to the class, and the result achieved in the circumstances, to be blunt about it, gives them an opportunity which in all probability would not exist; that is, the probability of some recovery if this matter were not approved. In the circumstances, in my view, the fee is an appropriate one, and taking into account the factors listed by both Mr. Justice Edwards and Mr. Justice Brenner, I would approve the fee.

¶ 25 I think the only thing I have not dealt with, counsel, is the appointing of Betty Lau as the representative plaintiff which I meant to do at the beginning. I am satisfied on the material before me that there is a common issue here, that she is not in a conflict with any other of the class members and that it is appropriate that she be appointed as the representative plaintiff.

¶ 26 In the circumstances, having reviewed the material and for the reasons stated, I am satisfied that this action should be certified as a class proceeding; that Betty Lau should be named as the representative plaintiff pursuant to s. 4 of the Act; that the settlement should be approved as it has been submitted; that counsel fees in the amount of 30 percent of the 3,000,000 shares Delgratia is to issue, are approved.

WILLIAMSON J.

QL Update: 20001030
cp/d/qltlm/qljjt

Case Name:

Furlan v. Shell Oil Co.

Between
Jean-Michel Furlan, Donald Atkinson, Russell D. Reid,
Mark Zwanski, Grev Grey and Kirsten Williams,
plaintiffs, and
Shell Oil Company, E.I. Du Pont De Nemours and
Company and Hoechst Celanese Corporation, defendants

[2003] B.C.J. No. 1411
2003 BCSC 938
Vancouver Registry No. C967239

British Columbia Supreme Court
Vancouver, British Columbia
Brenner C.J.S.C.
(In Chambers)

Oral judgment: June 11, 2003.
(4 paras.)

Practice — Costs — Solicitor and client costs — Measure of solicitor and client costs — Class actions.

Application for approval of fees and disbursements to class counsel. In parallel proceedings, an Ontario judge had concluded that the proposed fees and disbursements for $4.5 million were appropriate.

HELD: Application allowed. The fees as sought in BC were approved.

Counsel:

J.M. Poyner and K.J. Baxter, for plaintiffs.
D. Lebans, for defendant, Du Pont.

¶ 1 **BRENNER C.J.S.C.** (orally):— This is an application for approval of proposed fees and disbursements to Class Counsel.

¶ 2 This matter last came on before me April 29, 2003. I adjourned the application because of earlier reasons issued by Mr. Justice Nordheimer of the Ontario Superior Court of Justice. He has conduct of the parallel proceedings in Ontario. In my reasons, I expressed my reluctance to approve the proposed fee until such time as the matters that had been of concern to Mr. Justice Nordheimer were addressed.

¶ 3 There was a subsequent hearing before Mr. Justice Nordheimer. In Reasons issued June 3, 2003, he reviewed those issues and after fully canvassing them, concluded that the proposed fees and disbursements in the amount of $4.5 million including taxes was appropriate.

¶ 4 I concur with Mr. Justice Nordheimer's conclusion. Since his earlier concerns have now been addressed, I would approve the fees in British Columbia and approve the order sought.

BRENNER C.J.S.C.

QL UPDATE: 20030620
cp/i/qw/qlsng

Gagne v. Silcorp Limited

[Indexed as: Gagne v. Silcorp Ltd.]

41 O.R. (3d) 417
[1998] O.J. No. 4182
Docket No. C28348

Court of Appeal for Ontario
Charron, Rosenberg and Goudge JJ.A.

October 21, 1998

Civil procedure — Class actions — Contingency fees — Multiplier — Motion for approval of contingency fee with multiplier — Criteria for determining whether multiplier of base fee should be approved — Relevant criteria including risk and success achieved by solicitor — Class Proceedings Act, 1992, S.O. 1992, c. 6.

The appellants were solicitors who had acted on behalf of the representative plaintiff in a class action against Silcorp Ltd. The action arose because the plaintiff and a number of others had been dismissed from employment by Silcorp Ltd. and had been offered less than the minimum termination and severance pay to which they were entitled under the Employment Standards Act, R.S.O 1990, c. E.14. The solicitors executed a written agreement with respect to their fees and disbursements for the class action. The agreement provided that the payment of fees was contingent on the class action being concluded successfully. The agreement specified a base fee based on an hourly rate and provided that the solicitors could seek court approval for a multiplier to be applied to the base fee.

On March 27, 1997, the solicitors commenced a class action for wrongful dismissal on behalf of the former employees, and after a motion for an injunction was adjourned and after extensive negotiations, a settlement was reached on April 14, 1997. On April 17, 1997, the settlement was approved by the court. The settlement involved the certification of the action, a commitment to comply with the Employment Standards Act, a judgment against Silcorp Ltd. and a reference to determine the quantum of damages for each class member. The reference procedure included a mini-hearing process with a mediation stage and an arbitration stage.

In August 1997, the solicitors moved for approval of a contingent fee with a multiplier of three of their base fee. Southey J. dismissed the motion, and the solicitors appealed.

Held, the contingent fee should be approved with a multiplier of two.

The Class Proceedings Act, 1992 has the objective of enhanced access to justice for those with claims that would not otherwise be brought because of the prohibitive expense or inefficiency in individual claims. Because it gives the lawyer the necessary economic incentive to act, a contingency fee with a multiplier is an important means to achieve the objectives of the Act. Under the Act, a judge has discretion whether to approve a contingent fee, but an appellant court may substitute its own exercise of discretion if the motions judge gives no weight or insufficient weight to relevant considerations. In determining whether to approve the contingent fee with a multiplier of three, Southey J. was correct in weighing the degree of risk and the degree of success achieved by the solicitors. He was also correct in not giving weight to the view of the class members who, it was argued, appeared content with a

significant multiplier. However, he erred in giving no weight to considerations relevant to the risk and success criteria. In assessing the risk, Southey J. concluded that there was no material risk for the solicitors because there was little doubt that Silcorp Ltd. would be found liable. However, the risk of non-certification should also have been considered. In assessing success, the only success factor considered was that a procedure had been provided to former employees for prompt determination of their claims. This, however, failed to recognize that the solicitors achieved immediate partial success in extracting a commitment for compliance with the Employment Standards Act, that the ultimate settlement was achieved quickly, and that the settlement provided for a creative and effective mini-hearing process. In all the circumstances, it was appropriate to approve a multiplier of two. This multiplier reflected the risk and success factors and that this case did not exemplify the greatest risk or the greatest success. The resulting compensation provided a sufficient real incentive for solicitors in future similar cases.

Cases referred to

Dabbs v. Sun Life Assurance Co. (1998), 41 O.R. (3d) 97, 165 D.L.R. (4th) 482 (C.A.); Friends of the Old Man River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3, 88 D.L.R. (4th) 1, 132 N.R. 321, 84 Alta. L.R. (2d) 129, 48 F.T.R. 160n, [1992] 2 W.W.R. 193

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 29, 33 Employment Standards Act, R.S.O. 1990, c. E.14

APPEAL from an order of Southey J. (1997), 35 O.R. (3d) 501, 14 C.P.C. (4th) 269 (Gen. Div.) dismissing a motion for approval of a contingency fee in an action under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

Paul S.A. Lamek, Q.C, for appellant solicitors McGowan & Associates and Jeff Burtt, advocate.

The judgment of the court was delivered by

GOUDGE J.A.: — The Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act") permits a solicitor to take a class action on a contingency basis. If the action is successful the Act permits the solicitor to seek the court's approval to increase his or her base fee by applying a multiple to that fee. This appeal concerns the appropriate considerations that should inform the court's decision on such a motion.

The appellants are solicitors who acted on behalf of the plaintiff Sherrie Gagne in a class action against the defendant Silcorp Limited. The action was concluded successfully and the appellants, having taken the case on a contingency basis, moved to increase their base fee by a multiple of three. Southey J. denied this request [reported (1997), 35 O.R. (3d) 501, 14 C.P.C. (4th) 269], allowing the solicitors only their base fee, namely the product of their usual hourly rates and their hours worked on the matter. This is an appeal from that disposition.

The Factual Background

Beginning in late 1996, the defendant Silcorp proceeded to merge the operations of the Becker's and Mac's convenience store chains which it owned. As a consequence of the merger, a number of its

employees were no longer needed and were dismissed. Initially Silcorp offered those terminated only an amount that was less than the minimum termination and severance pay to which they were entitled under the Employment Standards Act, R.S.O. 1990, c. E.14.

On March 24, 1997 the appellant solicitors commenced a class action for wrongful dismissal on behalf of those former employees who had been terminated. Sherrie Gagne was the representative plaintiff.

Immediately after commencing the action, the appellants brought a motion before Southey J. seeking an injunction to compel Silcorp to comply with the Employment Standards Act. This motion was adjourned from April 3, 1997 to April 17, 1997 on the undertaking of Silcorp to immediately comply with the requirements of that Act.

The parties then engaged in intensive negotiations which culminated in minutes of settlement dated April 14, 1997. On April 17, 1997, that settlement was approved by Southey J. as required by s. 29 of the Act. The settlement order was very complex but its essential elements were the following:

-- The action was certified as a class proceeding for the purposes of the Act.

-- Sherrie Gagne was appointed the representative plaintiff on behalf of the class of former employees who had been terminated by the defendant Silcorp.

-- The appellant solicitors were appointed as counsel for the class.

-- The defendant was adjudged liable for compensatory damages and Employment Standards Act entitlements.

-- The claims for punitive and exemplary damages were dismissed.

-- Pursuant to s. 25 of the Act, a reference was directed to determine the quantum of damages for each class member.

-- The terms of the reference created a mini-hearing process with a mediation stage and an arbitration stage.

-- The class members were each permitted to be represented in the mini-hearing process by a personal lawyer rather than the appellant solicitors.

Between the date of the settlement and August 26, 1997, when the appellant solicitors prepared the material seeking to triple their base fee, 35 individual claims were finally resolved through the mini-hearing process. This court was further advised that by the time of this appeal, all sixty-five class members had resolved their individual claims for a total gross recovery of $1,945,723.

As required by the Act, the appellant solicitors executed a written agreement with the representative plaintiff respecting their fees and disbursements. It provided that the payment of any legal fees was contingent on the class action being concluded successfully as defined by the Act. It also provided that the base fee would be the product of the hours worked by the solicitors and their usual hourly rates. In addition, it set out that the solicitors could seek court approval for a multiplier to be applied to that base fee. Finally, the agreement described two examples of how this might work:

7. The Consortium and the Client acknowledge it is difficult to estimate what the expected

fee will be. However, the following are estimates:

(a) If the class action results in a quick settlement for the class, within 3 months after the date of this retainer, and at that time the Base Fee is $50,000 and if the court sets the Multiplier at 3.0, then the fee will be $50,000 x 3.0 = $150,000.
(b) If the trial of the common issues occurs within 2 or 3 years and is decided in favour of the class and no appeals arc taken, and at the time the Base Fee is $250,000 and if the court sets the Multiplier at 2.0, then the fee will be $250,000 x 2.0 = $500,000.

These estimates do not include work for any mini-hearings or other proceedings which may be necessary to deal with individual damage claims.

The motion brought by the appellants sought a multiplier of three. In denying this request Southey J. considered two factors, namely the degree of risk in accepting the retainer and the degree of success achieved by the solicitors. He set out his analysis of each of these factors clearly and concisely as follows [at p. 504]:

> As to the first of the above elements, I am unable to see any reason why the employees who were dismissed would not be entitled to their "entitlements" under the Employment Standards Act and to compensatory damages, if any. It appears to me that there was no serious issue as to liability in this case. In these circumstances, I cannot find that there was any material risk in accepting the retainer.
>
> When I asked counsel for the Consortium to explain the risk, his reply was that the difficulty arose out of procedural complexity. In my judgment, that is not the sort of risk that should influence the multiplier. That sort of risk is adequately covered by an award of a base fee in the full amount of the usual charges made by the legal professionals, as I have approved in this case. . . .
>
> As to the second element, what has been achieved? Former employees now have available to them a procedure for the prompt determination of their claims. For achieving that result, the solicitors, in my opinion, are fairly compensated for their services to August 8 last by the base fee of $109,411.28, including GST. Any premium based on a high degree of success must depend on the recovery in each case, which was not the subject of evidence before me.

The appellants argue that Southey J. erred in his consideration of both the risk factors and the success factors and, further, that he failed to give weight to the views of the class members who, it is argued, appear content with a significant multiplier. No one appeared in opposition to the appellants.

Analysis

Central to a consideration of these arguments is s. 33 of the Act. It reads as follows:

> 33(1) Despite the Solicitors Act and An Act Respecting Champerty, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding.
>
> (2) For the purposes of subsection (1), success in a class proceeding includes,
>
> (a) a judgment on common issues in favour of some or all class members; and
> (b) a settlement that benefits one or more class members.

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate;
"multiplier" means a multiple to be applied to a base fee.
(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.
(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or
(b) approved a settlement that benefits any class member.

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.
(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitors base fee;
(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and
(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement.

(8) In making a determination under clause (7)(a), the court shall allow only a reasonable fee.
(9) In making a determination under (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

This section makes clear that the motion seeking to apply a multiplier to the base fee can be brought only after the class proceeding has been concluded successfully as defined in s. 33(2). Section 33(7)(b) gives the judge a discretion in determining whether to apply a multiplier or not. Hence, on appeal, while this court is not free to simply substitute its own exercise of discretion for that exercised at first instance, reversal of the order appealed from may be justified if the motions judge gave no weight or insufficient weight to considerations relevant to his decision: see Friends of the Old Man River Society v. Canada (Minister of Transport), [1992] 1 S.C.R. 3 at pp. 76-77, 88 D.L.R. (4th) 1.

In applying this standard of review to the decision appealed from, it is appropriate to begin with a consideration of the genesis of the Class Proceedings Act, 1992. It was enacted following much legislative study and in the wake of a detailed report of the Ontario Law Reform Commission laying out the broad rationale for such legislation. One of the objects which the Act seeks to achieve is the efficient handling of potentially complex cases of mass wrongs: see Dabbs v. Sun Life Assurance Co. of Canada, a judgment of the Ontario Court of Appeal released September 14, 1998 at p. 3 [now reported 41 O.R. (3d) 97, 165 D.L.R. (4th) 482].

Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an

important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false hope.

With that background, I turn to the judgment appealed from. As I have said, Southey J. addressed two criteria in concluding that he would not apply a multiple to the base fee: the degree of risk assumed by the solicitors and the degree of success they achieve. In my view, he was correct in focusing on these two considerations. Section 33(7)(b) makes clear the relevance of "the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success". Section 33(9) invites a consideration of the manner in which the solicitor conducted the proceedings. However, for the reasons that follow I have concluded that he erred in giving no weight to considerations relevant to each of the risk and success criteria.

Risk factors

The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.

The only risk factor considered by Southey J. was whether the defendant might ultimately escape liability. Because there was no real doubt about that liability, he determined that there was no material risk in accepting the retainer.

Since this class proceeding was concluded quickly, the risk assessment was properly focused on the risks incurred at the outset in undertaking the proceeding and did not have to extend to the risks, if any, in continuing it. Nonetheless, in my view there was from the beginning a second material risk that was a relevant consideration, namely the risk that comes with this action being brought as a class proceeding, particularly the risk of non-certification. The certification step in a class action is a significant one, often requiring extensive preparation by counsel. If certification is denied, a solicitor who has agreed to a fee contingent on success recovers nothing. Moreover, when this action was commenced, certification could not be predicted with certainty. A debate was quite possible about whether the common issues requirement would be met or whether a class proceeding was the preferable procedure given the enforcement mechanisms provided by the Employment Standards Act. This risk factor was material and ought to have been given weight.

It is true that this risk factor will be present in most class proceedings. This factor should be recognized so that solicitors faced with a class proceeding retainer will have the necessary economic incentive to take on the matter. They will know that if, in prosecuting the action, they can meet the success criterion there will be a real opportunity to have some multiple attached to the base fee. To accord due weight to this consideration is to serve the legislative objective of enhanced access to justice.

Success factors

Section 33(9) invites the court, in determining whether a multiplier is appropriate, to consider the manner in which the solicitor conducted the proceeding. Just as the real opportunity to receive an enhanced reward for incurring the risks of the litigation serves as an incentive for the solicitor to take on the retainer, that opportunity is also designed to serve as an incentive for the solicitor to achieve the best

possible results for the class, expeditiously and efficiently.

The only success factor considered by Southey J. was that a procedure had been provided to former employees for the prompt determination of their claims. This was insufficient, in his view, to warrant the application of any multiple to the base fee.

In my view, this fails to recognize that the solicitors achieved immediate, partial success in extracting a commitment from the defendant to comply forthwith with the Employment Standards Act. Second, the ultimate settlement of the common issues was achieved quickly. Third, the settlement provided for a creative and effective mini-hearing process that resulted in the complete resolution of all individual claims within little more than a year. These factors are all relevant to the degree of success with which the solicitors conducted the proceedings and all deserved to be considered in determining whether a multiplier was appropriate.

Views of class members

In reaching his decision Southey J. did not consider the views of class members about whether a multiplier should properly be applied to the base fee. In my view, he was correct in doing so. The Act does not appear to invite such a consideration. Moreover, in this case those views, which are said to constitute acceptance or even approval of a multiplier, can be gleaned only by a very tenuous process of inference. One simply cannot say with any certainty that the views of class members on this issue are as they are argued to be.

In summary, therefore, I have concluded that Southey J. erred in the exercise of his discretion in failing to give due weight to relevant risk and success considerations. If appropriate weight is accorded them, I think the conclusion must be that this is an appropriate case to apply a multiplier to the base fee.

I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, as I have outlined, there were significant elements of success in the manner in which the solicitors conducted the proceedings. Weighed against these success factors is the fact that following the April 17, 1997 settlement, individual class members had to incur further legal fees to finally realize on their claims.

In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of ease and to do it well.

In this case, then, taking into account all the relevant considerations I have recited, in my view the appropriate multiplier is two. This reflects the risk and success factors at play. It represents a multiplied fee that is significantly less than ten per cent of gross recovery. It reflects the fact that this case does not exemplify the greatest risk or the greatest success. It is within the range contemplated by the retainer agreement. And finally, the resulting compensation should provide a sufficient real incentive for solicitors in future similar cases.

Disposition

I would therefore allow the appeal and provide for a multiplier of two to be applied to the base fee up to April 17, 1997, the date of the settlement order. I would vary the order below accordingly. The appellants do not seek costs of the appeal and I would order none.

Order accordingly.

Case Name:

Gariepy v. Shell Oil Co.

PROCEEDING UNDER The Class Proceedings Act, 1992

Between
Michael Gariepy, Lyne Marion, Wayne McGowan, Paul Berthelot
and Dale Elliott, plaintiffs, and
Shell Oil Company, E.I. Du Pont de Nemours and Company and
Hoechst Celanese Corporation, defendants

[2002] O.J. No. 4022
Court File No. 30781/99 (London)
Toronto Court File No. 99-CT-030781CP

Ontario Superior Court of Justice
Nordheimer J.

Heard: October 11, 2002.
Judgment: October 22, 2002.
(70 paras.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class or representative actions, for damages — Class actions, certification, considerations (incl. whether class action appropriate) — Settlements — Court approval, class actions — Barristers and solicitors — Compensation — Measure of compensation — Class actions.

Motion by the representative plaintiffs to certify their action against Du Pont as a class proceeding, to approve a settlement in that proceeding, and to approve the fees charged by counsel for the plaintiffs. The plaintiffs brought claims against Du Pont, Shell and Celanese for alleged defects in polubutylene plumbing pipe and acetal insert fittings, claiming that the products were unsuitable for use in potable water plumbing systems. The plaintiffs asserted causes of action including negligent design, failure to warn, misrepresentation and breach of warranty. A previous motion to certify the actions against Shell and Celanese had been dismissed and was under appeal. The proposed settlement with Du Pont involved Du Pont making payments to Canadian homeowners with the defective products from a $30 million fund. The settlement also contained a clause that would have barred any cross-claims, third party claim, or contribution and indemnity claim against Du Pont, leaving the class members restricted to making claims against only Shell and Celanese. Counsel for the class stated that their investigations and research enabled them to negotiate a settlement that was fair, reasonable and in the best interests of the class. There were no objections from potential class members to the proposed class, and members were able to opt out of the settlement. The settlement also included payment of $4.5 million to class counsel, including disbursements and taxes. Class counsel had previously entered into retainer agreements with the representative plaintiffs that would have resulted in approximately twice the amount in fees, and the time invested by all counsel at their regular hourly rates was approximately the amount of fees they would receive under the settlement. Some of the fees were for counsel in other provinces.

HELD: Motion allowed in part. There was an identifiable class and a common issue for settlement

purposes, and the settlement agreement provided a workable plan for the resolution of the common issue. Certification of the class in the settlement context was the appropriate procedure for resolution. The other defendants did not have the right to make submissions on the appropriateness of the settlement. The other defendants were not affected by the fact that the class and Du Pont wanted to resolve their outstanding issues, and the settlement agreement may have actually benefited the other defendants. The settlement provided a measure of certainty in the result, the factual basis for the claims were very well known, the terms and conditions were balanced and proper, similar types of settlements had been approved in the United States, there were no objectors, and the settlement was reached after prolonged arm's length negotiations between very experienced counsel. The settlement was approved subject to resolution of the bar order and the proposed fees to class counsel. The bar order was appropriate but it should have been restricted to matters that could have been raised as part of the action and it should have been clear that it did not operate with respect to claims made by anyone who opted out of the settlement. Provisional approval of the proposed settlement was granted, subject to those concerns. Approval of the fees was adjourned for counsel to address concerns about whether the court had the jurisdiction or expertise to approve fees for solicitors outside of Ontario, to address how the lump sum was to be divided among counsel, and whether the time spent on the previous unsuccessful certification application should have been included.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 29(2), 32(2), 32(4).

Counsel:

Michael A. Eizenga and Dawn M. Sullivan, for the plaintiffs.
David W. Kent, for the defendant, Shell Oil Company.
Jeffrey S. Leon and Laura F. Cooper, for the defendant, E.I. Du Pont De Nemours and Company.
J. D. Timothy Pinos and Glenn M. Zakaib, for the defendant, Hoechst Celanese Corporation.

¶ 1 **NORDHEIMER J.**:— Three representative plaintiffs (Paul Berthelot, Dale Elliott and Ross Baptist) move to certify this action as a class proceeding and to approve a settlement under the Class Proceedings Act, 1992, S.O. 1992, c. 6 with respect to the plaintiffs' claims against the defendant, E.I. Du Pont De Nemours and Company. For the purposes of this motion, Ross Baptist was added as a representative plaintiff.

¶ 2 This case is somewhat unusual because the motion to grant certification and approve the settlement follows my decision on July 9, 2002 in which I denied certification of this action as a class proceeding with respect to the plaintiffs' claims against the other two defendants. That decision is currently under appeal.

¶ 3 The claims asserted in this action arise out of alleged defects in two products, polybutylene plumbing pipe and acetal insert fittings. The plaintiffs allege that fittings made from acetal resin, supplied by the defendants, Hoechst Celanese Corporation and E.I. Du Pont De Nemours and Company, and pipe made from polybutylene resin, supplied by the defendant, Shell Oil Company, are unsuitable for use in potable water plumbing systems. The plaintiffs allege that if such fittings and piping are used in potable water plumbing systems, they will fail prematurely leading to leaks and damages consequent on such leaks. The plaintiffs assert causes of action including negligent design, failure to warn, misrepresentation and breach of warranty.

¶ 4 In the proposed settlement, DuPont agrees to make payments to Canadian homeowners with polybutylene plumbing and heating systems from a fund of up to $30 million. The terms and conditions are set out in a settlement agreement entered into between Class Counsel and DuPont on February 13, 2002 and amended on March 15, 2002. Pursuant to the proposed settlement, settlement class members will be deemed to have released DuPont from all claims against it arising from polybutylene plumbing and heating systems, but will retain their rights to pursue their claims against the non-settling defendants, Shell and Celanese. On the basis of "bar order" language agreed upon by Class Counsel and DuPont, cross-claims, third party claims and all claims for contribution and indemnity are to be barred against DuPont. As a consequence of the bar order, settlement class members will be restricted to making "several" claims only against Shell and Celanese.

¶ 5 The proposed settlement was reached after Class Counsel had conducted a significant amount of investigation. As part of the investigation, Class Counsel retained expert witnesses, interviewed dozens of installers and plumbers, examined the plumbing in many structures, arranged for scientific analysis on failed plumbing parts and interviewed hundreds of other witnesses and class members throughout Canada. In addition, Class Counsel reviewed hundreds of documents that were produced in the course of litigation which has been ongoing for many years in the United States over these issues.

¶ 6 Class counsel say that these investigations and research, including the plaintiffs' involvement earlier in these proceedings regarding motions brought by the defendants disputing the jurisdiction of this court, as well as the plaintiffs' preparation for the substantive litigation, enabled them to negotiate a Settlement Agreement that they are confident is fair, reasonable and in the best interests of the class. It is not disputed that the parties entered into the proposed settlement after months of arm's length negotiations. It should also be noted that the negotiation of the fees to be paid to Class Counsel took place after the other terms of the proposed settlement had already been agreed upon by Class Counsel and DuPont.

¶ 7 Class counsel advise that the settlement discussions were guided by many factors including: discussions with homeowners with PB plumbing and/or heating systems, an analysis of the facts and law applicable to the claims of the settlement class, a consideration of the burdens and expense of litigation, including the risks and uncertainties associated with certification, trials and appeals, a consideration of a fair and cost-effective method of resolving the claims of the settlement class and a consideration of other settlements in Canada and the United States.

¶ 8 While it is the plaintiffs' position that this litigation has merit, in evaluating settlement options, Class Counsel have understandably assessed the risks associated with the litigation. Those risks include various risks that are necessarily associated with this type of litigation including procedural risks related to certification, risks associated with complex scientific evidence and the assertion of some novel causes of action. In addition, there is the ever present reality that even if the plaintiffs are successful on each and every material issue in the litigation, appeals by the defendants could significantly delay a resolution for many years. In this case, the procedural risks relative to certification are obvious given my decision, at first instance, to deny certification against the other two defendants.

¶ 9 There are companion proposed class proceedings ongoing in British Columbia and Quebec. This proposed settlement applies to all three actions and requires the approval of the courts in all three Provinces. Hearings seeking approval of the proposed settlement are scheduled to take place in British Columbia on November 7, 2002 and in Quebec on November 19, 2002.

¶ 10 The proposed definition of the settlement class, subject to certain exclusions as set out in the Settlement Agreement, is as follows:

All persons and entities (1) who own or who previously owned or will own any improvements to real property to structures in Ontario and any of the Canadian provinces or territories other than British Columbia or Quebec, in which there is or was during the time of such ownership, a polybutylene plumbing system with acetal insert fittings, and/or (2) who own or who previously owned or will own any improvements to real property or structures in Ontario and any of the Canadian provinces or territories other than British Columbia, in which there is or was during the time of such ownership a polybutylene heating system with acetal insert fittings.

¶ 11 The settlement class will consist of the following subclasses:

(i) All persons and entities resident in Ontario, or with a right to recover in Ontario, as a result of ownership of a unit with a polybutylene plumbing system with acetal insert fittings in Ontario;
(ii) All persons and entities resident in provinces and territories other than Ontario, Quebec or British Columbia, or with a right to recover in provinces or territories other than Ontario, Quebec or British Columbia, as a result of ownership of a unit with a polybutylene plumbing system with acetal insert fittings in provinces or territories other than Ontario, Quebec or British Columbia; and
(iii) All persons and entities resident in provinces or territories other than British Columbia, or with a right to recover in provinces or territories other than British Columbia, as a result of ownership of a unit with a polybutylene heating system with acetal insert fittings in provinces or territories other than British Columbia.

¶ 12 Reduced to its basics, therefore, a person is a member of the settlement class if they own, have owned, or will own property that contains or has contained a polybutylene plumbing or heating system with acetal insert fittings. Polybutylene pipe is identifiable because it is usually grey plastic. Insert fittings are distinguishable from non-insert fittings by their mechanical structure (i.e. the fitting is inserted into the inside of the pipe). Acetal insert fittings are usually grey plastic and held in place with a metal crimp ring on the outside of the pipe. The fittings may carry the following markings: bow, Q, SG, W or A/I.

¶ 13 A website has been set up as part of the settlement process. It contains photographs of components of polybutylene plumbing and heating systems which were posted in conjunction with the notice of the proposed settlement. Copies of the photographs can also be obtained through a toll-free number. In addition, if the settlement is approved, inspectors will be available, if necessary, to assist in determining if a property has a polybutylene plumbing or heating system.

¶ 14 Pursuant to the proposed settlement, DuPont has agreed to the following:

(a) DuPont will pay 25% of the reasonable cost of a replumb of a polybutylene plumbing system with acetal insert fittings provided that such replumb has been completed within 15 years of the installation of the unit's polybutylene plumbing system;
(b) DuPont will pay 25% of the actual cost of repair of physical damage to tangible property caused by a leak in a polybutylene plumbing system with acetal insert fittings occurring within 15 years of its installation (to the extent not reimbursed by insurance), provided a replumb of the property unit has been completed;
(c) DuPont will pay $200 of the cost of repair of a polybutylene heating system with acetal insert fittings, provided that all acetal insert fittings in such system are replaced within 15 years of installation of the unit's polybutylene heating

system; and

(d) DuPont will pay the expenses of maintaining a claims processing facility to administer the settlement.

¶ 15 It is proposed under the settlement that no property owner with the subject plumbing and/or heating will be excluded due to limitations issues. Provided a Settlement Class member's replumb of a polybutylene plumbing system or replacement of a polybutylene heating system occurs within one year from the date of notice of final Court approval, DuPont will make payments to those Settlement Class Members even if the polybutylene plumbing and heating systems were installed more than 15 years before the settlement.

¶ 16 Other features of the proposed settlement are that it does not require class members to:

(a) distinguish between acetal insert fittings manufactured with Delrin versus those manufactured with Celcon;
(b) establish any liability against DuPont or any other entity; or
(c) establish any failure or leak in the polybutylene plumbing or heating system.

¶ 17 DuPont has also agreed to:

(a) Pay solicitors' fees and expenses to Class Counsel of $4.5 million, subject to Court approval, which fees and expenses are in addition to the other funding; and
(b) Fund a notice campaign informing prospective Class Members of the approval of the settlement, the claims process and their opt out rights.

¶ 18 DuPont and Class Counsel have agreed that settlement class members will be deemed to have released all claims against DuPont arising from their polybutylene plumbing and heating systems but will retain their claims against the non-settling defendants, Shell and Celanese. Settlement class members will also be deemed to have assigned to DuPont all claims against any entity that manufactured component parts of the systems, except for their rights against Shell and Celanese, and to have waived subrogation against DuPont for future losses to the extent allowed by applicable insurance policies.

¶ 19 Crossclaims, third party claims, and all claims for contribution and indemnity are to be barred against DuPont, on the basis of the following language proposed jointly by Class Counsel and DuPont:

> THIS COURT ORDERS that all claims for contribution, indemnity, or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, relating to polybutylene plumbing and heating systems, including (but not limited to) all claims for or in respect of the subject matter of the Class Actions, by any Non-Settling Defendant or any other person or party, against the Settling Defendant, are barred, prohibited and enjoined in accordance with the following terms:
>
> (a) The Plaintiffs shall not make joint and several claims against the Non-Settling Defendants but shall restrict their claims to several claims against each of the Non-Settling Defendants such that the Plaintiffs shall be entitled to receive only those damages proven to have been caused solely by each of the Non-Settling Defendants;
> (b) The Non-Settling Defendants may obtain an Order providing for discovery from

the Settling Defendant as deemed appropriate by the Court; and

(c) Except as otherwise provided herein, nothing in this Judgment shall prejudice or in any way interfere with the rights of the Settlement Class Members to pursue all of their other rights and remedies against the Non-Settling Defendants.

¶ 20 Notice of the hearing to approve the settlement was placed in Canadian newspapers and other media in accordance with the Plan of Notice approved by the Courts of British Columbia, Ontario and Quebec. The notice was also posted on a website, and made available at a specified toll-free number. The notice required that any objections to the proposed settlement were to be received by Class Counsel on or before September 20, 2002. No objections were, in fact, received.

¶ 21 Under the proposed settlement, there is a claims administration process. It has been designed such that class members can prepare their claims easily and then have those claims processed fairly and efficiently. The Canadian Polybutylene Claims Facility ("CPCF") is managed by the UAB Group Ltd., which is a company related to the claims administrator for one of the settlements of polybutylene litigation which has occurred in the United States. Claims have been managed in that settlement for years, and the CPCF will use a similar process.

¶ 22 The CPCF will provide information regarding the settlement and manage the process for opting out or making a claim through the website, the toll-free number and direct mail. All communications will be available in English and French. The CPCF will preserve all claim information, documentation and polybutylene system components received in the event they are required in any further proceedings involving these or other parties.

¶ 23 It is submitted that there are other benefits which accrue to the Settlement Class members from the proposed settlement. For instance, no settlement class member will be required to hire his or her own lawyer, be cross-examined, attend at examinations for discovery, or appear at a trial. Thus it is said that the Settlement Agreement generates efficiencies not only for the settlement class as a whole, but also for each of the settlement class members individually.

¶ 24 I earlier mentioned that no objections have been received to the proposed settlement. Since notice of this hearing was published, Class Counsel advise that they have communicated with hundreds of potential class members throughout Canada. In addition, the CPCF has received over 350 phone calls and over 3,470 "hits" on their website from potential class members. It is reported that the response from potential Settlement Class members has been overwhelmingly positive. Further, the three proposed representative plaintiffs have reviewed the Settlement Agreement and discussed its terms with Class Counsel. All three representative plaintiffs agree with the proposed settlement and have instructed Class Counsel to seek its approval.

¶ 25 The Notice Plan provides for comprehensive coverage of the settlement, if approved. The notice program will involve publication in two national newspapers, 52 other newspapers in ten provinces and two territories, two national magazines and two provincial magazines. A press release will be distributed through the Canadian wire service. In addition, a website and dedicated toll-free telephone number have been established. The costs associated with the Notice Plan will be paid by DuPont pursuant to the terms of the Settlement Agreement.

¶ 26 Any class member who is not satisfied with the terms of the settlement, and wishes to individually pursue his or her claim against DuPont, may opt out of the settlement. The proposed opt out period is 90 days following the first publication of Notice of court approval of the Settlement Agreement. A person can opt out by completing an opt out form which they will return to the CPCF by

mail on or before the deadline. The opt out procedure is clearly described in the Notice.

Analysis

Should the action be certified as a class proceeding?

¶ 27 The first issue is whether this action should be certified as a class proceeding for the purposes of the proposed settlement. The requirements for certification in a settlement context are the same as they are in a litigation context and are set out in section 5 of the Class Proceedings Act, 1992. However, their application need not, in my view, be as rigorously applied in the settlement context as they should be in the litigation context, principally because the underlying concerns over the manageability of the ongoing proceeding are removed.

¶ 28 In my earlier decision on certification, I found that there were properly pleaded causes of action and that conclusion remains true on this motion. In my earlier decision, I found, in essence, that there was an identifiable class regarding the plumbing pipe but not with respect to the inserts. The problem with the latter was the fact that visual inspection cannot necessarily determine whether a fitting is made of Celcon (Celanese's product) or Delrin (DuPont's product) or some other plastic material. That issue is eliminated in the proposed settlement as DuPont is prepared to reimburse settlement class members regardless of the actual manufacturer of the fitting. It is not necessary, therefore, for the settlement class members to identify the specific product in order to participate in the proposed settlement.

¶ 29 It is necessary for the insert to be an acetal insert for someone to qualify for participation in the settlement, but, as I earlier noted, pictures of acetal inserts will be provided to allow for that identification to take place. Counsel point out that insert fittings are easily distinguishable from non-insert fittings (such as compression fittings) by their mechanical structure (i.e. they go inside of the pipe rather than outside). Acetal fittings are also distinguishable from non-acetal fittings (e.g. copper) by the appearance of the material. The CPCF can also provide assistance to Settlement Class members if necessary.

¶ 30 I am satisfied, therefore, that there is an identifiable class.

¶ 31 The plaintiffs propose that the settlement class be certified on the basis of the following common issue:

> What claims does the DuPont Settlement Class have against DuPont USA arising from their ownership of real property or structures containing polybutylene plumbing or heating systems with acetal insert fittings?

I am satisfied that this constitutes a common issue for settlement purposes.

¶ 32 The Settlement Agreement provides a workable plan for the resolution of this common issue. DuPont has agreed to settle all claims against it on a nationwide basis with property owners who have, or had, polybutylene plumbing and/or heating systems with acetal insert fittings. Settlement Class members will not be required to establish any liability against DuPont or any other entity, nor will they be required to establish any failure or leak in the polybutylene plumbing or heating system. Furthermore, no Settlement Class member will be excluded due to the age of their plumbing and/or heating system so any problems surrounding limitations issues are avoided.

¶ 33 I am also satisfied that certification in this settlement context provides the preferable procedure

for the resolution of this matter. The Settlement Agreement provides an efficient plan to expeditiously and inexpensively resolve the claims of the Settlement Class members against DuPont. The Settlement Agreement allows the Settlement Class members to resolve their claims against DuPont in a summary fashion.

¶ 34 Dale Elliott and Paul Berthelot are Ontario homeowners with polybutylene pipe and acetal insert fittings in their plumbing systems. They are proposed representatives of the Ontario plumbing sub-class. Ross Baptist is an Alberta homeowner with polybutylene pipe and acetal insert fittings in his plumbing and heating systems. He is the proposed representative of the extra-provincial plumbing and heating sub-classes. These three individuals constitute proper representative plaintiffs for the settlement class.

¶ 35 I am satisfied therefore that the action should be certified as a class proceeding for the purposes of settlement.

Should the settlement be approved?

¶ 36 By virtue of section 29(2) of the Act, class action settlements must be approved by the Court to be binding. Before turning to my consideration of the settlement itself, I wish to address an issue that arose in the approval hearing and that is the right, if any, of the non-settling defendants to make submissions regarding the adequacy of the settlement. In this regard I am not dealing with the issue of the proposed bar order. I will deal with that later as a separate issue and one on which there was no dispute that the non-settling defendants have a direct interest and a clear right to make submissions.

¶ 37 Counsel for Shell did not attempt to make any submissions beyond its concerns respecting the bar order but counsel for Celanese did. Celanese insists that it has the right to make such submissions on the basis that it is a party to the proceeding and therefore entitled to participate in all steps in the proceeding. In the alternative, Celanese submits that it has the right to make such submissions because it has a direct interest in the settlement. I do not accept that either of these grounds gives Celanese the right to make such submissions. Just because Celanese is a named party in the action does not, in and of itself, give Celanese the right to make submissions on a settlement between the plaintiff and another defendant. In any interlocutory proceeding, the right to make submissions is directly related to whether the party is affected by the relief being sought. By way of example, if the plaintiff and one defendant were disputing the propriety of questions asked at that defendant's examination for discovery, a co-defendant would not automatically have the right to make submissions on that motion. The co-defendant would have to show that its interests would be impacted by the decision on the questions before it would have the right to make submissions. Similarly, if there was a dispute as to whether a statement of claim disclosed a cause of action against one defendant, other defendants would not have the right to make submissions on that issue.

¶ 38 Aside from the bar order, I do not see how Celanese is affected by the fact that the plaintiffs and DuPont wish to resolve the issues that are outstanding between them. I appreciate that the proposed settlement impacts on products made by Celanese because DuPont is prepared to contribute to replumbs which involve either company's products. That fact, however, does not adversely affect Celanese. On the contrary, it may benefit Celanese insofar as settlement class members will have to account for any monies they receive from DuPont respecting problems which are, in fact, those of Celanese's making. Further, and as will become clearer when I deal with the bar order, the bar order, if approved, would further benefit Celanese by requiring settlement class members to make only several, as opposed to joint and several, claims against the non-settling defendants.

¶ 39 I also do not accept that Celanese has a direct interest in the settlement. Again putting aside the bar order, Celanese asserts it has a direct interest because the settlement may cause relevant evidence to be destroyed. In particular, Celanese complains that if a Settlement Class member undertakes a replumb and then continues with a claim against Celanese, evidence of the original installation and original parts may be lost. While this is, of course, true, I fail to see how that reality adversely affects Celanese. If evidence is lost or destroyed, it is a matter that redounds to the detriment of the plaintiffs not Celanese. If the plaintiff cannot adequately prove his or her case because the original parts are no longer available, or the particulars of the original installation cannot be established, the plaintiff is the one that suffers the consequences. In any event, the proposed settlement contains terms directed to this issue. It may be that those terms need to be strengthened or expanded. In that limited aspect, it may be that Celanese has some right to make input but that concern alone cannot justify the broad right of participation in this process for which Celanese contends.

¶ 40 Ultimately, the court can and must control its own process. The court ought to be wary of allowing parties, who are clearly adverse in interest to the plaintiffs, to weigh in on matters such as the settlement of claims involving other parties in the guise of "protecting" the plaintiff class. In my view, except for those narrow instances to which I have referred where the interests of non-settling defendants are clearly engaged, non-settling defendants have no general right to involve themselves in the approval of a settlement to which they are not parties. I find this to be the case whether the non-settling defendants are, or are not, named parties in the proceeding where the settlement is sought to be approved. The non-settling defendants here suggest that the approach is different where the non-settling defendants are actual parties to the litigation in which the settlement is reached. They contend that Mr. Justice Cumming so held in Knowles v. Wyeth-Ayerst Canada Inc. (2001), 16 C.P.C. (5th) 343 (Ont. S.C.J.). In my view, a fair reading of Mr. Justice Cumming's decision does not lead to that conclusion. While Mr. Justice Cumming did point out that the fact that Servier was not a party in that case raised further obstacles to its right to make submissions on the settlement, I cannot find anything in his decision which suggests that he would have been anymore favourably disposed towards Servier's participation had it, in fact, been a party to the proceeding.

¶ 41 Simply put, non-settling defendants have no standing to make submissions, as Celanese sought to do here, against the approval of the settlement on the basis that the settlement class members were not receiving enough under the settlement or that the settlement class members were unlikely to take up the settlement in sufficient numbers. If the court has any concerns in those respects regarding a proposed settlement, then the answer is for the court to appoint independent counsel to review the settlement and advise on such issues. To conclude otherwise would permit non-settling defendants to take on a role which fits neither comfortably nor properly on their shoulders given that the non-settling defendants' fundamental position is, after all, that the plaintiffs have no legitimate claim to advance in the first place.

¶ 42 In determining whether to approve a settlement the Court will consider whether the settlement is fair, reasonable and in the best interests of the class as a whole. In the leading case on class action settlements, Dabbs v. Sun Life, Assurance Company of Canada, [1998] O.J. No. 1598 (Gen. Div.) Mr. Justice Sharpe approved the following list of considerations for the approval of a proposed settlement:

1. Likelihood of recovery, or likelihood of success
2. Amount and nature of discovery evidence
3. Settlement terms and conditions
4. Recommendation and experience of counsel
5. Future expense and likely duration of litigation
6. Recommendation of neutral parties if any
7. Number of objectors and nature of objections
8. The presence of good faith and the absence of collusion

¶ 43 Mr. Justice Sharpe also found helpful, as do I, the following judgment of Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 (H.C.J.) at pp. 230-231:

> "In approaching this matter, I believe it should be observed at the outset that the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system.
> "In deciding whether or not to approve a proposed settlement under s. 235(2) of the Act, the court must be satisfied that the proposal is fair and reasonable to all shareholders. In considering these matters, the court must recognize that settlements are by their very nature compromises, which need not and usually do not satisfy every single concern of all parties affected. Acceptable settlements may fall within a broad range of upper and lower limits.
> "In cases such as this, it is not the court's function to substitute its judgment for that of the parties who negotiate the settlement. Nor is it the court's function to litigate the merits of the action. I would also state that it is not the function of the court [to] simply rubber-stamp the proposal.
> "The court must consider the nature of the claims that were advanced in the action, the nature of the defences to those claims that were advanced in the pleadings, and the benefits accruing and lost to the parties as a result of the settlement."

¶ 44 It is not the function of the court in reviewing a settlement to reopen the settlement or to attempt to re-negotiate it in the hope of improving its terms. Simply put, the court must decide either to approve the settlement or to reject it. Similarly, in deciding whether to approve the settlement, the court must be wary of second-guessing the parties in terms of the settlement that they have reached. Just because the court might have approached the resolution from a different perspective, or might have reached a resolution on a different basis, is not a reason to reject the proposed settlement unless the court is of the view that the settlement is inadequate or unfair or unreasonable.

¶ 45 In this particular case, I questioned the absence of any provision in the settlement which would allow members of the settlement class to be reimbursed for repairs alone without the requirement of undertaking a replumb. One of the reasons for not including such a provision was the parties' wish to have finality and not to be faced with a series of claims by the same Settlement Class member. While that issue could have been addressed in another way, for the court to insist on such a provision as part of the approval of the settlement would be to engage in the "arm chair quarterbacking" of the settlement which the court ought not to do. I also note that if any member of the proposed settlement class finds the absence of that, or any other, provision troublesome, he or she may opt out of the settlement.

¶ 46 Matching the proposed settlement against the factors from Dabbs, I would make the following observations:

(a) This is a complicated action. The likelihood of recovery, or likelihood of success, is very much uncertain as, indeed, is the issue of whether certification itself is appropriate. This settlement provides a measure of certainty in the result for those members of the Settlement Class who wish to partake of it.
(b) While there has yet to be any discovery in this case, voluminous materials are available to class counsel because of the many years of litigation that have occurred in the United States. The factual basis for the claims are therefore very

well known notwithstanding that this action itself has only just begun.

(c) I find the settlement terms and conditions to be balanced and proper for the resolution as proposed.
(d) The settlement is recommended by Class Counsel who are very experienced in the area of class proceedings.
(e) The prosecution of these claims will involve significant future expense and the litigation itself will likely take a considerable period of time to get to trial.
(f) While there are no recommendations from neutral parties, I would note in this regard that similar types of settlements have been approved in the United States.
(g) There are no objectors to the proposed settlement.
(h) The settlement was reached after prolonged arm's length negotiations involving very experienced counsel on both sides.

¶ 47 For all of these reasons, therefore, I am satisfied that the settlement is fair and reasonable and one which ought to be approved subject to the resolution of two remaining issues - the proposed bar order and the proposed fees payable to Class Counsel.

The proposed bar order

¶ 48 The jurisdiction of the court to grant a "bar order" and the considerations in so doing are extensively canvassed by Mr. Justice Winkler in Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 (S.C.J.). I do not intend to repeat that analysis. Rather I shall simply express my agreement with it and with its conclusion that the court does have the jurisdiction to grant such orders in appropriate cases.

¶ 49 The bar order sought here is very much like the one that was before Winkler J. Subject to some specific concerns raised, I believe that it is an appropriate order to grant in this case. The practical reality is that no single defendant would agree to a settlement in this type of litigation without such a provision. This point was aptly made in In re Nucorp Energy Securities Litigation, 661 F. Supp. 1403 where District Court Judge Irving said, at p. 1404, that without the ability to obtain a bar order:

> "... partial settlement of any federal securities case before trial is, as a practical matter, impossible. Any single defendant who refuses to settle, for whatever reason, forces all other defendants to trial. Anyone foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented."

¶ 50 I now turn to the specific concerns raised regarding this proposed bar order. Those concerns are best expressed by Shell in its factum as follows:

(a) its application is overbroad, as it will apply to claims which do not originate in proceedings governed by the settlement;
(b) it fails to expressly cap the non-settling defendants' exposure to the Settlement Class, and;
(c) it fails to provide any particular discovery rights in favour of the non-settling defendants against DuPont.

¶ 51 I accept the first concern as legitimate. However, I believe that this results from imperfection in the language used in the bar order as opposed to any attempt to be overly inclusive in its scope. The intention of the bar order is to preclude claims arising from the subject matter of the action. In other

words, it is to be restricted to matters that are, or could have been, raised as part of that action. The bar order is not intended to, nor should it, go beyond those matters. Further, it should be made clear that the bar order does not operate with respect to any claims by anyone who opts out of the settlement, that is, the bar order applies only to the claims of the settlement class members.

¶ 52 There is also a concern in this regard that the terms of the settlement appear to bind future owners of polybutylene systems. The court has no ability to bind individuals who are not currently before it. The only people who can be bound are those that are currently covered by the class and those who may become subject to it during the opt out period. Again, counsel for the plaintiffs say that is all that was intended.

¶ 53 The second concern is not one which I believe should be addressed in the bar order. In essence the non-settling defendants want the court, as part of the bar order, to stipulate that the any recovery by each and every settlement class member has henceforth been reduced to 75% of what they would otherwise recover against the non-settling defendants. Put another way, the non-settling defendants want this court to rule that, regardless of whether any given settlement class member takes advantage of the settlement, they will be deemed to have received the benefits of the settlement.

¶ 54 I do not consider that to be a fair result. There may be any number of reasons why a settlement class member may not want to avail himself or herself of the settlement. One principal reason may be that the person does not wish to engage in a full replumb. In my view, the settlement class members should be free to make those choices. It is always open, at the trial of any of these claims, to the non-settling defendants to submit to the trial judge that a reduction in damages ought to be made as a consequence of this settlement, if it is ultimately approved and implemented. The plaintiffs can make their submissions as to whether that is appropriate in any given case. I do not believe that I should be foreclosing such submissions at this time. In this respect, this case is different than Ontario New Home Warranty Program v. Chevron Chemical Co., supra, where it appears that there was an overall repair cost to which all defendants had arguably contributed and therefore had varying degrees of possible liability. The settlement payments in that case had to be accounted for against the overall damages figure. Here, there may be cases where the ultimate liability is solely that of one of the non-settling defendants. If the particular plaintiff in such a case has not received any benefit from this settlement, and if the decision not to take the benefits of this settlement was properly made by that plaintiff, then I do not see any reason why that plaintiff's damages should be impacted by the existence of this settlement. The bottom line is that there is the distinct possibility of very different factual situations arising with respect to the non-settling defendants and, therefore, the appropriate impact of the settlement on the claims remaining against them ought to be dealt with by the trial judge.

¶ 55 The third concern regarding discovery is also not one that should be dealt with at this time except to provide, as the current proposed bar order does, that the non-settling defendants retain their rights to seek discovery from DuPont if they can satisfy the court that such discovery is necessary. The non-settling defendants seek to alter the bar order so as to make DuPont subject to an obligation to submit to documentary and oral discovery (including a positive obligation to deliver an affidavit of documents) unless DuPont can convince the court to order otherwise. I believe that suggestion places the onus on the wrong party. In light of the fact that the remaining claims can only be advanced if they are several claims against the non-settling defendants, it is not clear at this stage that information which DuPont has will have any relevance to those claims. Instead of placing the onus on DuPont in these circumstances to have to prove that it has no relevant information (in a situation where DuPont will not be involved in the claim and therefore will have a limited ability to demonstrate that fact), I consider it fairer to place the onus on the non-settling defendants to establish that such relevant information is in the possession of DuPont and that it ought to be produced.

¶ 56 Contrary to the submissions of the non-settling defendants, I do not read Mr. Justice Winkler's decision in Ontario New Home Warranty Program v. Chevron Chemical Co., supra, as having granted the type of order which the non-settling defendants seek here. Rather, I read his decision as simply outlining the types of information that the non-settling defendants might be able to obtain "on motion to this court". If Mr. Justice Winkler had determined that such information had to be supplied by the settling defendants, then I fail to see why he would have included the proviso that a motion had to be brought to obtain it.

Summary

¶ 57 In the end result, I grant provisional approval to the proposed settlement, subject to the following concerns being addressed through amendments to the language of the settlement terms:

(i) the settlement must include only those claims that are, or could have been, advanced in the action;
(ii) the settlement must only apply to persons who are part of the proposed settlement class as at the time of the settlement, i.e., it does not apply to future owners of homes which may contain such systems;
(iii) the only persons covered by the settlement are those who do not opt out of the settlement;
(iv) the plan administrator will preserve all product received and will maintain and preserve all records created through the implementation of the settlement, and;
(v) a proper caution or warning will be given to all settlement class members about the need to document existing installations prior to undertaking a replumb and to preserve all products removed as a consequence of the replumb.

¶ 58 I leave it to counsel to work out the necessary amendments to the terms of the settlement to ensure that these concerns are addressed. Once that has taken place, a further hearing should be held to make the approval of the settlement final. Approval of the fees for class counsel.

¶ 59 I turn to the final issue and that is the approval of the fees which DuPont has agreed to pay Class Counsel as part of the settlement. I am able to separate my consideration of this aspect of the overall settlement from my approval of the basic settlement itself due to the fact that Mr. Eizenga advised me that he was prepared to separate the approval of the settlement proper from the approval of the fees so that the settlement could proceed. In other words, counsel were prepared to "take their chances" on the fees issue in order to allow the settlement itself to move forward. I wish to commend plaintiff's counsel for the manifest fairness they demonstrate in taking that position.

¶ 60 Class Counsel's fees were resolved through a process of negotiations between the parties. Ultimately it was agreed that DuPont would pay fees and disbursements to Class Counsel in the total amount of $4.5 million inclusive of taxes. This amount includes the anticipated costs associated with the continued work required of Class Counsel as the implementation of the settlement proceeds. It bears repeating that the amount of the fees which DuPont has agreed to pay is over and above the amount set aside to address the claims of settlement class members.

¶ 61 Class Counsel, at some earlier point, entered into retainer agreements with the representative plaintiffs which provide that Class Counsel would pay all expenses associated with the litigation and would only be paid legal fees and be reimbursed for disbursements and taxes in the event of success in the litigation. The agreements provided for payment on the basis of a contingency fee of 30% of the first $10 million, or any part thereof, of damages awarded, 20% of the second $10 million or any part

thereof, and 10% of all additional amounts, plus disbursements and taxes. These retainer agreements have not, as yet, been approved by the court as required by section 32(2) of the Class Proceedings Act, 1992 which states:

> "An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor."

If the court does not approve the retainer agreements, then the court is to determine the amount owing to the solicitors for fees and disbursements under section 32(4) of the Act. Co-counsel in British Columbia and Quebec were retained under comparable contingency terms.

¶ 62 In support of their request for approval of the amount to be paid under the settlement for fees and disbursements, Class Counsel point to the fact that the value of the Settlement Agreement would give rise, under the retainer agreements, to Class Counsel being entitled to legal fees of $6,050,000 plus disbursements and taxes. The $4,500,000 inclusive of disbursements and taxes which DuPont has agreed to pay is clearly below that amount. In fact, after taxes and disbursements, the fees that will be paid are $3,023,956 which is almost exactly one-half of the amount provided for in the retainer agreements.

¶ 63 Class Counsel also point to the fact that significant time has been expended by them in pursuing this litigation. To date, I am told that the time invested in the file by all co-counsel is approximately $3,098,928 including taxes valued at regular hourly rates. Further, Class Counsel funded all of the disbursements associated with advancing the claims and did not apply to the Class Proceedings Fund for assistance. I am told that disbursements in excess of $1,279,507 inclusive of taxes have been incurred to date.

¶ 64 Class Counsel also note that considerable work remains to be done by them respecting the settlement including:

(a) responding to questions from class members regarding the Settlement Agreement;
(b) assisting class members with the completion and submission of their claims;
(c) assisting class members with the appeals process where necessary;
(d) monitoring the quality of service of the CPCF;
(e) involvement in any other matters which may arise as the Settlement Agreement is implemented.

¶ 65 Finally, Class Counsel offer certain comparatives to justify the fees to be received. They say that the fees and disbursements and taxes to be paid amount to 14.75% of the total value of the settlement. Once disbursements and taxes are paid, the legal fees remaining will amount to only 9.5% of the total value of the settlement. Class Counsel are required to pay all disbursements before applying settlement monies to fees. In this case, as I noted above, after the payment of all disbursements and applicable taxes, approximately $3,023,956 of the $4,500,000 will remain to pay fees. This equates to a multiplier of approximately 1.04 on the total time expended to date on the litigation by Class Counsel (including co-counsel).

¶ 66 I raised with counsel at the hearing a few concerns. First, I questioned my jurisdiction to approve fees for solicitors outside the Province of Ontario. In other words, I am uncertain on what basis I would necessarily approve the fees of lawyers from British Columbia, Quebec and the United

States. For one thing, assuming that I can claim some knowledge, as part of my experience in fixing the costs of proceedings generally in this court, regarding the prevailing rates for lawyers in Ontario as well as some general idea of the amount of time that certain matters consume in the process of being litigated in Ontario, I am clearly without that level of knowledge when it comes to other jurisdictions. I also question why this court is being asked to pass on the fees to be received by lawyers in British Columbia and Quebec when the courts of those Provinces must also give their approval to the settlement.

¶ 67 Second, even assuming that I should approve the fees of all counsel involved, I am being asked in this case to approve a lump sum or block fee which the various lawyers involved will subsequently divide up among themselves. I am not convinced that that is the appropriate approach. It seems to me that counsel ought to have decided already what each group of counsel involved is going to receive from the total fees so that I can, in turn, measure the amount which each counsel group is to receive against their contribution to the overall prosecution of the litigation.

¶ 68 Third, I also questioned the appropriateness of using time spent on the certification motion as a justification for the reasonableness of the fees to be received. DuPont did not participate in the certification motion. The certification motion only involved the non-settling defendants and it was unsuccessful - at least it was before me. Certification has not been argued in the other Provinces. I question whether the time spent in a losing endeavour can provide a justification for the fees arising from a separate settlement. I will leave that concern at this time, however, as I intend to return to the whole issue of the approval of the fees at a later date.

¶ 69 As may be apparent, I am not prepared to approve the fees sought at this time. I am therefore going to adjourn the motion insofar as it seeks the approval of the fees. That aspect of the motion may be brought back before me once counsel have addressed at least the second concern by agreeing on the distribution that is to be made among themselves of the fees which are sought to be approved. Before bringing the matter back, however, counsel ought to consider how to address the first concern. In that regard, counsel may wish to consider whether it is more appropriate to ask each of the courts, before whom approval must be sought, to only approve the fees for the lawyers in their specific Province. That route, however, raises other issues including which court should approve the fees being paid to U.S. counsel and what happens to any "surplus" created if a court reduces the fees for a particular group of counsel. Another alternative which counsel may wish to consider is whether some form of joint hearing by all three courts has to be held to address these issues.

¶ 70 On a final point, I suggest that any issue about the costs arising from this motion be addressed when the matter is brought back before the court for the final approval of the settlement. I will leave it up to counsel to determine if that final approval should await the approval hearings in Quebec and British Columbia in case further issues arise with respect to the basic settlement.

QL Update: 20021025
cp/e/qlrme

Case Name:

Gariepy v. Shell Oil Co.

PROCEEDING UNDER The Class Proceedings Act, 1992

Between
Michael Gariepy, Lyne Marion, Wayne McGowan, Paul Berthelot and Dale Elliott, plaintiffs, and
Shell Oil Company, E.I. Du Pont De Nemours and Company and Hoechst Celanese Corporation, defendants

[2003] O.J. No. 2490
Court File No. 30781/99 (London)
Toronto Court File No.: 99-CT-030781CP

Ontario Superior Court of Justice
Nordheimer J.

Heard: May 29, 2003.
Judgment: June 3, 2003.
(23 paras.)

Barristers and solicitors — Compensation — Agreements, the retainer — Measure of compensation — Class actions.

Motion by plaintiffs' counsel to approve class counsel fees and disbursements, and to approve a retainer agreement. The parties had reached a settlement agreement which provided for the defendant EI Du Pont De Nemours and Company to pay fees to class counsel. The fees were over and above the amount set aside for the settlement itself. There was no information available as to the number of the members of the class who intended to take up the settlement offer. Although the settlement had been approved, the fees were not approved due to concerns about jurisdiction to approve fees for out-of-province counsel and, difficulties in measuring compensation against relative contribution. The court also had concern about the appropriateness of using time spent on the certification motion as justification for the reasonableness of the fees to be received. As a result, class counsel for the various jurisdictions filed a joint affidavit to support a request for approval of a lump sum fee, the division of fees was explained and all time and expenses attributable to unrelated issues such as the certification motion were omitted.

HELD: Motion to approve fees and disbursements allowed. Since the class members were not being called upon to pay the fees of class counsel, there was no need to approve the retainer agreement. A proper evaluation of the reasonableness of the fees sought would benefit from evidence as to the actual performance of the settlement reached. However, the absence of such evidence did not preclude the approval of the fees sought. It was highly unlikely that no class members would avail themselves of the settlement. Moreover, the fees were warranted in light of the complexity of the action and the result obtained.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 32(2).

Counsel:

Michael Peerless, for the plaintiffs.
Jeffrey S. Leon, for the defendant, E.I. Du Pont De Nemours and Company.

¶ 1 **NORDHEIMER J.**:— This is a motion for approval of class counsel fees and disbursements and for the approval of a retainer agreement which arises out of a settlement agreement reached between the plaintiffs and the defendant, E.I. Du Pont De Nemours and Company. At the outset, I should record the fact that, without deciding whether the other two defendants had standing to participate in this motion, I directed that they be given notice of the motion, which was done. Neither Shell nor Celanese appeared on the motion. Further, while Du Pont appeared on the motion, Mr. Leon did not make any submissions.

¶ 2 On October 22, 2002, I provisionally approved the settlement agreement subject to certain issues being addressed. On November 5, 2002, after amendments had been made to the settlement agreement to address those issues, I granted final approval. The settlement was subsequently approved by the British Columbia Supreme Court and the Quebec Superior Court.

¶ 3 In my October 22, 2002 reasons, I declined to grant approval to the fees to be paid to class counsel under the settlement agreement. I expressed certain concerns regarding those fees including the following:

(a) the Ontario Court's jurisdiction to approve fees for lawyers from British Columbia, Quebec and the United States;
(b) that counsel were seeking approval of a lump sum fee without disclosing the share that each counsel group would receive which thereby made it difficult for the court to measure the compensation to each counsel group against their contribution;
(c) the appropriateness of using time spent on the certification motion as a justification for the reasonableness of the fees to be received.

It should be noted in respect of the last point that I had dismissed the certification motion brought by the plaintiffs respecting the other two defendants. As a consequence of those concerns, it was agreed that the approval of the fees would be made the subject of a separate motion and that the approval of the settlement itself could proceed independently of the fees issue.

¶ 4 The matter now comes back before me through this motion brought by Ontario class counsel, Siskind, Cromarty, Ivey & Dowler LLP ("Siskinds"), on its own behalf and on behalf of all associated co-counsel. Co-counsel include Siskinds in Ontario, Poyner, Baxter in British Columbia, Siskinds, Desmeules in Quebec, United States counsel, William H. Garvin and members of his firm, and Richardson, Patrick, Westbrook & Brickman, L.L.C. also of the U.S.

¶ 5 The concerns which I earlier raised have been addressed in the following manner:

(a) class counsel from each of the three jurisdictions have filed joint affidavit evidence to support their request for approval of the lump sum fee which provides details of each counsel group's contributions toward the litigation;

(b) the co-counsel agreement and the division of fees between counsel has been explained;
(c) all time and expenses attributable to unrelated issues such as the certification motion against Shell and Celanese and earlier motions regarding jurisdiction have been omitted.

The fees and disbursements must also be approved by the British Columbia Supreme Court and the Quebec Superior Court. The British Columbia Supreme Court is scheduled to hold a hearing on the issue on June 11, 2003. The Quebec Superior Court has already held its hearing on the issue but no decision has yet been rendered.

¶ 6 Class counsel submit that this case is somewhat unique in that the various counsel groups participated jointly at every stage and worked together as a team to achieve the settlement on a national basis. In addition to the experience of counsel in each of the jurisdictions, the U.S. co-counsel had experience with the American litigation on the same subject. Given this joint approach to the litigation, the parties negotiated a lump sum amount for class counsel fees to be paid in addition to the benefits to the class. Class counsel now seek approval of this lump sum which, if approved, would then be divided pursuant to the co-counsel agreement.

¶ 7 The co-counsel agreement essentially provides that Siskinds, Poyner Baxter and the U.S. counsel would share the risk by each contributing to the disbursements incurred in the Canadian litigation and by working together throughout the litigation. Ultimately it was agreed that, if success were achieved at some stage, funds would be applied to the share of disbursements paid by each counsel and the remaining amount would be divided 35% to Siskinds, 35% to Poyner Baxter and 30% to U.S. counsel. As counsel in Quebec were part of a small firm and not in a position to assume as much monetary risk in the litigation, it was agreed that all of the Quebec time and disbursements would be paid by the U.S. counsel on a quarterly basis with the understanding that Quebec counsel may receive a "premium" if class counsel realized a significant premium at some stage.

¶ 8 The settlement agreement made with Du Pont provides benefits to the class amounting to a "soft cap" of $30 million, plus notice costs and class counsel fees. In this latter respect, the settlement agreement provides that Du Pont shall pay class counsel fees in the amount of $4.5 million, including disbursements and taxes, over and above the benefits being made available to the class.

¶ 9 I should mention one other fact. Each of the Canadian class counsel entered into retainer agreements with their respective representative plaintiffs. None of those retainer agreements was ever put before the courts for approval. The retainer agreements vary in their terms. Ontario class counsel entered into a retainer agreement that provided for payment on the basis of a 30% contingency fee of the first $10 million or any part thereof, 20% of the second $10 million or any part thereof, and 10% of all additional amounts, plus disbursements and taxes. British Columbia and Quebec class counsel were retained under retainer agreements that provided for payment on the basis of a 25% contingency fee.

¶ 10 I mention this because, before dealing with the issue of whether the fees should be approved, there is the issue of whether or not the retainer agreement for Ontario class counsel should be approved. Section 32(2) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 states:

> "An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor."

¶ 11 Frequently, approval of the retainer agreement is sought early on in the proceeding so that class counsel has some degree of certainty regarding their arrangements for their remuneration. However, as I have mentioned, that was not done in this case. Now there is a settlement agreement which provides for Du Pont to pay fees to class counsel. Those fees are over and above the amount set aside for the settlement itself so the payment of the fees does not diminish the recovery for the members of the class. The result of those arrangements is that the class members are not being called upon to pay the fees of class counsel.

¶ 12 In such circumstances, I do not believe that there is any need to approve the retainer agreement. Indeed, given that the retainer agreement is not being relied upon for payment of the fees (although all of the retainer agreements are being relied upon as evidence of the reasonableness of the fees sought) the situation not only does not fall within the terms of section 32(2), it seems to me that to embark upon that exercise is to engage the court in considering an issue that is essentially moot. Put another way, whether I would have approved the retainer agreement is only of tangential relevance to the issue that I now have to determine, that is, the reasonableness of the fees actually being sought.

¶ 13 Turning then to that issue, the factors to be taken into account in considering the reasonableness of fees charged by a solicitor to a client are well-established. They are set out in the Court of Appeal's decision in Cohen v. Kealey & Blaney (1985), 26 C.P.C. (2d) 211 (Ont. C.A.) as follows:

(a) the time expended by the solicitor,
(b) the legal complexity of the matters to be dealt with,
(c) the degree of responsibility assumed by the solicitor,
(d) the monetary value of the matters in issue,
(e) the importance of the matter to the client,
(f) the degree of skill and competence demonstrated by the solicitor,
(g) the results achieved,
(h) the ability of the client to pay and
(i) the client's expectation as to the amount of the fee.

These factors are equally applicable in the class proceedings context - see Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.).

¶ 14 Class counsel provided the following chart outlining the value of the time that they have spent on this matter and the disbursements that they have incurred in pursuing the claim:

Counsel	Time	Disbursements	Total
Ontario	$ 531,280	$ 198,814.06	$ 730,094
B.C.	$ 538,253	$ 140,962.61	$ 679,215
Quebec	$ 226,773	$ 0	$ 121,496
U.S.	$ 516,001	$ 726,118.52	$ 1,242,119
TOTAL	$ 1,812,307	$ 1,065,895.19	$ 2,772,924

Counsel	% Share of contribution to total value	% Share pursuant to co-counsel agreement

Ontario	26.3%	35%
B.C.	24.5%	35%
Quebec	4.4%	potential premium
U.S.	44.8%	30%
TOTAL	100%	100%

*Note in calculating Quebec's contribution, the amount for discounted fees paid to Quebec from US was excluded leaving $121,496 in fees.

It should be noted that the time spent by B.C. counsel is an estimate. This situation arises, I am advised, because B.C. counsel apparently do not keep time records when they are operating under a contingency fee arrangement.

¶ 15 In considering each of the appropriate factors, I accept that class counsel have spent a great deal of time on this matter. Class counsel became involved in this matter six years ago. The action itself has been ongoing for four years. I also accept that the issues raised are complicated and that class counsel have assumed considerable responsibility in deciding to take on the task of prosecuting these claims. There is a significant monetary value to the claims as the settlement of $30 million dollars would aptly demonstrate. There is also no question as to the skill and competence of class counsel. The factors of the client's ability to pay and the expectation of the client regarding the amount of the fee do not really come into play in this case as the class is not paying the fees nor are the fees being taken out of what would otherwise be funds available to settle the class members' claims. However, insofar as the retainer agreements evidence the expectation of the representative plaintiffs regarding the fees to be paid to class counsel, the fees sought are well within the terms of those agreements.

¶ 16 Where I have some difficulty in this case is with the factors regarding the importance of the matter to the client and the results achieved. At this stage, there is no information available as to the number of members of the class who will actually decide to take up the settlement offered. Without that information, it is difficult to fully evaluate the results achieved. It is also difficult to evaluate whether the resolution of the claims was truly important to the class members. Put another way, if very few of the members of the class wind up taking advantage of the settlement, that might be some evidence that the results of the settlement were less favourable than they might otherwise appear to be and/or that the issue itself is not one of great importance to the members of the class. It must be remembered in this regard that this action deals with allegedly defective products used in plastic plumbing systems. The plaintiffs allege that if such fittings and piping are used in potable water plumbing systems, they will fail prematurely leading to leaks and damages consequent on such leaks. Under the settlement, Du Pont has agreed to pay a portion, namely 25%, of the costs of repairs to the systems and of damages caused by failures of the systems. It is theoretically possible that class members may view problems with the systems, if any, as being too inconsequential to bother with the settlement or they may view the steps they have to take to participate in the settlement as overwhelming the gain to be achieved through the settlement.

¶ 17 Class counsel responds to these concerns in two ways. First, they assert that it is unfair to require class counsel to wait for the settlement to be completed particularly in a case such as this where the time frame to take up the settlement may extend for a number of years. Second, they assert that the court has already passed on these issues by approving the settlement in the first place.

¶ 18 I accept that there would be an unfairness in requiring class counsel to await the completion of the settlement in order to obtain their remuneration if that required no payment being approved to class counsel. However, it seems to me that it is open to the court to approve a base level of remuneration at this stage and consider a request for additional remuneration once the take up rate in the settlement is known, if the take up rate would demonstrate that additional recompense is justified. For example, payment only of the value of the time spent together with the disbursements could be approved (in this case this would amount to $3 million of the $4.5 million sought) and the balance could be considered at a later stage. Indeed, it appears that just such an approach was negotiated, and approved, in Directright Cartage Ltd. v. London Life Insurance Co., [2001] O.J. No. 4073 (S.C.J.).

¶ 19 I do not accept that the concern I have raised, or my suggested solution to it, is in some fashion foreclosed by the fact that the settlement itself has been approved. The settlement was approved specifically excising from that approval the issue of the fees. Approval of the settlement in those circumstances cannot be seen as in any way being even an indirect approval of the fees sought. I do accept that approval of the settlement inherently includes a finding that the settlement has value and would be of benefit to the class members. That finding, however, is made prospectively and cannot be considered, as a consequence, to be immutable. If actual experience shows that the class members did not avail themselves of the settlement then it may be that, notwithstanding the apparent value of the settlement, its actual value differs. Having said that, such a conclusion does not mean that the settlement is valueless nor does it mean that such concerns would lead to no fees being paid to class counsel. Rather, what this issue goes to is the level of premium or "multiplier" that it is appropriate to approve.

¶ 20 Class counsel further responds that it is unrealistic to expect that there will be no take up under the settlement. From that reality, they contend that, even if the take up rate should turn out to be low, the fees they seek would still be reasonable because the level of premium is low relative to other fees which have been approved in other settlements of class actions. In this respect, they point to the following:

(a) after taxes and disbursements, there remains $3,175,690.00 for legal fees which would be approximately half of the amount provided for in the lowest of the retainer agreements and accordingly well within the amount the representative plaintiffs would have expected to pay;
(b) the figure of $3,175,690.00 for fees can be compared to the total value of the settlement which is at least $30,500,000.00. Class counsel are, therefore, requesting fees that amount to 10.4% of the total value of the settlement, and;
(c) the figure of $3,175,690.00 for fees equates to a multiplier of approximately 1.75 on the total time expended to date by class counsel on this part of the litigation.

¶ 21 These points are clearly relevant to the issue that I must determine. In Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417 (C.A.), Mr. Justice Goudge identified three tests against which fees sought by class counsel should be measured. They are:

(a) the percentage which the fees sought are of the gross recovery. As noted above, in this case that is 10.4%;
(b) whether the resulting multiplier is appropriately placed within the acceptable range which he identified as being between one at the low end and three to four at the high end. As noted above, in this case the multiplier would equal 1.75, and;
(c) whether the compensation sought is viewed by the court as sufficient to provide

> a real economic incentive to solicitors to take on such cases. I find that the fees sought here clearly satisfy that concern.

I might add to those considerations a fourth one, namely, how the fees sought relate to the fees that would be payable under any retainer agreement that has been entered into. In this case, as already noted, the fees are well within the parameters of those agreements.

¶ 22 While I remain of the view that in class proceedings the proper evaluation of the reasonableness of the fees sought under a settlement would benefit from evidence as to the actual performance of the settlement reached, I have concluded that in this case the absence of such evidence ought not to preclude the approval of the fees sought. I accept the point that it is highly unlikely that no class members will avail themselves of the settlement. I agree with counsel for the plaintiffs that had I thought that such a result might obtain, I would not likely have approved the settlement in the first place. Further, even if, in the end result, a low percentage of the members of the class do in fact take up the settlement, I would still be hard pressed to conclude that the fees sought by class counsel were not warranted. The action was complex. It involved considerable risk as my denial of certification regarding the other two defendants evidences. Nonetheless, a significant resolution was achieved respecting this one defendant. In addition, the fees are being paid by that defendant over and above the amount being made available to the class members. Class counsel are entitled to be compensated relative to the result achieved. In that regard, the fees here satisfy the factors set out in Gagne v. Silcorp Ltd., supra, without being excessive.

¶ 23 As a result, having considered all of the above, I have concluded that the fees should be approved as requested. An order will therefore issue approving class counsel fees and disbursements in the amount of $4.5 million including taxes.

NORDHEIMER J.

QL UPDATE: 20030626
cp/e/nc/qw/qlrme/qlmjb

Haney Iron Works Ltd. v. Manufacturers Life Insurance Co.

169 D.L.R. (4th) 565

British Columbia Supreme Court
Court File No. C970226 Vancouver Registry
Brenner J.

December 3, 1998;
DECEMBER 16, 1998

Civil procedure — Class actions — Procedure — Defendant having right to support application for certification and settlement while preserving right to contest certification if settlement not approved — Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4, 35.

A firm applied for appointment as the representative plaintiff in a class action against an insurance company, and for approval of a settlement with the defendant. The defendant supported the proposed representative plaintiff's application. A member of the proposed class supported the application for certification but opposed approval of the settlement agreement and argued that a plaintiff sub-class with himself as the representative plaintiff should be created. A parallel class action involving the same insurer in Ontario had been certified and settled on identical terms to those proposed. The proposed settlement was in some respects better and in some respects worse for the plaintiffs than the settlement of other Ontario and U.S. class actions against other insurance companies involving the same legal and factual issues.

Held, the application should be granted.

The certification and settlement process should not be bifurcated because the result would be added expense and delay. The defendant should have the right to support an application for certification and settlement while preserving its rights to contest certification if settlement is not approved. Where an application for certification is made contingent upon a settlement being approved, the court should determine whether the applicants have made out a prima facie case for certification; if so, the court should determine whether the settlement is fair and reasonable. The court must consider both whether the plaintiffs would succeed and whether the defendant would successfully oppose certification. ***[page566]***

The plaintiffs had established a prima facie case for certification. The pleadings disclosed a cause of action in breach of contract and misrepresentation; there was an identifiable class of persons comprising those policyholders who were or could have been sold policies on the basis of misrepresentation; there was a common issue concerning the defendant's representations. The proposed representative plaintiff had made out a prima facie case that it was a representative plaintiff. Considering the terms of the settlement as compared to the othersettlements and considering the risk that the defendant might be able to resist certification or assert defences, the settlement fell within a range of reasonableness or fairness. Judicial comity and the goal of certainty in litigation made it essential to afford considerable weight to decisions in other Canadian jurisdictions in identical class action claims. There was no reason to make the objector a party or to consolidate his earlier action with the class action.

Cases referred to

Dabbs v. Sun Life Assurance Co. of Canada (1998), 22 C.P.C. (4th) 381, [1998] I.L.R. 1-3575, 40 O.R. (3d) 429, 80 A.C.W.S. (3d) 956, [1998] O.J. No. 2811 (QL); [appeal quashed 165 D.L.R. (4th) 482, [1999] I.L.R. 1-3629, 41 O.R. (3d) 97, 113 O.A.C. 307, 82 A.C.W.S. (3d) 638; leave to appeal to S.C.C. refused, 165 D.L.R. (4th) vii] -- consd

Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 1598 (QL) -- consd

Greenspun v. Bogan, 492 F.2d 375 (1974) -- refd to

McKrow v. Manufacturers Life Insurance Co. (1998), 83 A.C.W.S. (3d) 729 --refd to

Yonge v. Katz, 447 F.2d 431 (1971) -- refd to

Statutes referred to Class Proceedings Act, R.S.B.C. 1996, c. 50 s. 4(1)(e) s. 35(1)

Authorities referred to Newberg, Herbert B. and Alba Conte, Newberg on Class Actions, 3rd ed. (Rochester, N.Y.: Lawyers Cooperative Publishing, 1992)

APPLICATION for appointment of a representative plaintiff and approval of a settlement in a class action.

J. Poyner, K. Baxter, C. Wright and P. Poyner, for plaintiff.

D. Mullan, for defendant.

D.A. Klein, P. Rosenburg and B. Nayer, for objector, Gordon Moffat.

BRENNER J.

BRENNER J.:—

INTRODUCTION

¶ 1 Haney Iron Works Ltd. applies to be appointed as the representative plaintiff in the within action commenced pursuant to the Class ***[page567]*** Proceedings Act, R.S.B.C. 1996, c. 50, and to have a settlement agreement entered into with the defendant, Manulife, approved by the Court. The objector Gordon Moffat is a member of the proposed class. He supports the application for certification, but says that the settlement agreement should not be approved by the court and that a plaintiff sub-class should be created with Moffat as the representative plaintiff for that sub-class. The defendant Manulife supports Haney's application to have the settlement agreement approved and supports Haney's certification application on condition that the settlement agreement is approved. If the court rejects the settlement agreement Manulife reserves the right to oppose certification.

BACKGROUND

¶ 2 This case arises from the sale of so-called "vanishing premium" whole life insurance policies. These policies featured a "premium offset" option whereby the annual dividends could be applied to the annual premium. The dividend was expected to increase each year and be applied to the annual premium which

was fixed in amount. When the amount of the annual dividend exceeded the annual premium, the policyholder would not have to make any more premium payments and hence the term "vanishing premium".

¶ 3 These cases involve the representations made to policyholders about the length of time it would take the amount of the annual dividends to overtake the amount of the annual premium payments. The allegations in this case primarily concern the use of sales illustrations, combined with verbal or written representations made by Manulife with respect to the date that class members' policies would become "fully paid up" or the date by which the policy dividends would equal or exceed the annual premium payment.

¶ 4 The plaintiffs contend that these representations were overly optimistic and that as a result premium payments will be required for a longer period than projected in the illustrations and other representations.

ONTARIO ACTION

¶ 5 A parallel action has been proceeding in Ontario. On November 18, 1998 Sharpe J. of the Ontario Court of Justice (General Division) certified the Ontario action as a class proceeding ***[page568]*** and approved the settlement proposed by the parties in that action. [See McKrow v. Manufacturers Life Insurance Co., infra.] That settlement is identical to the terms of the settlement agreement before me. This raises the issue of the weight this court should attach to the fact that an identical class proceeding and settlement has been certified and approved in Ontario.

¶ 6 The Manulife litigation involves some 160,000 policyholders, 30,000 of which reside in B.C. The class action legislation in B.C. and Ontario is very similar. In my view judicial comity and the goal of certainty in litigation outcomes makes it essential that the courts in the class action jurisdictions in Canada afford considerable weight to the decisions in other Canadian jurisdictions in identical class action claims.

¶ 7 Dabbs v. Sun Life Assurance Co. of Canada, [1998] O.J. No. 2811(QL), Action No. 96-CT-022862 July 3, 1998 [now reported at 22 C.P.C. (4th) 381] was an earlier vanishing premium case. Actions in Quebec and British Columbia were certified as class actions and the proposed settlements approved prior to the application in Ontario which was contested by a number of objectors. In his reasons certifying the action in Ontario and approving the settlement, Sharpe J. stated at p. 16 [pp. 392-3]:

Another factor which favors approval of the settlement is that the same agreement has been approved by the courts of British Columbia and Quebec.

¶ 8 In my view that conclusion is apposite and in the case at bar I consider the fact that Sharpe J. certified the Ontario action and approved the settlement to be a factor that favours approval.

CAN MANULIFE RESERVE ITS RIGHTS TO CONTEST CERTIFICATION IF THE SETTLEMENT IS NOT APPROVED?

¶ 9 It is a term of the settlement agreement that this proceeding would only be certified as a class proceeding upon court approval of the settlement in Ontario and British Columbia. Can the parties, or more particularly, can the defendant Manulife reserve this right?

¶ 10 The objector Moffat says that Manulife has made an election. Moffat submits that by entering into

the proposed settlement and by supporting this application, even on conditional terms, Manulife is foreclosed from being able to advance its arguments against ***[page569]*** certification in the event that the settlement is rejected. The submission is that the Act requires a two step process: first the court must determine whether the action should be certified under the Class Proceedings Act and only after deciding that question in the affirmative can the court then move on to consider whether the proposed settlement is reasonable.

¶ 11 If this view is correct, it would require defendants in class actions to decide whether to contest certification prior to any fairness hearing. Instead of opening negotiations when confronted with a proposed class action and trying to achieve an early global settlement, defendants would be forced to contest certification, since on Moffat's submission, participating in any proposed settlement would foreclose the right to challenge certification.

¶ 12 Although the wording of the Act does reflect the expectation that the issue of certification will generally be decided before the issue of settlement fairness, it is my view that to judicially mandate a two step process would be inconsistent with the intent of the Act.

¶ 13 Class actions are intended to allow for the more efficient judicial handling of potentially complex cases of mass wrong. Typically the numbers of potential plaintiffs are large and the individual amounts lost by each plaintiff would not normally permit the plaintiffs to economically pursue individual civil claims. To that extent the legislative scheme permits improved access to the justice system for those whose actions might not otherwise be heard.

¶ 14 If the certification and settlement approval process is judicially bifurcated into two steps, and if defendants are required to either assert their opposition to certification at a separate hearing before any fairness hearing or waive their right to do so, then the result will be added expense and a delay in the settlement negotiation process. Settlements will necessarily be delayed while the certification issue is litigated; this will inevitably introduce extra cost into the process.

¶ 15 In my view the goal of efficient judicial handling of these types of cases is best achieved by affirming the right of a defendant to support an application for certification and settlement approval while at the same time preserving its right to contest certification in the event that the settlement is not approved. ***[page570]***

¶ 16 Where an application for certification is made contingent upon a settlement agreement being approved, the court should first determine whether the applicants have made out a prima facie case for certification; that is to say whether they have made out a prima facie case that the claim meets the requirements of s. 4 of the Act. If such a prima facie case has been made out, the court can then move on to consider whether the settlement is fair and reasonable.

¶ 17 In such a case, one of the considerations that the court will have to weigh is the litigation risk; that is not only whether the plaintiffs will succeed in the action against the defendant, but also the risk that the defendant reserving its rights will be able to successfully oppose certification in the event the settlement is not approved and a full hearing on the certification issue subsequently proceeds.

CERTIFICATION

¶ 18 In this case I am satisfied that the plaintiffs have established a prima facie case for certification under s. 4(1) of the Act. The pleadings disclose a cause of action framed in breach of contract and misrepresentation. There is an identifiable class of two or more persons comprised of those

policyholders who were or could have been sold their policies on the basis of premium offset. There is a common issue which is whether the use of illustrations and/ or representations, in writing or verbal created an obligation on the part of Manulife with respect to a specified offset date despite the terms of the policy and the terms of any illustration. A class proceeding is the preferable procedure for the fair and efficient resolution of the common issue. Finally I am satisfied that Haney has made out at least a prima facie case that it is a representative plaintiff that meets the test in s. 4(1)(e).

¶ 19 Having concluded that there is at least a prima facie case favouring certification, I now consider whether the proposed settlement agreement is fair and reasonable.

SETTLEMENT -- STANDARD OF REVIEW

¶ 20 The Act states in s. 35 that:

35(1) A class proceeding may be settled, discontinued or abandoned only

(a) with the approval of the court, and
(b) on the terms the court considers appropriate. ***[page571]***

¶ 21 The role of the court in approving class action settlements was addressed by Sharpe J. in Dabbs v. Sun Life Assurance Co. of Canada unreported, [1998] O.J. No. 1598 Court File No. 96-CT-022862, February 24, 1998. At paragraphs 8 through 16 of his reasons, Sharpe J. addresses the role of the court in settlement approval and the factors to be considered by the court. I concur with his analysis.

¶ 22 At paragraph 10 of his reasons Sharpe J. observed that the court is asked to approve or reject a settlement and that it is not open to the court to rewrite or modify its terms. While the court could indicate areas of concern, Sharpe J. noted that in Sun Life as the agreement had already been approved by the courts in British Columbia and Quebec, that would be considered as a factor making changes unlikely in that case.

¶ 23 In his reasons Sharpe J. referred to a leading American text Newberg on Class Actions, (3rd ed.) paragraph 11.43 which sets out the following criteria on an application to the court for settlement approval in a class proceeding:

1. Likelihood of recovery or likelihood of success;
2. Amount and nature of discovery, evidence or investigation;
3. Settlement terms and conditions;
4. Recommendation and experience of counsel;
5. Future expense and likely duration of litigation;
6. Recommendation of neutral parties, if any;
7. Number of objectors and nature of objections;

8. The presence of arms-length bargaining and the absence of collusion.

¶ 24 He also referred to the Federal Third Circuit decision in Yonge v. Katz, 447 F.2d 431 (3rd Cir. 1971):

It is not necessary in order to determine whether an agreement of settlement and compromise shall be approved that the court try the case which is before it for settlement. Such procedures would emasculate the very purpose for which settlements are made. The court is only called upon to consider and weigh

the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable. ***[page572]***

¶ 25 In Greenspun v. Bogan 492 F.2d 375 at 381 (1st Cir. 1974) the court said:

. . . any settlement is the result of a compromise -- each party surrendering something in order to prevent unprofitable litigation, and the risk and costs inherent in taking litigation to completion. A district court, in reviewing a settlement proposal, need not engage in a trial of the merits, for the purpose of settlement is precisely to avoid such a trial. See United Founders Life Ins. Co. v. Consumer's National Life Ins. Co. 447 F. (2d) 647 (7th Cir. 1971); Florida Trailer & Equipment Co. v. Deal 284 F. (2d) 567, 571 (5th Cir. 1960). It is only when one side is so obviously correct in its assertions of law and fact that it would be clearly unreasonable to require it to compromise in the extent of the settlement, that to approve the settlement would be an abuse of discretion.

¶ 26 At paragraph 15 Sharpe J. concluded:

It is apparent that the court cannot exercise its function without evidence. The court is entitled to insist on sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the settlement in all the circumstances.

¶ 27 The standard Sharpe J. set out in Dabbs to be met by parties seeking approval of a settlement in a class proceeding is whether, in all the circumstances, the settlement is fair, reasonable and in the best interests of those affected by it. I agree with that test.

¶ 28 In the case at bar, the Manulife settlement has been approved in Ontario but not Quebec. In McKrow v. The Manufacturers Life Insurance Company (unreported) Court File No. 24112/96 Reasons for Judgment November 18, 1998 [summarized 83 A.C.W.S. (3d) 729] Sharpe J. reviewed the terms of the settlement, applied the standard set out in Dabbs and approved the Manulife settlement.

¶ 29 On this application the objector says that the evidence put forward by Haney is insufficient to satisfy the burden of proving that the settlement is fair and reasonable and that the proposed settlement falls short of the benchmarks of fairness set in other class actions as more particularly demonstrated by the Sun Life and the U.S. Manulife settlements.

SUFFICIENCY OF EVIDENCE AND FAIRNESS

¶ 30 On this application much was made of the apparent limited knowledge of the principal of Haney, Henry Pranke and the objector Gordon Moffat. I do not attach much weight to this. While the court must be satisfied that the intended plaintiff is an appropriate ***[page573]*** individual to be court approved as a representative, the reality is that these actions are to a large extent driven by counsel and class counsel are the individuals who are in a position to provide the necessary evidentiary support for certification and settlement applications.

¶ 31 Haney filed in support of the settlement an affidavit from one of its class counsel Kenneth Baxter. Moffat says that little or no probative value should be placed on Mr. Baxter's affidavit because of his limited direct knowledge of the evidence supporting the application.

¶ 32 Mr. Baxter was only one of a number of class counsel both in British Columbia and in Ontario supporting the certification and settlement applications. In my view the state of Mr. Baxter's direct knowledge is not as important as whether the terms of the settlement itself are fair.

¶ 33 Haney also relies on an opinion from David Huff, a consulting actuary. Huff has some 30 years of experience in matters relating to the development of life insurance policies. In Huff's opinion the proposed settlement addresses the problems alleged by the class members, provides substantial and real economic value and is fair to class members. He points out that there is no cap on the total recovery of settlement benefits as well as no internal limits capping the benefits to be awarded. He also sets out two provisions that he considers to be generally less favourable to class members when compared to other agreements: the availability of benefits for lapsed or surrendered policies and the $250 deposit to pursue an appeal from a denial of Policy Review Process benefits. However he concludes that the settlement "compares favourably in structure and benefits to similar class actions in the United States and Canada".

¶ 34 Moffat contends that the settlement does not appear to add anything material to the Manulife "Valued Customer Program" (the "VCP") offered to policyholders in 1996 prior to the proposed settlement. However, the VCP instituted by Manulife before the involvement of class counsel has been significantly improved. All members of the class, not just those who register complaints are eligible for this "no fault" program. The Policy Review Process (the "PRP") allows class members to present certain evidence and to ***[page574]*** appeal an adverse decision. Class members can choose to participate in the PRP without forfeiting any of their no fault benefits under the VCP.

¶ 35 Moffat says the PRP is "significantly inferior" to the Sun Life and U.S. Manulife settlements because upon electing to enter the PRP:

a) the class member does not receive a copy of his policy file from Manulife;

b) the class member has no entitlement to see the agent's file;

c) the class member is not provided with the name, address and telephone number of the agent;

d) there is no class counsel participation on the adjudication of individual claims;

e) class counsel will be sent rejection decisions but not the evidence on which the decision was based;

f) the class member must pay $250 to file an appeal from a rejection decision;

g) the settlement agreement contains insufficient safeguards to ensure Manulife is administering the settlement diligently and in good faith;

h) unreasonable restrictions have been placed on the ability of class members with lapsed or surrendered policies to obtain benefits under the PRP;

i) the settlement agreement does not provide funding to class counsel for auditing and monitoring of the claim review process.

¶ 36 However, in their submissions both Haney and Manulife identify other features of the settlement which in their view are superior to the Sun Life and U.S. Manulife settlements, some of which I refer to herein.

¶ 37 In Sun Life there is a panel review step designed to screen out appeals without merit; here there is a direct appeal. In Sun Life policyholders who chose to enter the appeal process will have given up their global and optional global benefits; here the policyholder does not have to give up anything to try the PRP and no deposit is required until the policyholder elects to appeal an unfavourable decision. The

deposit for the appeal is arguably less than the no-fault benefits which are given up in the other settlements. ***[page575]***

¶ 38 In Sun Life the policyholder gives up the no fault benefits if he enters the Alternative Claims Resolution Process (the "ACRP"), (the equivalent of the PRP). This choice is made before he sees his file. If he sees his file after making this election and realizes he will lose in the ACRP, he cannot re-elect the global benefits. In the U.S. Manulife settlement the policyholder must similarly give up the no-fault benefits in order to participate in the ADR portion of the settlement.

¶ 39 In the U.S. Manulife settlement the ADR portion of the settlement is capped at $50 million. If a sufficient number of U.S. Manulife policyholders succeed in the U.S. ADR program, the benefits are reduced pro rata. There is no cap on the value of the PRP in the Canadian settlement.

¶ 40 Ultimately this proposed settlement is a settlement like many others; it is a compromise of a disputed claim which has been entered into by parties represented by experienced counsel bargaining at arms length and in good faith. Some features of the settlement are inferior to other similar settlements; others are superior.

¶ 41 No Manulife policyholder is obliged to continue as a member of the class. Any person who chooses can opt out and pursue an individual action against Manulife; alternatively, a separate class action could be filed on behalf of those who choose to opt out and wish to litigate and pursue a more favourable settlement. While I recognize that both of these options may be uneconomic, they are nonetheless available to anyone who wishes to opt out of this settlement.

¶ 42 In weighing the advantages and disadvantages of this settlement when compared with other class action settlements I must ultimately decide whether the disadvantages are sufficient to justify rejecting this settlement.

¶ 43 In making this decision I must also consider the litigation risk. If this settlement is rejected there is no guarantee that a settlement improved from the plaintiff's perspective can be successfully negotiated. Manulife has clearly reserved its right to argue both that this action is not certifiable under the Act and that even if it is certifiable, that it has a number of good defences to the action as set out in its statement of defence. ***[page576]***

CONCLUSION

¶ 44 Based on the foregoing I am satisfied that the settlement falls within a range of reasonableness or fairness. Accordingly there will be an order certifying this action as a class proceeding, appointing Haney Iron Works Ltd., as the representative plaintiff and approving the proposed settlement.

¶ 45 As noted by Sharpe J. in his reasons, as a term of the settlement agreement, Manulife has agreed to pay the costs of the plaintiff "in such amount as the parties may agree or as the Court may determine". Sharpe J. has remained seized of the Ontario action and has directed that any fee agreement be submitted to him for approval.

¶ 46 I shall remain seized with this action and would also direct that any fee agreement between the parties in respect of this action is to be submitted to me for approval. By remaining seized I shall also be available in the event that a motion for directions with respect to the administration of the settlement becomes necessary under paragraph 13.2 of the settlement agreement.

STATUS OF MOFFAT

¶ 47 Counsel for the objector asks that I grant Moffat party status or alternatively consolidate his action which was filed earlier with the case at bar. In my view there is no reason to do so. Moffat is currently a member of the class in this action. He was given objector status and granted leave to cross-examine on the affidavits filed by the parties prior to the hearing. At the hearing Moffat made full submissions with respect to both the certification and settlement issues. While I understand that the application is motivated by a concern over Moffat's status on an appeal, in my view there is no need in this court to make such an order.

Application granted.

Case Name:

Hislop v. Canada (Attorney General)

PROCEEDING UNDER the Class Proceedings Act, 1992

Between
George Hislop, Brent E. Daum, Albert McNutt, Eric Brogaard and Gail Meredith, plaintiffs, and
The Attorney General of Canada, defendant

[2004] O.J. No. 1867
Court File No. 01-CV-221056CP

Ontario Superior Court of Justice
E. Macdonald J.

Heard: February 12, 2004.
Judgment: April 30, 2004.
(28 paras.)

Counsel:

J.J. Camp, Patricia LeFebour and Victoria Paris, for the plaintiffs.
Sheila R. Block, for the plaintiffs Counsel Group.

REASONS FOR DECISION

E. MACDONALD J.:—

Introduction and Background

¶ 1 This motion is brought by Roy Elliott Kim O'Connor LLP ("REKO") on behalf of the plaintiffs' counsel group ("PCG") under s. 32(2) of the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA") for approval of fees and disbursements (retainers). The retainers are in the form of written agreements with each of the representative plaintiffs. The retainers with George Hislop, Albert McNutt and Brent Daum provide for a contingency fee of 25% plus party and party costs. The retainers with Gail Meredith and Eric Brogaard provide for a contingency fee of 33 1/3%.

¶ 2 REKO seeks a fee based on a multiplier of at least 5 for all fees incurred up to and including the final disposition of the matter whether by court order or settlement. Ms. Block submitted that the appropriate multiplier is 6 times up to judgment and 4 times for the appeal. For the administration, the PCG proposes an hourly rate with no multiplier.

¶ 3 In the alternative, REKO seeks a fee of 25% on the total value of the award, plus applicable taxes, plus a 1% levy for a disbursement fund. In addition and in accordance with the retainer agreement, REKO asks that it be paid any amount awarded in costs. [See Note 1 below]

Note 1: After I heard this motion I was advised by counsel that the parties were successful in reaching settlement on the quantum of costs to be paid by the AGC as a result of my judgment released December 19, 2003 which awarded costs to the plaintiffs.

¶ 4 Each of the representative plaintiffs received notice of this motion. Each of them consents to the orders being sought. The Attorney General of Canada ("AGC"), not being affected by this order, is not entitled to notice. For the reasons set out below, I find that the multiplier approach is most appropriate to the unique circumstances of this case. I fix it at 4.8, which is at the high end of the range of multipliers in class action litigation in Canada. Before dealing with the factors that have influenced my determination of the appropriate multiplier, I refer to Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, wherein Goudge J.A. observed the following after setting out s. 33 of the CPA:

> Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.
>
> ....
>
> The multiplier is in part a reward to the solicitor for bearing the risks of acting in the litigation. The court must determine whether these risks were sufficient that together with the other relevant considerations a multiplier is warranted. While this determination is made after the class proceeding has concluded successfully, it is the risks when the litigation commenced and as it continued that must be assessed.
>
> ....
>
> I recognize that the selection of the precise multiplier is an art, not a science. All the relevant factors must be weighed. Here, while the risk of an adverse finding on liability was minimal, there was a material risk of non-certification. As well, as I have outlined, there were significant elements of success in the manner in which the solicitors conducted the proceedings. Weighed against these success factors is the fact that following the April 17, 1997 settlement, individual class members had to incur further legal fees to finally realize on their claims. [emphasis added]
>
> In the end, three considerations must yield a multiplier that, in the words of s. 33(7)(b), results in fair and reasonable compensation to the solicitors. One yardstick by which this can be tested is the percentage of gross recovery that would be represented by the multiplied base fee. If the base fee as multiplied constitutes an excessive proportion of the total recovery, the multiplier might well be too high. A second way of testing whether the ultimate compensation is fair and reasonable is to see whether the multiplier is appropriately placed in a range that might run from slightly greater than one to three or four in the most deserving case. Thirdly, regard can be had to the retainer agreement in determining what is fair and reasonable. Finally, fair and reasonable compensation must be sufficient to provide a real economic incentive to solicitors in the future to take on this sort of case and to do it well.

¶ 5 These are the considerations that have influenced my thinking on the choice of multiplier. [See

Note 2 below] This case is in the category of "the most deserving case".

Note 2: I am also influenced by the recent decision in Christian Brothers of Ireland in Canada (Re), 68 O.R. (3d) 1, [2003] O.J. No. 4249, (O.C.A.) in which the court allowed a significant premium on fees, and held that a premium provides incentive to counsel to take on difficult litigation and to do it well. As in this case, "the litigation was complex, difficult and time consuming, its outcome uncertain." (See para. 3).

Factual Background

¶ 6 This action claimed Canada Pension Plan ("CPP") [See Note 3 below] survivors' pensions for surviving same sex partners of persons who died between April 17, 1995 and January 1, 1998. The action was framed under s. 15 of the Canadian Charter of Rights and Freedoms. [See Note 4 below] It also claimed equitable relief that was dismissed in my reasons for judgment released on December 19, 2003. The judgment was in favour of the class members on the s. 15 claims. Interest was awarded on the arrears beginning in February 1992.

Note 3: Canada Pension Plan, ss. 2(1) and 8(1).

Note 4: Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11, (the "Charter").

¶ 7 Ms. Block stated that these class proceedings are the largest class action award after trial in Canadian legal history. The award has the potential value of $81 million. [See Note 5 below] This is the first class action judgment in the world that addressed an infringement of the rights of lesbians and gay men. The appeal from the judgment is being heard in June 2004.

Note 5: This is based on the assumption that there are approximately 1500 people who would be entitled to benefits as a result of the judgment but so far the "take-up" rate is 1/3 of the eligible class members.

¶ 8 Under ss. 32 and 33 of the CPA, a retainer between counsel and the representative plaintiff or plaintiffs cannot be enforced without the approval of the court. Cullity J., appointed as the case management judge, directed that the trial judge approve the form of the retainer. If the retainers are approved as requested by the PCG, the net recovery to the class members should be about 70% of their individual claims after legal fees and all applicable taxes and disbursements are deducted. Each of the representative plaintiffs consents to the approval of the retainers. Each has filed an affidavit in which he/she expresses appreciation for the extraordinary efforts of their counsel and for the results achieved at trial.

Plaintiffs' Counsel Group (PCG)

¶ 9 I note the following about the PCG. They are an outstanding group of men and women from across Canada, all of whom have a high level of expertise in class actions and same sex equality rights litigation.

¶ 10 Mr. Elliott, lead counsel for the class members, has extensive experience in Charter litigation, especially in cases involving equality rights for gay men and lesbians. Mr. Camp and Ms. Matthews are also very experienced in class proceedings and were the lead counsel in the B.C. action. Ms. Matthews was co-counsel at the trial. The other members of the counsel team from coast to coast were selected by Mr. Elliott because of their past experience and their willingness to work in a national team environment.

¶ 11 Because of the nature of the claims being advanced, it was difficult to identify lesbians and gay men who were willing to serve as representative plaintiffs. Many people who would otherwise be eligible as representative plaintiffs were shy about the publicity of this action and the potential for invasion of the privacy of their sexual orientation and their relationships. They knew that this case would attract significant media attention. These factors made it difficult to identify persons who would come forward and who were prepared to endure the glare of publicity that was inevitable from being a representative plaintiff.

The Risks In This Class Action

¶ 12 In this case there were significant risks for the PCG. These risks infuse the determination of the appropriate multiplier. Any lawyer, considering a retainer in an action such as this would know that he/she faced the burden of accumulating very significant work in progress without compensation for a long period of time. [See Note 6 below] As the court remarked in Endean v. Canadian Red Cross Society, [2000] B.C.J. No. 1254, this was "bet your firm" litigation.

Note 6: This risk is so significant that one highly respected plaintiff's lawyer and one large Bay Street firm declined continued involvement in the case. Counsel for the class members also incurred significant disbursements in the course of the action, none of which has been reimbursed by the plaintiffs.

¶ 13 Aside from the financial burden and risk undertaken by the PCG, there are other risks that are set out in paragraph 18 of PCG's factum. Rather than paraphrase these risks, I reproduce them exactly as they appear in the factum:

a. Chance of having the equitable claims struck - There was a risk that the Crown would succeed in having these claims struck in the Rule 21 motion. If this were the case, it could have had the effect of weakening the chances of certification. This risk no longer exists.
b. Failure to certify the equitable claims - There was a risk that even if the equitable claims survived the Rule 21 motion of the Crown, these claims would be unsuccessful on certification. This risk no longer exists.
c. Failure to certify the Charter claims - There was a risk that certification would not occur in B.C. because of the Auton [See Note 7 below] decision. In Ontario, the chances of certifying a class proceeding on a Charter issue alone were significantly less. This risk no longer exists.
d. Failure to succeed at trial - There was a risk that the class members would not

succeed on any of the claims advanced. The Crown argued consistently that this Class Action was concerned with Parliament's ability to select an effective date of legislation and was not concerned with discrimination. If the class members were entirely unsuccessful at trial, there would have been no recovery to them and counsel would have received nothing according to the Retainer. This risk no longer exists.

e. Failure to succeed on any of the common issues at trial - There were 17 common issues identified for the trial of this action. There was a material risk that the plaintiffs could have failed on any or all of those common issues. In fact, the plaintiffs did:

    i. Fail to establish any of the equitable claims: This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.
    ii. Fail to win full interest: For the period since February 1992, the plaintiffs were successful in winning interest. However, since this aspect of the judgment is under appeal, there is still a risk that may materialize. With respect to interest prior to that time, the plaintiffs were unsuccessful. Since there is no cross appeal, there is no hope of an alternate finding on that point.
    iii. Fail to win symbolic damages for the class members. This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.
    iv. Fail to win damages pursuant to s. 24 of the Charter. This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.

f. Failure to win the equitable claims at trial - There is a risk that, if the equitable claims were unsuccessful at trial, the class members would have to succeed on the Charter claims, including entitlement to the arrears of the CPP survivor pension, in order to be fully successful. This risk materialized. Since there is no cross-appeal there is no hope of an alternate outcome.

g. Risk of having certain provisions of the CPP struck and others remain - It was possible that the trial judge could have found certain provisions of the CPP, whether or not they were of general application, to be constitutional, while finding others to be in violation of s. 15(1). This could have produced a pyrrhic victory for the class members. This risk still exists because of the appeal.

h. Risk of application of statutes of limitations - If the Crown were successful on having various statutes of limitation apply in this Class Action, the amount recoverable by the class members would be reduced. For example, the arrears could be limited to one year. This risk is extant because of the appeal by the Crown.

i. Risk of application of CPP insulating clause - Section 65 of the CPP precludes any payment from being attached or assigned. If the Court were to rule that these provisions applied, there would be restrictions on the ability of counsel to collect their fees. This risk continues to exist.

j. Failure to succeed on remedy at trial - There was a significant risk that, even if the class members were successful at establishing a s. 15(1) Charter breach which was not saved by s. 1, the court would award the CPP survivor pensions only on a prospective basis, without interest. This outcome would have reduced the recovery to the class members by a considerable degree and would also have

had a negative impact on the fees to counsel. This risk existed up to and including the trial and still exists on the appeal.

k. Risk of having the trial decision overturned on appeal - There is a material risk that, because of the appeal by the Crown from the trial decision, the class members' recovery and payment of counsel's fees will be delayed. Moreover, there is always a risk that the trial decision will be overturned in whole or in part, which will mean either no recovery for the class members or a significantly reduced recovery and accordingly no recovery for counsel. There is also a risk that the defendant will, if unsuccessful at the Court of Appeal, seek leave to appeal to the Supreme Court of Canada.

l. Use of notwithstanding clause - There has always been and continues to be a material risk that if the Crown does not wish to accept a court ruling, it can invoke the notwithstanding clause. In this event, the class members would be powerless and would receive nothing.

Note 7: Auton v. British Columbia (2001), 197 D.L.R. (4th) 165 (B.C.S.C.); aff'd (2002) 220 D.L.R. (4th) 411 (B.C.C.A.), leave to appeal to the Supreme Court of Canada granted May 15, 2003, [2002] S.C.C.A. No. 510.

¶ 14 The AGC put forth a vigorous and able defence to these claims. It brought motions to strike the claims in Ontario and British Columbia. It opposed certification of the class proceeding in British Columbia. There were examinations for discovery of all representative plaintiffs prior to trial. There was documentary production of approximately 3,500 documents. In summary, the AGC was a well-funded opponent. In this high profile case, excellent counsel fought hard on behalf of the AGC.

¶ 15 The reality is that there is no vehicle other than a class proceeding by which these claims could have been advanced. Individual class members could not afford to mount a legal challenge on their own to obtain a CPP survivors' pension. Proceeding by way of this class action provided the representative plaintiffs with the opportunity to advance their claims with no financial exposure to them as individuals.

Section 33 of the CPA

¶ 16 Under s. 33 of the CPA, a solicitor and a representative party may enter into an agreement which provides for the payment of fees and disbursements only in the event of success in a class proceeding, where success is defined as judgment on common issues or a settlement for the benefit of the class members. A pattern has developed that supports the concept that counsel are to be paid a premium on their base fees in the event of success. A judge hearing a motion such as this selects the method of calculating the fees whether by way of a percentage of the recovery or a multiplier on the base fee amount.

PCG's Approach

¶ 17 The PCG have submitted that the percentage approach provided in the retainers is not the preferable method for compensation in this case. I agree. The percentage approach could result in unfairly low compensation if the class size is smaller than anticipated or the "take up rate" is low. It is estimated that there are a maximum 1500 class members. If this were so, the total fees would be approximately $20 million using the percentage approach. This is based on the application of 25% to Chief Actuary Menard's calculation of a total award of approximately $81 million plus costs. However, the reality is that there has never been a class proceeding that has had 100% participation by class

members. Class proceedings where there is a high level of participation generally involve cases where there is a known finite group such as patients of a physician. In those cases, class members are readily identified and contacted. Even in cases with high participation rates such as Nantais v. Telectronics Proprietary (Canada) Limited (1996), 28 O.R. (3d) 523 and Anderson v. Wilson (1997), 32 O.R. (3d) 400 (certification motion), the participation rates did not exceed 75%. I accept Ms. Block's submission that it is rare that a class action has more than a 75% "take-up" rate. To date, despite a well-funded notification campaign and the notoriety of the trial judgment in this case only 500 class members have come forward.

¶ 18 In addition, section 65 of the CPP provides that pensions are not to be attached or assigned. This is a consideration that underlies the proposal of the plaintiffs. It is suggested, that in the context of this motion, s. 65 of the CPP has no application to: (a) costs awarded, (b) pre-judgment interest or (c) post-judgment interest. Given the current numbers of class members, there is a risk that these three items will not be sufficient to protect the accounts of the PCG. In order to afford some protection to the PCG and at the same time ensure fairness to the class members, the PCG proposed the following steps once the fee is set:

a. All costs will be paid and applied directly against the amount;
b. All pre-judgment interest will be paid and applied directly against the amount;
c. All post-judgment interest will be paid and applied directly against the amount;
d. The ACG or administrator of the Class Action will withhold 50% of the arrears pending the hearing specified below;
e. On or about September 16, 2004, the situation will be reviewed on notice to the defendant and the representative plaintiffs. At that time, a determination will be made as to whether the balance of the arrears can be released or, alternatively, whether there is a need for argument on s. 65 of the CPP Act. [See Note 8 below]

Note 8: The PCG are content to have all of the fees awarded paid from the interest and costs on an interim basis with the result that it is premature to resolve the application of s. 65 of the CPP to the solicitors lien on arrears at this time. If need be, I will be available to deal with this matter at some future point.

¶ 19 The method of payment proposed by the PCG advantages the class members in the following ways:

a. it ensures that the future monthly pension cheque is available in full in total to meet the needs of class members so long as they live;
b. it provides the class members with certainty, finality and the psychological comfort of paying legal fees at one time when they are receiving a larger lump sum cheque for arrears and interest and without encumbering their future stream of survivor pensions; and,
c. it simplifies administration because once class members are "in pay", they can be paid directly by the Government with no further involvement by class counsel or the Court.

¶ 20 This process is fairest to the class members. Class members who have large claims for arrears and reduced expectations of a long stream of future income, (particularly those older class members whose partners died early in the class period), could pay a disproportionately higher burden of the fees

compared to the younger class members whose partners died later in the class period. However, all class members will receive some arrears and some interest so all will make a contribution to fees. With the exception of George Hislop, there are no other known class members, who could potentially be affected by this approach. George Hislop has consented to this approach.

Compensation To The Representative Plaintiffs

¶ 21 The representative plaintiffs are entitled to payment for their work on the preparation of this case. The amounts that they request are modest. These amounts are to be treated as a disbursement and are recoverable from the class members. I agree that George Hislop should receive the highest amount of compensation with Gail Meredith and Albert McNutt receiving the second highest amounts and Eric Brogaard and Brent Daum receiving the third highest amounts.

¶ 22 For George Hislop, the amount is fixed at $15,000. For each of Gail Meredith and Albert McNutt, the amount is fixed at $10,000. For each of Eric Brogaard and Brent Daum the amount is fixed at $5,000. All five agree to the amounts as fixed. These amounts do not in any way compensate the representative plaintiffs for the enormous amount of their personal time and energy devoted to the advancement to these proceedings. It signals recognition of the value of their contributions to the other class members and to their counsel.

The Determination Of The Appropriate Multiplier

¶ 23 There have been various choices of appropriate multiplies in class proceedings. In Gagne, supra, the court indicated that in cases where certification is contested, the minimum multiplier that should be awarded is 2 times the hourly rate. The court has also indicated that rarely should the multiplier exceed 4 times the hourly rate.

¶ 24 The average multiplier for cases in Ontario that are settled prior to trial is approximately three times. The highest multiplier known in Ontario for a settlement in a class proceeding was 3.8 in Parsons v. Canadian Red Cross Society, [2001] O.J. No. 214, aff'd [2001] O.J. No. 214 (C.A).

¶ 25 In the United States multipliers in the range of 2 to 4 are common. Higher multipliers have been awarded in exceptional cases, such as cases that were tried or were exceptionally risky. [See Note 9 below]

Note 9: See: H. Newberg, A. Conte, "Newberg on Class Actions, 3rd ed". (1992), Footnote 21 which refers to two American decisions. One is a personal injury class action where a multiplier of 5 was fixed for lead counsel for contingency and superior trial skills. In another American decision, in the California Superior Court in August 1982 non-contingent hourly rates were fixed at up to $150 an hour with a multiplier of up to 10 times the hourly rate.

¶ 26 My choice of a 4.8 times multiplier reflects fair compensation for very devoted and experienced counsel who carried enormous financial burden and risk in their commitment to access justice for the class members. I set out sample calculations of the range of fees that result from the use of multipliers at different levels. Based on total fees as at February 2004, of $3,067,352.15, these sample calculations are:

a. a 3 times multiplier would yield a fee of $9,202,056.45;

b. a 4 times multiplier would yield a fee of $12,269,408.60;
c. a 4.8 times multiplier would yield a fee of $ 14,723,290;
d. a 5 times multiplier would yield a fee of $15,336,760.75; and
e. a 6 times multiplier would yield a fee of $18,404,112.90.

¶ 27 The highest fee approved in Canada was in Parsons, supra and Endean, supra. Counsel submitted that in Parsons, the equivalent team was awarded a total of $30 million in a case that did not reach trial.

¶ 28 4.8 shall be the multiplier for the trial and for the appeal. Fees for the administration will be at counsel's hourly rate.

E. MACDONALD J.

QL UPDATE: 20040511
cp/e/nc/qw/qlrme/qlhcs

Case Name:

Hoffman v. Monsanto Canada Inc.

Between
Larry Hoffman, L.B. Hoffman Farms Inc. and Dale Beaudoin, plaintiffs, and
Monsanto Canada Inc. and Bayer Cropscience Inc., defendants

[2005] S.J. No. 304
2005 SKQB 225
Q.B.G. No. 67 of 2002 J.C.S.

Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon
G.A. Smith J.

May 11, 2005.
(341 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Members of class — Representative plaintiff.

Application by the plaintiffs, Hoffman, LB Hoffman Farms Incorporated and Beaudoin, for certification of their action as a class proceeding. This was an action by the plaintiffs, Hoffman, LB Hoffman Farms Incorporated and Beaudoin, against Monsanto Canada Incorporated and Bayer Cropscience Incorporated. Hoffman, LB Hoffman Farms and Beaudoin were organic farmers who sought to bring the action on behalf of all organic canola farmers. Monsanto and Bayer were manufacturers of agricultural products including chemical fertilizers and pesticides. Monsanto developed a genetically modified canola plant which was resistant to an herbicide sold by Monsanto. Bayer developed a canola plant that was resistant to its own herbicide. The government had approved the release of the genetically modified crop. Hoffman, LB Hoffman Farms and Beaudoin alleged that they had suffered damages as a result of the introduction of genetically modified canola into Canada by Monsanto and Bayer. The proposed class of plaintiff was all organic grain farmers in Saskatchewan who were certified organic grain farmers. Hoffman and Beaudoin argued that cross-contamination from genetically modified canola made it impossible for them to market certified organic canola. They framed their claims in negligence, strict liability, nuisance, trespass, and on the provisions of the Environmental Assessment Act and the Environmental Management and Protection Act. They had assigned their right to instruct counsel to the Saskatchewan Organic Directorate Organic Agriculture Protection Fund. Hoffman and Beaudoin argued that Monsanto and Bayer owed the organic farmers a duty to ensure that the genetically modified canola did not contaminate their fields and to preserve the organic canola markets. Monsanto and Bayer had agreed to develop export rules to ensure that no genetically modified canola entered the export market, but subsequently dropped the program.

HELD: Application dismissed. The claims were novel. Only two of the proposed claims disclosed a reasonable cause of action, those under the Environmental Assessment Act and the amended Environmental Management and Protection Act. There was no sufficiently proximate relationship between the parties such that a duty of care in negligence was owed to the farmers by Monsanto and

Bayer. The claim for loss of the use of organic canola as a marketable crop was a claim for pure economic loss which was not previously recognized by the courts. There was no allegation that the modified canola was inherently unhealthy. If found liable in negligence, Monsanto and Bayer would be exposed to indeterminate liability for an indeterminate time to an indeterminate class. Monsanto and Bayer had gratuitously agreed to undertake the preservation program and there had not been any detrimental reliance by the plaintiffs. There was no liability under the strict liability rule unless there was injury caused by an escape from land under Monsanto and Bayer's control. This was not the present case. There was no reasonable claim in nuisance against Monsanto and Bayer as the manufacturers or marketers of the genetically modified canola. Their actions also did not constitute a trespass. It was not plain and obvious that a claim that Monsanto and Bayer were responsible for the discharge of a "pollutant" into the environment would not succeed. It was also not plain and obvious that a claim that they proceeded with a development that was likely to have a significant impact on the environment would be unsuccessful. These were the only reasonable causes of action. There was no identifiable class connected to the claims. Even assuming that the pleadings disclosed a cause of action in any of the proposed claims, the issues were not common to an identifiable class and involved claims that were essentially individual. A class action was not the preferable procedure. The proposed representative plaintiffs were not directing the litigation. Their duty to do so could not be delegated.

Statutes, Regulations and Rules Cited:

Agricultural Operations Act, S.S. 1995, c. A-12.1

Class Actions Act, S.S. 2001, c. C-12.01 s. 2, s. 6, s. 6(a), s. 6(b), s. 6(c), s. 6(d), s. 6(e), s. 9

Competition Act

Environmental Assessment Act, S.S. 1979-80, c. E-10.1 s. 2(a), s. 2(b), s. 2(d), s. 2(d)(i), s. 2(d)(ii), s. 2 (d)(iii), s. 2(d)(iv), s. 2(d)(v), s. 2(e), s. 2(j), s. 2(k), s. 2(l), s. 2(m), s. 4, s. 5, s. 8(1), s. 8(2), s. 8(3), s. 9, s. 9(1), s. 9(2), s. 18, s. 21, s. 23(1), s. 23(2)

Environmental Management and Protection Act s. 2(d), s. 2(e), s. 2(r), s. 2(t), s. 2(u), s. 2(v), s. 2(v)(i), s. 2(v)(ii), s. 2(v)(iii), s. 13(1), s. 13(3)

Environmental Management and Protection Act, 2002, S.S. 2002, c. E-10.21 s. 2(a), s. 2(h), s. 2(i), s. 2 (w), s. 2(bb), s. 4, s. 8, s. 10, s. 11(1), s. 12, s. 13, s. 14, s. 15(1), s. 15(2), s. 15(3), s. 15(3)(a)(i), s. 15(4), s. 15(5), s. 15(6), s. 15(7), s. 15(8), s. 51, s. 52, s. 74(2)

Feeds Act, R.S.C. 1985, c. F-9

Food and Drugs Act, R.S.C. 1985, c. F-27

Insecticide, Fungicide, and Rodenticide Act

Mortgage Brokers Act, R.S.B.C. 1996, c. 313

Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6

Saskatchewan Class Actions Act s. 7

Saskatchewan Queen's Bench Rules Rule 173(a)

Seeds Act, R.S.C. 1985, c. S-8

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E. Criterion 5: Adequacy of the representative plaintiffs

Conclusion

JUDGMENT

G.A. SMITH J.:—

Introduction

¶ 1 The plaintiffs are organic farmers who seek to bring this action on behalf of all organic grain farmers in Saskatchewan. The defendants, Monsanto Canada Inc. ("Monsanto") and Bayer Cropscience Inc. ("BCS"), are both manufacturers and distributors of agricultural products including chemical fertilizers and pesticides. The plaintiffs claim damages to organic grain farmers allegedly resulting from the development and commercial introduction into Canada of genetically modified ("GM") canola by the two defendants. This is an application for certification of the action as a class action pursuant to s. 6 of The Class Actions Act, S.S. 2001, c. C-12.01.

¶ 2 The proposed class is composed of all organic grain farmers in Saskatchewan who were certified organic farmers at any time between January 1, 1996 and the date of certification as a class action by any one of six named private certification organizations (referred to in the claim and hereafter as "organic certifiers"). The named organic certifiers are Organic Crop Improvement Association International, Inc. ("OCIA"), Pro-Cert Organic Systems ("Pro-Cert"), Canadian Organic Certification Cooperative Ltd. ("COCC"), International Certification Services - Farm Verified Organics ("ICS-FVO"), Saskatchewan Organic Certification Association ("SOCA"), and Organic Producers Association of Manitoba Co-op Ltd. ("OPAM"). The plaintiffs also reserve the right to amend the claim, if necessary, to permit certified organic grain farmers residing outside of Saskatchewan to opt in if the action is certified to proceed as a class action.

¶ 3 Although there will be a more extensive description of the plaintiffs' factual allegations in the discussion that follows as to whether the pleadings disclose a reasonable cause of action, and more extensive discussion of the evidence placed before the Court on this application by all the applicants in relation to the other criteria for certification as a class action, a brief overview of the claim and issues is in order by way of introduction.

¶ 4 Organic food production involves growing crops and livestock without the use of, inter alia, synthetic pesticides and fertilizers. In order to be marketed as "organic", products must comply with organic standards set by private organic certifiers. In addition, in order for a product to be sold into an export market as "organic", it must comply with the standards adopted by that market. Individual buyers may impose their own standards. The plaintiffs allege in the statement of claim and in replies to demands for particulars that, in addition to synthetic pesticides and fertilizers, the organic certifiers also list genetically modified organisms ("GMOs") as prohibited substances and that the principal foreign markets for organic grain, the United States, Japan and Europe, have prohibited the use of GMOs in the production of organic products.

¶ 5 "GMO" has been defined by the Canadian General Standards Board's Organic Agriculture Standards, approved by the Standards Council of Canada, to mean:

> All organisms, and products thereof, produced through techniques of genetic

> engineering and modification including, but not restricted to recombinant DNA, cell fusion, encapsulation, macro and micro injection, gene deletion or magnification, and other techniques for altering the genetic composition of living organisms in ways, or with results, that do not occur in nature through mating or through traditional breeding techniques such as conjugation, hybridization, or transduction.

¶ 6 For the purposes of this application, that definition is not at issue, although the extent to which GMOs are "prohibited" by organic certifiers or foreign standards and the nature of such prohibition is.

¶ 7 It is not disputed that in 1995 the defendant, BCS, under its predecessor corporation AgrEvo Canada, and in 1996, Monsanto, began to market varieties of GM canola seed in Canada.

¶ 8 In the case of Monsanto, it had developed a gene using genetic engineering which, when inserted in canola, renders the plant resistant to glyphosate-based herbicides such as Roundup, a herbicide marketed and sold by Monsanto. Field trials for the resulting new variety of canola, which came to be known as "Roundup Ready canola", took place in Canada between 1992 and 1995, following which Monsanto sought and was granted approval in 1995 for the unconfined release of the GM canola by the Canadian Food Inspection Agency. Commercial sales of Roundup Ready canola began in Canada in 1996.

¶ 9 Meanwhile, AgrEvo Canada, the predecessor of BCS, had developed a gene using genetic engineering which, when inserted in canola, renders the plant resistant to glufosinate ammonium based herbicides such as Liberty, a herbicide marketed and sold by this defendant. The new varieties of canola developed in this way by BCS or its predecessor became known as "Liberty Link canola". Field trials were conducted in Canada between 1990 and 1994 and approval for the unconfined release of the GM canola was granted by the Canadian Food Inspection Agency in 1995.

¶ 10 Because of their advantages in permitting superior weed control (growing crops can be sprayed with Roundup or Liberty without damage to the crop), GM canola has now been embraced by conventional grain growers in Western Canada with the result that by 2003 approximately 70 percent of all canola grown in Western Canada was either a Roundup Ready or Liberty Link variety.

¶ 11 Canola in general and Roundup Ready and Liberty Link varieties in particular are open-pollinated. As a result, there is inevitable pollen drift as a result of wind and cross-pollination can occur with non-GM ("conventional") canola grown nearby. This can result in the production of GM seeds in conventional canola, which can, in turn, result in GM progeny. Volunteer plants of GM canola can also result in fields where canola is not grown at all as a result, inter alia, of spillage of GM canola seeds from passing trucks, or from neighbouring farmland where GM crops are cultivated. The resulting presence of GM canola or canola seed on cultivated land where it is not intentionally cultivated is referred to by the plaintiffs as "contamination of the environment". A more neutral term, "adventitious presence" (sometimes referred to in the following discussion as "AP") is proposed by the defendants. This term is explained in the brief filed on this application by BCS as follows:

> In the context of the production and trade of grain and seed, the term "adventitious presence" (often simply abbreviated as "AP") refers to the unintentional, unavoidable, and incidental commingling of trace amounts of seed, grain, or foreign material (biological or other) or impurities in a quantity of seed or grain. AP can occur through any one of a number of unavoidable means, including mechanical mixing during the harvesting, processing, handling and storage of seed and grain, as a result of inclusion of foreign seed in or around the planted area, as a result of volunteers from the previous

year's crop or low seed admixtures, or as a result of cross-pollination with plants near or in the planted area. ... (BCS brief of law at tab 1, para. 12)

¶ 12 The statement of claim refers specifically to the two "decision documents" whereby the Canadian Food Inspection Agency (also known as Agriculture and Agri-Food Canada, or "AAFC") first approved the unconfined release of GM canola varieties of the two defendants respectively, but not to the specific findings in these decisions on which the unconfined release approval was based. However, those decisions are before the Court as exhibits to the affidavits of Margaret Gadsby (for BCS) and Robert George Ingratta (for Monsanto). As these documents are specifically identified in the pleadings, they are incorporated by reference into the statement of claim.

¶ 13 The Decision Document DD95-01 relates to the first release of Liberty Link canola, a variety referred to in the report as "HCN92", a Brassica napus canola line tolerant to glufosinate ammonium. This document is entitled "Determination of Environmental Safety of Agrevo Canada Inc.'s Glufosinate Ammonium-Tolerant Canola". Its summary states the following:

> The Plant Biotechnology Office and the Feed Section of the Plant Products Division have evaluated information submitted by AgrEvo Canada Inc. regarding a glufosinate ammonium-tolerant and kanamycin-resistant canola line. They have determined that this plant with novel traits does not present altered environmental interactions when compared to currently commercialized canola varieties and is considered substantially equivalent to canola currently approved as livestock feed.
> Unconfined release into the environment, including feed use of HCN92, and other B. napus lines derived from it, but without the introduction of any other novel trait, is therefore considered safe. (Exhibit "C" found in tab 3 of the affidavit of Margaret Gadsby)

¶ 14 In reaching this decision, AAFC applied five assessment criteria, with the following results:

1. Potential of the PNT [plant with novel traits] to become a weed of agriculture or to be invasive of natural habitats: The AAFC concluded that HCN92 had no altered weed or invasiveness potential compared to currently commercialized canola varieties, but noted a longer term concern that if there were general adoption of several different crop and specific herbicide weed management systems, there was potential for development of crop volunteers with a combination of novel resistances to different herbicides. It therefore recommended (in general terms only) promotion of careful management practices for growers using herbicide tolerant crops, to minimize the development of multiple resistance.
2. Potential for gene flow to wild relatives whose hybrid offspring may become more weedy or more invasive: AAFC, noting that "Brassica napus plants are known to outcross up to 30% with other plants of the same species," concluded that gene flow from HCN92 to canola relatives was possible, but would not result in increased weediness or invasiveness of those relatives, as these weeds, even if tolerant to glufosinate ammonium, could be easily controlled using mechanical and other available chemical means.
3. Potential for the PNT to become a plant pest: AAFC determined that HCN92 did not display any altered pest potential, noting that Brassica napus (i.e., canola) had been found not to be a plant pest in Canada.
4. Potential impact of the PNT or its gene products on non-target species, including humans: AAFC concluded that the unconfined release of HCN92

would not result in altered impacts on interacting organisms, including humans, compared with currently commercialized counterparts.

5. Potential impact on biodiversity: AAFC referred to findings that HCN92 is not invasive of natural habitats and is no more competitive than its counterparts, both in natural and managed ecosystems. It concluded that its impact on biodiversity was equivalent to that of currently commercialized canola lines.

¶ 15 AAFC also assessed the nutritional factors of the PNT and concluded it to be substantially equivalent to traditional canola varieties in terms of nutritional composition.

¶ 16 The Decision Document DD95-02 relates to the first release of Roundup Ready canola, referred to in the report as "GT73", a Brassica napus canola line tolerant to glyphosate. This document is entitled "Determination of Environmental Safety of Monsanto Canada Inc.'s Roundup Herbicide-Tolerant Brassica napus Canola Line GT73." Its summary states the following:

> Agriculture and Agri-Food Canada (AAFC), specifically the Plant Biotechnology Office and the Feed Section of the Plant Products Division, have evaluated information submitted by Monsanto Canada Inc. regarding the canola line GT73. This line has Roundup-Ready genes that express novel tolerance to glyphosate, the active ingredient of Roundup herbicide. The Department has determined that this plant does not present altered environmental interactions when compared to existing commercialized canola varieties in Canada, and is considered substantially equivalent to canola currently approved as livestock feed.
> Unconfined release into the environment, including feed use of GT73, and other B. napus lines derived from it, but without the introduction of any other novel trait, is therefore considered safe. (Exhibit "J" of vol. 1 of the affidavit of Robert George Ingratta)

¶ 17 In coming to this decision the AAFC considered the same factors with the same results as the decision DD95-01 described above.

¶ 18 Although not mentioned in the statement of claim, prior to the commercial release of GM canola it was also necessary to obtain a food safety assessment by Health Canada and approval for food uses of the refined oil from the GM canola varieties. Regulatory approval to market the GM seed was also obtained under the Seeds Act, R.S.C. 1985, c. S-8, the Feeds Act, R.S.C. 1985, c. F-9, and the Food and Drugs Act, R.S.C. 1985, c. F-27.

¶ 19 The plaintiffs' primary complaint is based on the allegation that, as a result of the unconfined commercial release of GM canola and even, possibly, as a result of the field trials of GM canola prior to approval for unconfined release, the adventitious presence of GM canola in the fields of organic grain farmers, or the widespread potential therefore, has made it impossible for farmers to guarantee that canola grown as "organic" does not contain traces of GM canola seed, with the result that canola cannot be grown for the organic market. Paragraphs 26 and 27 of the statement of claim allege this consequence in these terms:

> 26. Since its introduction into the environment of Western Canada, GM canola has widely proliferated and has been found growing on land on which it was never intended to be grown. The contamination has reached a level such that very few, if any, pedigreed seed growers in Saskatchewan will warrant their canola seed to be GMO-free and few, if any, grain farmers in Saskatchewan could warrant their

canola crop, even if planted with GMO-free seeds, to be free of GMO contamination.

27. As a result of widespread contamination by GM canola few, if any, certified organic grain farmers are now growing canola. The crop, as an important tool in the crop rotations of organic farmers, and as an organic grain commodity, has been lost to certified organic farmers in Saskatchewan. It is likely that the domestic and foreign market demand for organic canola will be met primarily by foreign organic growers who can warrant their crops to be free of GMO contamination.

¶ 20 Secondarily, by an amendment to the statement of claim, the plaintiffs claim that even if organic farmers are not attempting to grow canola, they suffer contamination of their fields by reason of the prevalence of Roundup Ready canola or Liberty Link canola "volunteers" growing on their land. They claim for past and future cleanup costs resulting from this contamination.

¶ 21 Finally, a more recent amendment to the statement of claim alleges that abandonment of an "identity preservation program" ("IPP") that had been implemented by the defendants when GM canola was first introduced on a commercial basis in 1995-96, to ensure the segregation GM canola from conventional canola for the purposes of export, has resulted in the loss of the European market for all Canadian canola.

¶ 22 It is important for the discussion which follows to note that, in general, the plaintiffs do not allege in their pleadings that GM canola is per se harmful or dangerous to crops grown by the defendants. The damage alleged to organic grain farmers is solely the damage resulting from loss of use of canola as an organic crop or for cleanup costs for fields "contaminated" by GM canola, due to standards imposed by organic certifiers or by foreign markets or individual customers for organic products. The single exception is that, in the context of pleading one of the seven proposed causes of action, that the defendants have failed to comply with the requirements of a provincial environmental statute, The Environmental Management and Protection Act, S.S. 1983-84, c. E-10.2 ("EMPA"), the plaintiffs have alleged that GM canola is a "pollutant" within the meaning of that Act. Counsel for the plaintiffs argued, on this application, that this allegation did not require proof that GM canola is harmful or dangerous, and I will return to this point below.

¶ 23 The point here simply is that the plaintiffs' theory, in general, does not rely upon proving that GM canola is inherently harmful or dangerous. Indeed, any allegation that GM canola is inherently harmful or dangerous in any respect, or at least that any possible or potential inherently harmful quality was known to the defendants at the time that GM canola was commercially introduced in Canada, would seem to be inconsistent with the express pleading of the AAFC decision documents described above.

¶ 24 It should also be noted that, although the statement of claim also claims an injunction to restrain the release of GM wheat by the defendant Monsanto, certification is no longer sought for this part of the claim. Since the date of the statement of claim, Monsanto has voluntarily indicated that it does not intend to pursue approval for the release of GM wheat at the present time.

¶ 25 The criteria for certification of an action as a class action are set out in s. 6 of the Act, as follows:

> 6 The court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class;
(c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
(d) a class action would be the preferable procedure for the resolution of the common issues; and
(e) there is a person willing to be appointed as a representative plaintiff who:

(i) would fairly and adequately represent the interests of the class;
(ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
(iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

¶ 26 The defendants take the position that the plaintiffs are unable to satisfy any of these criteria, arguing, in effect, that the pleadings do not disclose a reasonable cause of action, that there is not an identifiable class, that the majority of the proposed common issues are not common to all members of the proposed class, that a class action would not be the preferable procedure for the resolution of any common issues that remain, and that the proposed representatives (the named plaintiffs) are not appropriate representative plaintiffs. Each of these issues will be canvassed in the discussion that follows.

A. Criterion 1: Is the Court satisfied that the pleadings disclose a cause of action?

General Considerations

¶ 27 Section 6(a) of the Act provides that on an application for certification the Court must be satisfied that the pleadings disclose a cause of action. As The Class Actions Act is purely procedural and is not intended to create any new cause of action, authorities from Ontario and British Columbia in relation to the identical certification requirement in their class proceedings legislation confirm that a similar test is to be applied on an application for certification as that applied in relation to Rule 173(a) of The Queen's Bench Rules, which permits the Court to order any pleading or part thereof to be struck out if it discloses no reasonable cause of action or defence. In Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, Wilson J. enunciated the now widely applied "plain and obvious" test for striking out a pleading on the basis that it discloses no cause of action, as follows:

> ... [A]ssuming that the facts as stated in the statement of claim can be proved, is it "plain and obvious" that the plaintiff's statement of claim discloses no reasonable cause of action? As in England, if there is a chance that the plaintiff might succeed, then the plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues, the novelty of the cause of action, nor the potential for the defendant to present a strong defence should prevent the plaintiff from proceeding with his or her case. (at p. 980)

She added, at pp. 990-91:

> ... [W]here a statement of claim reveals a difficult and important point of law, it may well be critical that the action be allowed to proceed. Only in this way can we be sure

that the common law in general, and the law of torts in particular, will continue to evolve to meet the legal challenges that arise in our modern industrial society.

¶ 28 The primary difference - and it is not a significant one - is that, on an application for certification under the Act, the onus is on the applicant to establish that the pleadings disclose a cause of action, and not on the party challenging the proceeding to establish that they do not. This approach is summarized by Ward Branch, in Class Actions in Canada (looseleaf), (Toronto: Canada Law Book Inc., 2004) at 4-1 to 4-2:

> The wording of this requirement is very similar to those provisions in the rules of court in Ontario and B.C. permitting the dismissal of a proceeding that does not disclose a cause of action. A similar test is applied, the only difference being that the onus to show a cause of action falls upon the party bringing the class action, as opposed to the party challenging the proceeding.
> The court will presume the facts alleged in the pleadings are true, and will determine whether it is plain and obvious that no claim exists. This is not a preliminary merits test. As Mr. Justice Winkler stated in Edwards v. Law Society of Upper Canada:
>
> > There is a very low threshold to prove the existence of a cause of action ... the court should err on the side of protecting people who have a right of access to the courts.
>
> Courts in B.C. have also adopted a low threshold for this requirement. The Statement of Claim is read as generously as possible, and as it might reasonably be amended, to accommodate inadequacies due solely to drafting deficiencies. (at paras. 4.60-4.80)

¶ 29 It may be that, in the context of certification of a class action, the courts have employed an even more generous approach. In Abdool v. Anaheim Management Ltd. (1995), 121 D.L.R. (4th) 496 at 511 (Ont. Ct. (Gen. Div.)), Moldaver J. applied these principles in the context of a proposed class action as follows:

> The principles to be applied when considering whether pleadings support a legal cause of action are as follows:
>
> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
> (c) The novelty of the cause of action will not militate against the plaintiffs; and
> (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies.

¶ 30 This statement was cited with approval by McLellan J. in Daniels v. Canada (Attorney General), 2003 SKQB 58, (2003), 230 Sask.R. 120 (Q.B.) in a decision on a certification application pursuant to the Saskatchewan Class Actions Act. McLellan J. described this as a "generous approach", which he believed to be confirmed by s. 7 of the Act, which permits the Court to adjourn the application for certification to permit the parties to amend their materials or pleadings and confirms that an order certifying an action as a class action is not a determination of the merits of the action. A generous approach to interpretation of the requirements for certification generally has also been endorsed in

relation to the Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6, by the Supreme Court of Canada in Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 S.C.C. 68, where Chief Justice McLachlin outlined the advantages of class actions and concluded:

> ... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters. (at para. 15)

¶ 31 As the discussion below will reveal, in some circumstances the defendants in this case argue not so much that the existence of the cause of action presumed in the pleadings finds no legal support as that the plaintiffs have failed to plead sufficient facts to support a particular allegation essential to the cause of action asserted. This particular objection, where determined to be well founded, raises the question of whether such a defect is merely a technical failure of pleading or is more substantive-a question which comes down to whether or not the defect could be readily cured by an amendment. The plaintiffs have already twice amended the statement of claim, and it could be argued that their application must now stand or fall on the basis of the facts as pled, particularly as they have not sought leave to once again amend the claim, having had notice of the objections raised by the defendants. The general rule on an application pursuant to Rule 173(a) is that the Court is to look only at the pleadings, assuming the truth of the facts as pled, and that extraneous evidence is inadmissible, for the test is not a test of the merits of the claim. As the defendants point out, this procedure permits the Court to evaluate the legal basis of the plaintiffs' claim on the most optimal view of the facts, presupposing that the plaintiffs have, in the pleadings, stated their factual case at its highest.

¶ 32 A more generous approach, however, on a certification application, for which affidavit evidence is filed in relation to the other criteria listed in s. 6, would be for the Court to examine whether, on the basis of other evidence before it, it is apparent that the plaintiffs do, in fact, intend to allege facts, additional to those articulated in the statement of claim, that would be sufficient to fill any lacuna in the pleadings, and to consider whether an amendment to the pleadings, to plead such additional facts, should be considered. I am of the view that whether a further amendment of the pleading should be suggested or permitted in the context of considering whether the first criterion for certification has been met is a matter of discretion for the Court, the exercise of which would depend primarily on whether it would be unfair to the respondents or catch them by surprise to consider such a possible amendment on this application. I will return to this point in the context of the discussion which follows.

¶ 33 I wish to make it clear at this point, however, that in indicating the potential for some flexibility in relation to possible amendments to the pleadings, I do not intend to relieve the plaintiffs of the general obligation to allege sufficient facts to support each element of the causes of action pled. It is not sufficient for the plaintiffs to argue simply that the area of law at issue is complex and evolving and that the Court should therefore refrain from determining the question until it has all the evidence at trial before it. The test to be applied assumes that all factual determinations will be favourable to the plaintiffs. The plaintiffs, however, bear the burden of enunciating in the pleadings (or the pleadings as amended, if amendment is permitted) the facts upon which they rely for each cause of action asserted. In this respect, I agree with the comments of Conrad J.A. in Tottrup v. Alberta (Minister of Environment), 2000 ABCA 121, [2000] 9 W.W.R. 21 (Alta. C.A.), addressing the issue of whether the plaintiffs had pled facts sufficient to support the allegation of a duty of care in a claim for negligence. Conrad J.A. emphasized that the Court must pay strict attention to the facts pled and that it was only the pled facts that could sustain the plea, commenting:

> In my view, it is not the allegation of a duty at law that is critical, but the facts alleged supporting such a duty. For example, a statement of claim alleging only that "A" breached a duty owed to "B" thereby causing damage does not, in my view, disclose a

> cause of action. Pleadings are allegations of fact and, in my view, where negligence is alleged, that allegation must be supported by facts capable of sustaining a determination that a duty was owed, that an act or omission occurred breaching that duty, and that damages resulted. On a motion to strike it is the allegations of fact that must be examined to determine whether a cause of action exists.
>
> There is no need to wait for an application for summary judgment. An application for summary judgment requires sworn evidence. Frequently, it involves extensive affidavits and cross-examinations. For the purposes of a R. 129(1)(a) application there is no need (in fact no opportunity) for sworn evidence. The plaintiff receives the benefit of an assumption that all the facts which he or she has chosen to plead are true. It is not necessary to wait for summary judgment to evaluate whether those facts, interpreted in light of the existing law, establish a cause of action.
>
> It is an appropriate function of the Court to consider and determine these questions of law on the basis of the alleged facts. The existence of a duty of care, for example, may depend on the facts of the case, but whether certain facts could sustain a finding of such a duty is a question of law. It is therefore proper, in the circumstances of this case, to ask whether a duty of care and a breach of that duty by these Ministers could be found on the facts alleged by the plaintiff. The Court ought not to refuse to strike solely on the grounds that the facts may, at some later stage, turn out to be different from those alleged. (at paras. 11-13) (Italics in the original)

¶ 34 The applicants have asserted seven causes of action in the twice amended statement of claim, at least one of which must be shown to be a reasonable cause of action if it is to support an order for certification. Each is strenuously contested by the defendants.

¶ 35 It is clear that the principal challenge faced by the plaintiffs in relation to this criterion is to persuade the Court that there is a plausible legal basis for imposing on the defendants' liability for losses the plaintiffs may have suffered as a result of the adventitious presence of GM canola in crops or fields of organic grain farmers, and for losses related to the fact that the standards imposed by third parties (organic certifiers or organic markets) might prohibit the use or presence of GMOs in relation to commodities marketed as organic.

¶ 36 The magnitude of this challenge is evident. In virtually every case, the plaintiffs conceded in argument that the cause of action asserted was in at least some respect novel, and relied heavily on the position that, given the novelty of the claim, it should be left for the trial judge to consider whether this is an appropriate case to expand the legal category at issue. This presents a recurring issue which is addressed in the discussion that follows. While the issue can only be determined in the context of cause of action alleged, in general I have concluded that it is open to the Court on this application, as it is under an application under Rule 173(a), to address the question of whether a novel claim has a reasonable prospect for success. Such determinations have been made on applications such as this, as I will demonstrate below. In some cases the Court may conclude that the matter ought to be determined in the context of a full evidential inquiry. In others, the facts to be assumed in support of the cause of action asserted are entirely clear and this Court as well as appellate courts will be at no disadvantage in addressing the issue on this application.

¶ 37 I will now turn to consideration of each of the causes of action asserted.

1. Does the statement of claim disclose a cause of action in negligence?

¶ 38 The plaintiffs' claim in negligence is set out in paras. 34, 35, 36 and 36(a) of the amended amended statement of claim (hereafter, "the claim"):

34. The Plaintiffs state that the Defendants owed a duty to certified organic grain farmers to ensure that their GM canola would not infiltrate and contaminate farmland where it was not intended to be grown. The Plaintiffs state that the Defendants knew, or ought to have known, that the introduction of GM canola into the Saskatchewan environment without any, or in the alternative, proper, safeguards would result in GM canola infiltrating and contaminating the environment, seed supplies, and property of certified organic grain growers.

35. Further, or in the alternative, the Defendants ought to have warned growers purchasing their products of cross-pollination, and advised them of farming practices designed to limit the spread of the gene, such as the keeping of an adequate buffer strip around land where GM canola was being grown.

36. The Plaintiffs state that the Defendants failed and/or neglected to ensure that their GM canola would not infiltrate and contaminate farmland, that they failed and/or neglected to warn growers about cross-pollination and further, that they failed to and/or neglected to advise growers of farming practices that would limit the spread of their GM canola. By such failure and/or neglect, the Defendants have breached their duties to certified organic grain farmers as set out in paragraphs 34 and 35 hereof. The Plaintiffs therefore state that the Defendants are liable in negligence for the damages incurred by certified organic grain farmers represented in this action.

36(a) Further, or in the alternative, the Plaintiffs state that because the export of GM canola was not regulated in Canada, the Defendants together undertook to develop their own export rules needed to assure continued access to foreign markets for Canadian canola in regard to the introduction of their GM canola. The Defendants developed these export rules with the Canola Council of Canada. They introduced their products in 1995 and sold them in 1996 under an identity preserving program ("IPP") purportedly designed to ensure that no GM canola entered the canola export market, as the Japanese and European market had not approved the GM canola lines of the Defendants. The Plaintiffs state that the Defendants dropped the IPP in 1997, once approvals for the Japanese market were obtained. The Plaintiffs state that the Defendants knew that the removal of an IPP and/or failure to introduce an adequate one, would result in the eventual loss of the European Economic Union market for Canadian canola. As a consequence, the Plaintiffs state that the European Union market for their organically grown Canadian canola was destroyed. The Plaintiffs state that the Defendants, when undertaking the task of developing export rules to ensure continued access to foreign markets, owed a duty not to do so negligently and, in particular, owed the Plaintiffs a duty to maintain an adequate IPP to preserve the European canola export market where most of the organic canola produced in Canada was sold. As a consequence, the Plaintiffs state that the Defendants are liable for the Plaintiffs' losses as particularized herein.

¶ 39 The losses alleged are summarized in paras. 43-44:

43. Because of the extensive GMO contamination of canola by genes introduced into the environment by the Defendants few, if any, certified organic grain growers in Saskatchewan will include canola in their crop rotations and risk contamination.

44. The Plaintiffs each grew certified organic canola but have discontinued this practice because of environmental contamination by GM canola. Their damages, and the damages of the class they represent, derive from damages and loss of

revenues caused by:

(a) loss of canola as a crop to be used within their regular rotations;
(b) loss of opportunity to participate in the certified organic canola market;
(c) past and future cleanup costs caused by Roundup Ready or Liberty Link canola volunteers growing on the fields of organic farmers including the costs of:

(i) identifying Roundup Ready or Liberty Link canola volunteers;
(ii) the mechanical and/or hand removal of any Roundup Ready or Liberty Link canola volunteers;
(iii) cleaning Roundup Ready or Liberty Link canola seed from the seeds of other organic crops produced by organic farmers; and
(iv) additional equipment cleaning, segregation cost, crop monitoring, organic inspections and record keeping.

¶ 40 The facts alleged in the pleadings and relied upon in relation to this cause of action are set out in the claim and in the plaintiffs' replies to the defendants' demands for particulars. In addition to those facts specified in paras. 34-36(a) and 43-44 quoted above, they can be summarized as follows:

1. In order for food and fibre products to be labelled as "certified organic", the production and processing procedures must be verified as complying with organic standards set by recognized certifying bodies such as the organic certifiers. The production must be without the use of, inter alia, synthetic pesticides and fertilizers. At the present time, production must also be without the use of genetically modified organisms. Farmers receive substantial price premiums over conventional products of the same grade for products certified as organic, as well as enhanced access to international food markets. (claim, para. 7)
2. An organic field must be managed without the use of prohibited substances and must be free from such use typically for a period of at least three years to be certified as organic. (claim, para. 9)
3. Certified organic products are subject to testing by regulators for the presence of prohibited substances including GMOs. Contamination of organic products by prohibited substances such as GMOs can result in the rejection of shipments and substantial losses to organic farmers. (claim, para. 10)
4. The defendant Monsanto commenced commercial sales of a variety of genetically modified canola known as "Roundup Ready canola" in 1996. The genetic modification renders the variety resistant to glyphosate-based herbicides such as Roundup, a chemical also marketed by Monsanto. Monsanto obtained a patent for the gene in the United States and in Canada and markets the canola pursuant to a "technology user agreement" which grants a licence to users to grow Roundup Ready canola but does not permit them to save seeds for replanting. Monsanto retains ownership of the gene. The commercialization of Roundup Ready canola followed confined field trials in Canada between 1992 and 1995 after which Monsanto was granted approval in 1995 by the Canadian Food Inspection Agency for the unconfined release of Roundup Ready canola. (claim, paras. 12-16(a))
5. AgrEvo Canada, as the defendant BCS was formerly known, commenced commercial sales of a variety of genetically modified canola known as "Liberty Link canola" in 1995. In this case, the genetic modification renders the canola resistant to glufosinate ammonium based herbicides including Liberty, a herbicide marketed by BCS. Again, the commercialization was preceded by field trials in

Canada between 1990 and 1994 following which AgrEvo Canada sought and was granted approval by the Canadian Food Inspection Agency for the unconfined release of Liberty Link canola. BCS sells Liberty Link canola and also licenses other seed companies to incorporate the gene into their canola and sell it to growers. (claim, paras. 18-20)

6. The defendants' genetic modifications were incorporated into open-pollinated varieties of canola. Thus, pollen from the genetically modified canola, in both cases, can pollinate conventional canola, conferring the genetic modification upon the seed of the formerly conventional canola. Due to this natural process of cross-pollination, conventional canola plants can produce seeds which contain the GM gene. These seeds can germinate and produce further generations of canola that contain the GM material by their own progeny and by further cross-pollination. (claim, para. 22)
7. Farmers in Saskatchewan were induced to buy the two defendants' genetically modified canola by advertised claims that superior weed control could be achieved because of the ability to spray Roundup or Liberty herbicide on a growing canola crop to kill weeds while leaving the canola intact. By 2003 approximately 70 percent of all canola grown in Western Canada was either Roundup Ready or Liberty Link canola. (claim, paras. 23-24)
8. Farmers purchasing either variety were not warned about potential harm to neighbouring crops caused by "GM volunteer canola". In particular, no warnings were given to maintain a buffer zone to minimize the flow of pollen to surrounding crops, to securely tarp farm trucks transporting seed, to thoroughly clean all farm machinery before leaving a field where the GM crop was being grown, or to warn neighbours that GM volunteers might emanate from the GM crop. (claim, para. 25)
9. Claim, para. 26: "Since its introduction into the environment of Western Canada, GM canola has widely proliferated and has been found growing on land on which it was never intended to be grown. The contamination has reached a level such that very few, if any, pedigreed seed growers in Saskatchewan will warrant their canola seed to be GMO-free and few, if any, grain farmers in Saskatchewan could warrant their canola crop, even if planted with GMO-free seeds, to be free of GMO contamination."
10. Claim, para. 27(a): "The plaintiffs state that organic farmers in Saskatchewan, even if not growing, or attempting to grow, organic canola, have and will sustain contamination of their organic fields by reason of the prevalence of Roundup Ready canola or Liberty Link canola "volunteers" growing on their land. By reason of the prevalence of canola as volunteers in other crops, the proliferation of transgenic (GMO) crops of the Defendants, organic farmers in Saskatchewan have and will sustain contamination of their fields from the transgenic crops sold by the Defendants."

¶ 41 The defendants demanded particulars of some of these claims. The particulars supplied add to or clarify the above-noted allegations of fact. In particular, both defendants sought further particulars as to the dates that organic certifiers were alleged to have adopted or purported to adopt standards or regulations respecting the presence of genes or organisms containing genes from techniques of genetic engineering or modification, and precision of the standards adopted. The responses to these demands can be summarized as follows:

1. Since 1999 the organic certifiers referred to in the claim use standards that meet or exceed the "National Standard" (the National Standards of Canada for Organic Agriculture, created in June 1999 by representatives of the organic farming

community, the Canadian General Standards Board of Public Works and Government Services Canada and the Standards Council of Canada). This is not the end of the issue. Most organic crops grown in Saskatchewan are grown for the export market. Therefore, organic farmers wishing to export organic grain to Europe must meet the requirements of the European Standard, exporters into the United States must now (i.e., sometime after 1998, according to the reply to the demand for particulars-the defendants have filed evidence that the NOP did not come into effect until 2001) meet the requirements of the "NOP" (National Organic Program, under the authority of the Organic Food Production Act of 1990 as amended) and exporters to Japan (after January 2000) must adhere to the "JAS" (Japanese Agricultural Standard).

¶ 42 Of these various standards, it appears that only the European Standard is alleged to have been in place prior to the defendants' commercialization of GM canola, in 1995 (since 1991, according to the reply-an allegation denied by the defendants, who say the first European Union ("EU") organic standard that dealt with the use of GMOs in organic products was in 1999).

2. The first organic certifier to introduce regulation on the "use" of GMOs was sometime after 1996. Subsequent to that other private organic standards were amended to deal with GM issues over several years, in some cases as late as 2000. It appears from the replies to the demands for particulars that none of the private certifiers' standards referred to GMOs at the time that the defendants began to market genetically modified canola.

¶ 43 The essential elements of an action in negligence are a duty of care owed by the defendants to the plaintiffs to conform to a certain standard of care, breach of that duty, damage to the plaintiffs caused by the breach and proximity, or lack of remoteness, of causation. The principal issue in relation to the claims of negligence asserted in this case is whether the facts alleged support the imposition of a duty of care on the defendants toward the plaintiffs.

¶ 44 In the pleadings set out above, the plaintiffs say that the defendants were subject to two duties, the breaches of which are said to give rise to liability. These are: (a) a duty on the part of each defendant to certified organic grain farmers to "ensure" that its GM canola would not infiltrate and contaminate farmland where it was not intended to be grown, or at least to take steps to minimize such infiltration and contamination by warning growers purchasing their products of the potential for cross-pollination and advising them of farming practices designed to limit the spread of the gene (para. 34); and (b) a duty to maintain an IPP adequate to preserve the European canola market (para. 35). These are distinct claims and must be discussed separately. The second involves the allegation of an "undertaking" on the part of the defendants which the plaintiffs say was performed negligently. In each case the defendants say that the plaintiffs have not pled facts sufficient to support the legal duty asserted.

¶ 45 The first issue, then, is whether the facts as pled are sufficient to support the allegation of a duty owed by the defendants (developers and marketers of GM canola) to the plaintiffs (organic grain farmers in Saskatchewan) to prevent or to minimize the extent of adventitious presence of their respective GM canola varieties on the plaintiffs' farmland or in their crops.

¶ 46 This duty and the breach thereof are alleged in paras. 34, 35 and 36 of the claim. Paragraph 34 asserts that the defendants "owed a duty to certified organic grain farmers to ensure that their GM canola would not infiltrate and contaminate farmland where it was not intended to be grown." The use of the word "ensure" here is somewhat startling for it would seem to go beyond the claim of a duty to take reasonable care to something more in the way of a guarantee. No facts at all are alleged that would

support the allegation of the existence of a guarantee. However, read in the context of the rest of paras. 34-36, it is reasonable to interpret this sentence as expressing the more modest allegation that the defendants owed a duty to certified organic grain farmers to take reasonable care to prevent their GM canola from infiltrating and contaminating farmland. So far, however, this is the bare assertion of a legal duty and is, by itself, insufficient to support the cause of action.

¶ 47 In para. 35, the plaintiffs allege that the defendants "ought to have warned growers purchasing their products of cross-pollination, and advised them of farming practices designed to limit the spread of the gene, such as the keeping of an adequate buffer strip around land where GM canola was being grown." (Paragraph 25 pleads that the defendants' GM canola was marketed between 1995 and 2003 without such warnings.) The defendants' briefs tend to treat this allegation as the assertion of a separate "duty to warn", and argue that at law no action can lie for a duty to warn a third party. I believe that the defendants have misinterpreted the intent of this claim. A more generous reading of the statement of claim, together with the responses to the demands for particulars, support the interpretation that the plaintiffs are here simply claiming that the duty of care owed to the plaintiffs (and to the members of the putative class of organic grain farmers) to "ensure" that GM canola did not infiltrate organic crops included the duty to warn growers purchasing the GM canola to employ farming practices, such as keeping a buffer strip around GM canola crops, carefully tarping trucks used to haul GM grain, and carefully cleaning machinery used to handle GM grain, which practices, it is impliedly alleged, would at least have limited the spread of the GM canola gene.

¶ 48 In its reply to Monsanto's demand for further and better particulars, for example, the following reply is offered with regard to the demand for particulars of para. 25 of the statement of claim:

> ... By way of further clarification, what is being alleged in paragraph 25 of the Statement of Claim is that Monsanto breached its duty to the Plaintiffs by failing to warn the users of its product of contamination risks and of measures designed to limit the spread of its gene as identified in the Statement of Claim. The Plaintiffs never purchased or used Roundup Ready canola, so it is irrelevant whether they were aware of the requirements and instructions that ought to have accompanied the product. The allegation pertains to what Monsanto told, or did not tell, the users of its product, not what it told the Plaintiffs, or when the Plaintiffs became aware of what Monsanto ought to have told its users.

¶ 49 The reply to BCS's demand for further and better particulars is similar. BCS demanded confirmation that the plaintiffs alleged that Aventis (a previous incarnation of BCS) should have advised farmers sowing Liberty Link canola to keep the buffer strip referred to in the statement of claim. The plaintiffs replied:

> The Plaintiffs allege that Aventis should have advised farmers sowing Liberty Link canola to keep a buffer strip adequate to stop cross-pollination. As indicated, the Canadian Seed Growers Association recommends a buffer strip of 600 meters with regard to canola. Certain organic standards were referred to which would require isolation distances of 3 times that amount. The Plaintiffs state that adhering to the Canadian Seed Growers Association's isolation distances would have drastically reduced the amount of environmental contamination associated with the Liberty Link canola. Any isolation distance will reduce the amount of cross-pollination occurring between fields. The Plaintiffs state that having no buffer strips greatly compounded the contamination of the environment.

¶ 50 BCS also demanded whether the farming practices mentioned in the pleadings would have

avoided the result described in the pleadings. The plaintiffs replied:

> The Plaintiffs allege that the said farming practices would either have avoided the result described or greatly reduced it.

¶ 51 Accordingly, it is my conclusion that para. 35 of the statement of claim is not intended to assert a duty owed to the plaintiffs distinct from the duty alleged in para. 34 to minimize the infiltration and contamination of GM canola in the environment, but is a particularization of that claim, alleging a set of safeguards that could have been but were not put in place by the defendants, and which would have alleviated the extent of the adventitious presence of GM canola complained of.

¶ 52 The essential question, then, is whether the facts as pled support this allegation of a duty of care owed by the defendants to the plaintiffs. The plaintiffs concede that the duty of care here asserted is novel in the sense that there is no existing judicial or legislative authority that clearly establishes its existence. They point out, however, that the circumstances in which a duty of care may arise are not closed, relying on the principles enunciated in Anns v. Merton London Borough Council, [1978] A.C. 728 (H.L.) and Canadian cases that have interpreted and refined those principles.

¶ 53 The central passage from Anns is in the frequently quoted judgment of Lord Wilberforce and reads as follows:

> ... [T]he position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity of neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause the damage to the latter-in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. ... (at pp. 751-52)

¶ 54 The Anns test is thus said to be a two-pronged test, first to determine whether a prima facie duty of care arises, and second whether there are any policy considerations that ought to reduce or limit the scope of the duty. Two recent decisions of the Supreme Court of Canada have applied this test, with important refinements, each, it is important to note, in the context of determining whether the statement of claim disclosed a cause of action for the purpose of certifying the action as a class action pursuant to the class proceedings legislation in British Columbia and Ontario respectively.

¶ 55 In Cooper v. Hobart, [2001] 3 S.C.R. 537, 2001 S.C.C. 79, investors had invested funds with a mortgage broker who used the funds for unauthorized purposes and lost the funds. The plaintiff sought certification as a class action for a claim against the registrar under the Mortgage Brokers Act, R.S.B.C. 1996, c. 313, for failure to properly oversee the conduct of the broker who was licensed by the regulator. The issue before the Court was whether a private law duty of care in tort law is owed by the registrar, a statutory regulator, to members of the investing public giving rise to liability in negligence for economic losses that the investors sustained. The Court concluded that such a duty was as yet unrecognized by Canadian courts and that this was not a proper case in which to recognize a new duty of care.

¶ 56 Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562, 2001 S.C.C. 80, raised a very similar issue and the two decisions were delivered simultaneously. The plaintiffs sought class action certification for a claim in negligence against the defendant law society for allegedly breaching a duty of care to properly monitor one of its members' trust account, resulting in loss to the plaintiffs. As in Cooper, the Court concluded that this was not a proper case for finding a duty of care and concluded that the pleading failed to disclose a cause of action in negligence. In addressing the question, "Does the Law Society of Upper Canada owe a duty of care to persons who deposit money into a solicitor's trust account in respect of losses resulting from misuse of the account?", the Court reiterated much of its discussion in Cooper of the Anns test.

¶ 57 The following passages from Cooper set out the current view of the Supreme Court of Canada in respect of the application of the Anns test where, as here, the case is novel, in the sense that it is not analogous to a previously decided case.

> In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the Anns analysis is best understood as follows. At the first stage of the Anns test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the Anns test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a prima facie duty of care arises. At the second stage of the Anns test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in Yuen Kun Yeu, that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed.
>
> On the first branch of the Anns test, reasonable foreseeability of the harm must be supplemented by proximity. The question is what is meant by proximity. Two things may be said. The first is that "proximity" is generally used in the authorities to characterize the type of relationship in which a duty of care may arise. The second is that sufficiently proximate relationships are identified through the use of categories. The categories are not closed and new categories of negligence may be introduced. But generally, proximity is established by reference to these categories. This provides certainty to the law of negligence, while still permitting it to evolve to meet the needs of new circumstances.
>
> On the first point, it seems clear that the word "proximity" in connection with negligence has from the outset and throughout its history been used to describe the type of relationship in which a duty of care to guard against foreseeable negligence may be imposed. "Proximity" is the term used to describe the "close and direct" relationship that Lord Atkin described as necessary to grounding a duty of care in Donoghue v. Stevenson, supra, at pp. 580-81:
>
> > Who then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. ... I think that this sufficiently states the truth if proximity be not confined to mere physical proximity, but be used, as

> I think it was intended, to extend to such close and direct relations that the act complained of directly affects a person whom the person alleged to be bound to take care would know would be directly affected by his careless act. [Emphasis added.]

As this Court stated in Hercules Managements Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165, at para. 24, per La Forest J.:

> The label "proximity", as it was used by Lord Wilberforce in Anns, supra, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. [Emphasis added.]

Defining the relationship may involve looking at expectations, representations, reliance, and the property or other interests involved. Essentially, these are factors that allow us to evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant.

The factors which may satisfy the requirement of proximity are diverse and depend on the circumstances of the case. One searches in vain for a single unifying characteristic. As stated by McLachlin J. (as she then was) in Canadian National Railway Co. v. Norsk Pacific Steamship Co., [1992] 1 S.C.R. 1021, at p. 1151: "[p]roximity may be usefully viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors" (cited with approval in Hercules Managements, supra, at para. 23). Lord Goff made the same point in Davis v. Radcliffe, [1990] 2 All E.R. 536 (P.C.), at p. 540:

> ... it is not desirable, at least in the present stage of development of the law, to attempt to state in broad general propositions the circumstances in which such proximity may or may not be held to exist. On the contrary, following the expression of opinion by Brennan J in Sutherland Shire Council v. Heyman (1985) 60 A.L.R. 1 at 43-44, it is considered preferable that "the law should develop categories of negligence incrementally and by analogy with established categories".

What then are the categories in which proximity has been recognized? First, of course, is the situation where the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property. This has been extended to nervous shock (see, for example, Alcock v. Chief Constable of the South Yorkshire Police, [1991] 4 All E.R. 907 (H.L.)). Yet other categories are liability for negligent misstatement: Hedley Byrne & Co. v. Heller & Partners Ltd., [1963] 2 All E.R. 575 (H.L.), and misfeasance in public office. A duty to warn of the risk of danger has been recognized: Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189. Again, a municipality has been held to owe a duty to prospective purchasers of real estate to inspect housing developments without negligence: Anns, supra; Kamloops, supra. Similarly, governmental authorities who have undertaken a policy of road maintenance have been held to owe a duty of care to execute the maintenance in a non-negligent manner: Just v. British Columbia, [1989] 2 S.C.R. 1228, Swinamer v. Nova Scotia (Attorney General), [1994] 1 S.C.R. 445, etc. Relational economic loss (related to a contract's performance) may give rise to a tort duty of care in certain situations, as where the

claimant has a possessory or proprietary interest in the property, the general average cases, and cases where the relationship between the claimant and the property owner constitutes a joint venture: Norsk, supra; Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210. When a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a prima facie duty of care may be posited.

This brings us to the second stage of the Anns test. As the majority of this Court held in Norsk, at p. 1155, residual policy considerations fall to be considered here. These are not concerned with the relationship between the parties, but with the effect of recognizing a duty of care on other legal obligations, the legal system and society more generally. Does the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized? Following this approach, this Court declined to find liability in Hercules Managements, supra, on the ground that to recognize a duty of care would raise the spectre of liability to an indeterminate class of people.

...

The second step of Anns generally arises only in cases where the duty of care asserted does not fall within a recognized category of recovery. Where it does, we may be satisfied that there are no overriding policy considerations that would negative the duty of care. ... However, where a duty of care in a novel situation is alleged, as here, we believe it necessary to consider both steps in the Anns test as discussed above. This ensures that before a duty of care is imposed in a new situation, not only are foreseeability and relational proximity present, but there are no broader considerations that would make imposition of a duty of care unwise. (at paras. 30-39)

¶ 58 In applying the test to the case before it, the Court indicated that reasonable foreseeability of harm might be established, but it added:

> ... However, as discussed, mere foreseeability is not enough to establish a prima facie duty of care. The plaintiffs must also show proximity - that the Registrar was in a close and direct relationship to them making it just to impose a duty of care upon him toward the plaintiffs. In addition to showing foreseeability, the plaintiffs must point to factors arising from the circumstances of the relationship that impose a duty. (Emphasis added)

¶ 59 Thus, the Anns test as amplified in the passages from Cooper quoted above requires the Court to determine, first, whether the case falls within or is analogous to a category of cases in which a duty of care has previously been recognized. The plaintiffs concede that the answer to this question in the case before me is no.

¶ 60 The second question is then whether this is a situation in which a new duty of care should be recognized. The first leg of the Anns test is whether the pleadings allege reasonably foreseeable harm and relational proximity sufficient to establish a prima facie duty of care.

¶ 61 As for foreseeability, the plaintiffs have alleged facts sufficient to support a finding that it was reasonably foreseeable that release of the defendants' GM canola into the general environment would result in the adventitious presence of GMOs in the plaintiffs' crops and fields. Paragraph 34 states that the defendants "knew, or ought to have known, that the introduction of GM canola into the Saskatchewan environment without any, or in the alternative, proper, safeguards would result in GM canola infiltrating and contaminating the environment, seed supplies, and property of certified organic grain growers." This is an allegation that the adventitious presence of GM canola in the crops and fields

of organic farmers was foreseeable. Facts alleged in support of this aspect of the claim include para. 22 of the claim which alleges that the defendants' GM canola varieties are open-pollinated varieties which, due to the "natural" process of cross-pollination can pollinate conventional canola conferring genetic modification upon the seed of the formerly conventional canola.

¶ 62 There are other factual allegations, set out above, that the crops and farmlands of organic farmers have in fact been "contaminated" by GM canola. In effect, the plaintiffs make two claims in this regard. The first is that the plaintiffs can no longer grow or market organic canola because of the substantial risk of cross-pollination of their organic crop by GM canola. The second is that, even if they are not attempting to grow canola, fields intended for use in growing organic crops are liable to infestation by volunteer GM canola plants and this results in clean-up costs and loss of use of that land for growing organic crops for a period of time.

¶ 63 These allegations are sufficient, in my view, to support the general claim that the adventitious presence of GM canola in fields and crops where it is not intended to be grown, including those of organic farmers, was foreseeable. Indeed, foreseeability of AP of GM canola, as such, is not seriously challenged by the defendants who tend to argue that AP was not only foreseeable but inevitable, given the open-pollinating nature of canola, generally.

¶ 64 What is missing from the plaintiffs' claim, however, is any specific allegation that the loss and damage to organic farmers in particular which is claimed (viz., loss of the use of canola as a marketable organic commodity and loss of canola for use in crop rotation, plus the clean-up costs and loss of use of fields as a result of GM canola volunteers) was foreseeable. It is clear from the replies to the demands for particulars, for example, that in no case did the standards of organic certifiers mention GMOs at the time that GM canola was first released commercially, and, of the external markets, only the European market is alleged to have had standards in place that addressed the issue at that time. In the replies, the plaintiffs say:

> ... The European Standard expressly prohibits Genetically Modified Organisms ("GMOs") in organic agricultural products and foodstuffs and did so well before the Defendants released their GMOs unconfined into the Saskatchewan environment. ...

¶ 65 An inspection of the portions of the European regulation referenced in the reply (Council Regulation (EEC) No 2092/91 on organic production of agricultural products and indications referring thereto on agricultural products and foodstuffs) discloses that the regulations in effect at that time prohibited the use of GMOs and GMO derivatives in products labelled or advertised as organically produced. It is not alleged that the defendants knew or should have known of the existence of this standard, nor is it alleged that the effect of a prohibition of "use" of GMOs in products marketed as organic entails a prohibition of the adventitious presence of GMOs in such products.

¶ 66 Thus, it is doubtful whether the pleadings are sufficient to support a claim for foreseeability. Nonetheless, I am prepared, for the purpose of this analysis, to assume that the pleadings are sufficient to support this allegation, or that they could be easily amended to support the allegation.

¶ 67 More serious, however, is the absence of any pleading of a relationship between the plaintiffs and the defendants sufficient to support a finding of relational proximity. The decision of the Supreme Court in Cooper makes it clear that mere foreseeability of loss is not sufficient to establish a prima facie duty of care. The plaintiffs must also allege proximity-a close and direct relationship of such a nature that the defendants may be said to have been under an obligation to be mindful of the plaintiffs' legitimate interests. Here, in relation to the duty of care asserted in paras. 34-36 of the claim, the

plaintiffs have not alleged the existence of any expectations, representations, or reliance. They have not alleged physical harm to themselves or their property. They have alleged no special relationship between themselves and the defendants. Indeed, they have not alleged any relationship at all, either in the pleadings or in argument before me, that would give rise to an argument for sufficient relational proximity to support a prima facie duty of care.

¶ 68 The plaintiffs would seek to limit the import of the requirement expressed in Cooper and Edwards that the plaintiff must prove not only foreseeability but also a relationship of proximity in order to establish a duty of care in a novel case and to distinguish those decisions from the present case. They point out that the Supreme Court was able to look to the regulatory statute in both Cooper and Edwards to conclude that there was no legislative intent to impose a private law duty on the public regulator in favour of the putative class of plaintiffs. They argue that these cases are therefore not relevant to the case before me, where the plaintiffs are relying on "conduct-based" rather than "legislation-based" duty. The plaintiffs put the argument this way at paras. 89 and 90 of their brief:

> 89. The Supreme Court was able to engage in the analysis without a factual matrix because in both cases the proposed duty to supervise was determined solely by reference to governing legislation (the Mortgage Brokers Act of British Columbia in the case of Cooper and the Law Society Act of Ontario in the case of Edwards). In both cases, the court was able to determine in the abstract that there was no duty of supervision owed to the class of plaintiffs represented in each case.
> 90. This is not so in our case. The duty owed by Monsanto Canada and Bayer Cropscience will not be determined by legislation, but by conduct. While much of what the Defendants did with the release of their crops into the environment and the IPP is known, there is much that is not. Nor will it be known in advance of document production, discoveries, and viva voce evidence subject to cross-examination before a trier of fact. Due to the fact that the Plaintiffs are relying upon a conduct-based rather than a legislation-based duty, they should be allowed to proceed to trial so that proximity and foreseeability matters based on the Defendants' conduct can be canvassed with the benefit of a full factual matrix. For, while the skeleton of the duty can be discovered by reading the pleadings, the flesh cannot. This is not a matter that can fairly be determined in the abstract. (Emphasis in original)

¶ 69 I do not accept this argument, which in my view is fully answered by the passages quoted above from the Alberta Court of Appeal judgment in Tottrup. Of course the plaintiffs are not required to prove their case in the pleadings, and they may not yet know all of the evidence that will be relevant to their claim. Nor is the Court required to assess the merits of the claim at this stage. But the plaintiffs are required to allege facts sufficient to support the causes of action asserted. It is not sufficient for the plaintiffs to say, "I do not yet know what facts might support the allegation of a duty of care, but facts may emerge in the process of discovery that would support the allegation of a duty."

¶ 70 I conclude that the plaintiffs have failed to establish a prima facie duty of care in accordance with the first leg of the Anns test, in relation to the putative cause of action raised in paras. 34-36 of the claim.

¶ 71 In addition, there are policy considerations that, in accordance with the second leg of the test, would in my view bar or limit the imposition of the duty of care alleged on the defendants in the circumstances of this case. First, as the plaintiffs clearly plead in paras. 15 and 19 of the claim, both defendants received approval of the federal government for the unconfined release of their GM canola varieties prior to their release. The imposition by the courts of a duty of care not to release these

substances into the environment would therefore appear to be in conflict with express governmental policy.

¶ 72 Further, the bulk of the plaintiffs' claim, for loss of use of organic canola as a marketable crop, is a claim for pure economic loss of a category not previously recognized by Canadian courts. In effect, the alleged damage is not of physical harm to the plaintiffs' crops, but arises from the alleged inability to meet the requirements of organic certifiers or of foreign markets for organic canola. There is no allegation that GM canola is unhealthy or causes detrimental physical problems to humans or plant life. The claim is therefore analogous to that of M. Hasegawa & Co. v. Pepsi Bottling Group (Canada), Co., 2002 BCCA 324, (2002), 213 D.L.R. (4th) 663 (B.C.C.A.), in which the plaintiff claimed damages resulting from the introduction of mould into bottled water. The evidence failed to establish any health or safety concerns. The Court concluded the only consequence of the mould was aesthetic, with a resulting adverse effect of the marketability of the water. On these facts the Court held there was no duty of care.

¶ 73 In general, the common law has been reluctant to find a duty of care to avoid causing foreseeable pure economic loss, largely for policy reasons. By definition, such losses are not the direct result of the defendant's action. It has been argued that imposition of liability for causing pure economic loss risks exposing the defendant to indeterminate liability ("liability in an indeterminate amount for an indeterminate time to an indeterminate class") and, in a competitive commercial environment, may be "inconsistent with community standards in relation to what is ordinarily legitimate in the pursuit of personal advantage." (Perre v. Apand Pty. Ltd. (1999), 164 A.L.R. 606 (H.C.A.) per Gaudron J. at paras. 32-33.) Exceptions have been where the courts have found a special relationship, or proximity, such as the cases of negligent misstatement, where it can be shown that the defendant claimed special skill or knowledge and the plaintiff, to the defendant's knowledge, relied on the statement or professional negligence.

¶ 74 The plaintiffs, pointing out that the courts have on many occasions held that the categories for recovery of pure economic loss are not closed, rely in particular on two cases from non-Canadian jurisdictions: Perre v. Apand Pty. Ltd., supra, a decision of the High Court of Australia and Union Oil Co. v. Oppen, 501 F. 2d 558 (1974) a decision of the United States Court of Appeals, 9th Circuit. Both cases are, in my view, distinguishable.

¶ 75 In Perre, the defendant was found negligent in having provided defective potato seed to the Sparnons, commercial growers of potatoes and other vegetables. The seed caused an outbreak of bacterial wilt in the Sparnons' potato crop. The Perres owned farms near the Sparnons' land. They sold potatoes in the lucrative Western Australia market. Their potatoes were not directly affected by potato wilt, but Western Australia prohibited the import of potatoes that were grown within 20 kilometres of a bacterial wilt outbreak. They therefore lost the most lucrative market for their potatoes. At trial and in the Court of Appeal the Perres were unsuccessful, these Courts holding that, as the Perres had suffered no physical damage, their claim was for pure economic loss and was not recoverable. The High Court of Australia found a duty owed to the Perres and allowed the claim. The loss to them was on the facts clearly foreseeable and the plaintiffs were known to be a vulnerable class.

¶ 76 Significantly, however, as McHugh J. pointed out, imposing the duty on the defendant in this case did not expose it to indeterminate liability, nor did it unreasonably interfere with the defendant's commercial freedom, because it was already under a duty to the Sparnons to take reasonable care to avoid the very risk complained of.

¶ 77 Neither of these factors is present in the matter before me. Imposing a duty on the defendants in this case in relation to the economic losses of all those who claim loss of the ability to market canola due

to the adventitious presence of GM canola in their crops would indeed expose the defendants to a "liability in an indeterminate amount for an indeterminate time to an indeterminate class." Nothing in the nature of the plaintiffs' claim, for example, would impose a temporal limitation on the liability sought to be imposed, and, indeed, the plaintiffs seek to assert the claim on behalf of any organic farmer who has suffered a loss up to the time of certification. Further, the duty claimed to be owed by the defendants to the plaintiffs in this case is entirely independent of any more direct duty owed, for example, to the immediate customers of the defendants. It cannot be said that in developing and marking GM canola the defendants were not pursuing their legitimate economic interests.

¶ 78 In Union Oil, a number of fishermen brought a class action against a number of oil companies arising out of an oil spill in California. The claim was for "ecological damage" causing loss of profits as a result of a loss or reduction in commercial fishing potential. Relying heavily on the finding that loss to the plaintiffs was a clearly foreseeable consequence of the ecological damage caused, the Court added:

> An examination of ... other factors ... only strengthens our conclusion that the defendants in this case owed a duty to the plaintiffs. Thus, the fact that the injury flows directly from the action of escaping oil on the life in the sea, ... the public's deep disapproval of injuries to the environment and the strong policy of preventing such injuries, all point to existence of a required duty. (at p. 569)

¶ 79 In this case, as in Perre, it is clear that the defendants could not be said to have been pursuing their legitimate economic interests in relation to the damage complained of, for they were not legitimately entitled to cause damage to life in the sea or damage to the environment.

¶ 80 It is my conclusion that the case before me does not present a situation in which the courts would extend the categories for recovery of pure economic loss, for all of the policy reasons traditionally cited in support of the exclusion of this recovery are in play in this case.

¶ 81 I find that the claims based on negligence asserted in paras. 34-36 of the claim do not assert a reasonable cause of action, for the facts as pled fail to establish a duty of care owed by the plaintiffs to the defendants to prevent or minimize the adventitious presence of GM Canola in their crops and on their land. The claim asserted clearly does not fall within nor is it analogous to any category of cases in which a duty of care has been recognized. The plaintiffs do not allege facts sufficient to establish that the losses claimed were foreseeable and, in any case, they allege no facts sufficient to establish a relationship of proximity. Moreover, I have concluded that the claim would also fail on the second leg of the Anns test, for there are compelling policy reasons for excluding a duty of care in this case.

¶ 82 Paragraph 36(a) of the claim, recently added as an amendment to the original claim, also asserts a claim in negligence. In this case, the duty of care alleged to have been breached is said to have arisen from undertakings by the two defendants. The claim alleges that when the defendants commercially introduced their GM canola varieties in 1995, they "undertook" to develop export rules, in the form of an identity preservation program ("IPP") designed to ensure that no GM canola entered the export market because, at that time, the Japanese and European markets had not approved the defendants' GM canola. It is alleged that when approvals for the Japanese market were obtained, in 1997, the IPP was abandoned by the defendants, who knew that this would result in the eventual loss of the EU market for all Canadian canola. The plaintiffs allege that, in "undertaking" the task of developing export rules to ensure continued access to foreign markets, the defendants owed a duty not to do so negligently. This duty is said to have been breached when the IPP was dropped, resulting in the loss of the European market for Canadian canola. The plaintiffs allege that Europe was the export market where most of the organic canola produced in Canada was sold. It is common ground that the purpose of the IPP was to keep GM canola separate from conventionally grown canola in the first years of its introduction so that

it would not inadvertently enter the export market.

¶ 83 While, admittedly, this claim is pled "further or in the alternative", it seems somewhat inconsistent with the principal allegations of the claim, which assert, in effect, that organic farmers process and market organic grain crops separately from all conventional grain crops and are subject to an audit trail to ensure adherence to the certification standards (claim, para. 10) but that, because canola is open-pollinating, mingling of GM canola with organically produced canola is inevitable and that it is impossible to ensure that organically grown canola is free of the adventitious presence of GM canola (claim, paras. 22-27). If these allegations are true, then it is difficult to understand what difference it would have made to the marketing of organic canola whether the IPP existed or not. Both defendants complain that this claim has little to do with organic standards or organic markets per se.

¶ 84 In any case, this claim fails for a more fundamental reason. It is not alleged that the defendants are governments or government agencies, or that the alleged undertakings were anything but gratuitous. Thus, the duty to continue such a program, assuming that the defendants were responsible for instituting it (a fact alleged in the pleadings but disputed by the defendants), could only arise if the defendants' action in instituting the program and then discontinuing it had somehow worsened the plaintiffs' position. In other words, detrimental reliance is an essential element of this cause of action. The plaintiffs do not plead detrimental reliance or any facts from which detrimental reliance could be deduced. The passage from Robert M. Solomon, R.W. Kostal and Mitchell McInnes, Cases and Materials on the Law of Torts, 5th ed. (Toronto: Carswell, 2000) on which the plaintiffs rely makes this clear:

> Once the defendant begins performance of a gratuitous undertaking, he may be held liable for negligently injuring the plaintiff. However, he is under no general common law duty to complete the task itself, or to otherwise act for the plaintiff's benefit, unless he has somehow worsened the plaintiff's original position. Thus, having begun performance, the defendant may incur liability for injuring the plaintiff by lulling him into a false sense of security, denying him other opportunities for aid or putting him in a more precarious physical position. ... (at p. 262)

¶ 85 The plaintiffs place particular reliance on the British Columbia Supreme Court decision in Brown v. Port Edward (District), [1997] B.C.W.L.D. 133, for in that case liability was founded on an undertaking which was not made directly to the plaintiff, who therefore could not have been said to have personally relied on the undertaking. The plaintiff claimed damages for personal injuries she suffered when she slipped on a spot where oil had spilled from an excavator in front of a residence. The owner of the residence where the oil spill occurred indicated to the owner of the excavator that he would clean up the oil. Partial liability was imposed on the owner of the residence to the plaintiff for neglecting to do what he undertook to do.

¶ 86 While I agree that this case represents an instance where the plaintiff's reliance on the undertaking was not direct, the decision makes it clear that the plaintiff's situation was worsened by the undertaking to clean up the oil spill, combined with the defendant's failure to do what he had promised. This point is clear in the following passage from the case where, after concluding that the property owner owed no duty of care by way of occupier's liability, and was not responsible for the oil spill itself, the learned trial judge continued:

> Thirdly, was a duty of care imposed on Mr. Bragg by his telling Mr. Smith that he would clean up the spill and failing to do so adequately? The authorities cited to me that deal with this point establish a duty of care to the person who receives the undertaking and who relies upon it and not to persons who have no knowledge of or reliance upon

> the undertaking. These cases include Baxter v. Jones (1903), 6 O.L.R. (Ont. C.A.); Maxey v. Permanent Trust Co. (1984), 9 D.L.R. (4th) 380 (Man. C.A.); Densmore v. Whitehorse (1986), 5 W.W.R. 708 (Y.T.S.C.).
> In this case, the duty of care must be established toward Mrs. Brown as a user of Wildwood Avenue. In determining this I think it necessary to return to the basic principles of the imposition of a duty of care in negligence. ...
> ...
> Was Mr. Bragg's undertaking to Mr. Smith to clean up the hydraulic oil coupled with his failure to do so properly sufficient to impose a duty of care towards Mrs. Brown? Should he have reasonably foreseen that his acts could likely cause injury to persons walking on this roadway? I think the answer must be yes much as it would be if Mr. Bragg had originally created the hazard on the roadway in front of his house. I see no distinction between those circumstances and the ones here. Mr. Bragg would know that because of his undertaking to Mr. Smith, Mr. Smith would do nothing and that by a failure to properly remedy the hazard would affect people using the roadway. (at paras. 20-23) (Emphasis added)

¶ 87 Thus, the trial judge made a specific finding in that case that, but for Bragg's promise to clean up the oil spill, Smith would have cleaned it up himself, as was his usual practice and as was his duty. Clearly, then, Bragg was responsible for the continued existence of the hazard that injured Mrs. Brown. The trial judge found Mr. Bragg, Mr. Smith and Mrs. Brown equally responsible.

¶ 88 In the case before me, there is no allegation that the plaintiffs relied in any way on the implementation of the IPP or even that they knew of its existence. There is no allegation that their circumstances were worse, as a result of the implementation and subsequent abandonment of the IPP, than they would otherwise have been had the IPP not been introduced in the first place. It is my view that no duty of care arises from a gratuitous undertaking in the absence of some element of detrimental reliance, or other detriment. Accordingly, I conclude that para. 36(a) of the claim does not disclose a reasonable cause of action.

2. Does the statement of claim disclose a cause of action based on the rule in Rylands v. Fletcher?

¶ 89 Paragraph 37 of the claim reads as follows: 37. Further, or in the alternative, the Plaintiffs state that the Defendants are liable to certified organic grain farmers represented in this action on the basis of strict liability, having engaged in a non-natural use of land, and allowing the escape of something likely to do mischief and damage.

¶ 90 This claim is based on the principle of law set out in Rylands v. Fletcher (1866), L.R. 1 Ex. 265; (1868), L.R. 3 H.L. 330. In that case the plaintiff, Fletcher, was mining coal on land adjacent to land owned by the defendant, Rylands, who operated a mill. Rylands, who had no knowledge of the mining operation on the adjacent land, built a reservoir to supply water for the mill. The reservoir gave way and flooded the mining site. Blackburn J., holding Fletcher liable, set out the principle:

> We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, he is primâ facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient. ... (at pp. 279-80)

On appeal, the House of Lords, agreeing with the analysis, added the concept of "non-natural use" in the passage that follows at (1868), L.R. 3 H.L. 339:

> ... if the Defendants, not stopping at the natural use of their close, had desired to use it for any purpose which I may term a non-natural use, for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, -and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the Plaintiff, then it appears to me that that which the Defendants were doing they were doing at their own peril; and, if in the course of their doing it, the evil arose to which I have referred, the evil, namely, of the escape of the water and its passing away to the close of the Plaintiff and injuring the Plaintiff, then for the consequence of that, in my opinion, the Defendants would be liable. ...

¶ 91 Thus, the elements of this cause of action are: (i) the defendant has made a non-natural use of its land; (ii) the defendant brought onto his land something which was likely to do mischief if it escaped; (iii) the substance in question escaped; and (iv) damage was caused to the plaintiff's property or person as a result of the escape. See Klar, Linden, Cherniak & Kryworuk, Remedies in Tort, vol. 3 (looseleaf), (Toronto: Carswell, 1987) at 21-16, para. 3; John Campbell Law Corp. v. Strata Plan 1350 (2001), 8 C.C.L.T. (3d) 226 (B.C.S.C.) per Melnick J. at paras. 21-23.

¶ 92 Particulars of the allegation in para. 37 of the claim were demanded by BCS, answers to which were as follows:

> Question: What non-natural use of land is alleged? Reply: Growing a transgenic plant on test plots for confined field trials and licensing others to grow it on their land (while retaining ownership of the genetic modification.)
> Question: The date of such alleged non-natural use on the part of Aventis [now BCS]?
> Reply: The dates of the test plot confined field trials are particularized in the Claim. The dates of use by others are also particularized in the claim.
> [Paragraph 19 of the claim refers to BCS' confined test plots grown in 1990 to 1994. Paragraph 20 refers to marketing of Liberty Link canola beginning in 1995, and proceeding for years subsequent.]
> Question: The legal description of the land(s) which Aventis [now BCS] is alleged to have used non-naturally? Reply: The Plaintiffs do not have particulars of the exact land locations of the confined field trials. Such particulars can be obtained from Aventis or Agriculture and Agri-Food Canada. The use by others includes those farmers who grew it under license from Aventis in the years in question. The Plaintiffs do not have particulars of the identity of these farmers and the land locations where they grew Liberty Link canola. Aventis should have such particulars.
> Question: What is it that Aventis has allowed to escape? Reply: Their gene.

¶ 93 Monsanto also demanded particulars with these results:

> Question: With respect to paragraph 37 of the Statement of Claim and paragraph 22 of the Monsanto Reply, further and better particulars of the land which the Plaintiffs allege

the Defendants have engaged in a non-natural use. ... Reply: ... the unnatural use of land includes the lands upon which Monsanto conducted its confined field trials. ...
The Plaintiffs further allege that the licensing of seed companies to grow material for Monsanto for commercial sale is a further non-natural use of land. ...
Finally, because Monsanto licenses its registered users to use its gene on their land without relinquishing ownership of the gene, it is responsible for contamination emanating therefrom. ...

¶ 94 These replies appeared to indicate two different allegations in relation to the Rylands v. Fletcher claim, the first relating to the growing of GM canola in confined field plots in 1990 to 1994 and the second relating to the escape of genetic material from the fields of conventional farmers growing varieties of Liberty Link or Roundup Ready canola after its commercial release. In oral argument, however, the plaintiffs indicated that they were not pursuing the allegations of escapes from the fields of conventional farmers, but only from the confined field trials.

¶ 95 The nature of the plaintiffs' argument in this respect is far from clear. It appears from the plaintiffs' oral argument that they are not alleging that the GM canola genes actually "escaped" during the confined field trials. Such "escapes", necessarily limited, could hardly in any case have had the impact the plaintiffs allege in terms of the damage caused. Paragraphs 22-27(b) of the claim clearly refer to "contamination of the environment by genetically modified canola" which has resulted from its widespread use by conventional farmers. It is not alleged that the impossibility of growing organic canola free from the adventitious presence of GM canola did or could have resulted simply from GM canola pollen or seeds produced in the context of the confined field trials.

¶ 96 Rather, the "escape" argued is the general commercial release of GM canola following the confined field trials. In their brief of law the plaintiffs acknowledge that there can be no liability under the rule in Rylands v. Fletcher except in circumstances where injury has been caused by an escape from land under the control of the defendant. (plaintiffs' memorandum of law, para. 148) They clearly acknowledge that this would pose a problem in relation to the allegation that the escape in question was from the fields of farmers growing the defendants' GM canola, for the defendants are not the owners of the property where the GM seed is planted. (para. 150) They propose to meet this problem by arguing that "GMOs were initially released from the laboratories of these companies and this is what counts." (para. 151) That this is a reference to the general commercial release of GM canola was confirmed in oral argument.

¶ 97 Regardless of whether one considers GM canola a "dangerous substance", or the field trials for GM canola an "unnatural" or "non-natural" use of land, it is not reasonably arguable that the commercial release and sale of Roundup Ready canola seed and Liberty Link canola seed constituted an "escape" of a substance, dangerous or otherwise, from property owned or controlled by the defendants in the sense of "escape" required by the rule in Rylands v. Fletcher. It is my conclusion that the pleadings do not disclose a reasonable cause of action based on the rule in Rylands v. Fletcher.

3. Does the statement of claim disclose a cause of action in nuisance?

¶ 98 This claim is alleged in para. 38 of the claim, as follows:

38. Further, or in the alternative, the Plaintiffs state that the introduction of GM canola into the Saskatchewan environment by the Defendants created a nuisance that has interfered with certified organic grain farmers' use and enjoyment of their land. The Plaintiffs therefore state that the Defendants are liable in nuisance for any damages

> caused to certified organic grain farmers represented in this action from the introduction of GM canola and its unconfined release in the Saskatchewan environment.

¶ 99 Again, it is clear that the "release" referred to in this claim is the general commercial release, or sale, by the defendants of GM canola seed to conventional grain farmers in Saskatchewan who in turn plant and grow GM canola. The focus of the plaintiffs' oral argument was the damage to property or alternatively interference with use and enjoyment of the land of organic grain farmers allegedly caused by the presence of GM canola volunteers, although the claim is expressed broadly enough to include other adventitious presence, such as the presence of GM canola genes in organic canola crops as a result of cross-pollination.

¶ 100 The tort of private nuisance is concerned with conditions or activities that cause physical injury or damage to land or that interfere with the use or enjoyment of land. The common law has distinguished between activities or conditions that cause physical injury or damage to another's land from activities and injuries that interfere with the use or enjoyment of land, without actual physical damage, although the distinction is not always clearly drawn in the cases, nor is it always easy to draw. G.H.L. Fridman, The Law of Torts in Canada, vol. 1 (Toronto: Carswell, 1989), for example, says this:

> A use of one's land that causes injury to another's property is capable of being a nuisance in law without reference to the circumstances in and under which the conduct in question occurred, and without involving any inquiry into the character of the activities being carried out, or the manner in which the conduct occurs, or the reasonableness or otherwise of the use being made of the land in question. All these matters are factors to be considered when the alleged nuisance takes the form of interference in the beneficial use and enjoyment of the plaintiff's land or premises. To support a nuisance action where interference with beneficial use is alleged, there must be some substantial interference with the comfort or convenience of persons occupying or using the premises. In this respect, the character of the locality is of importance in determining the standard of comfort an occupier may reasonably claim. Such character has no relevance where material damage to the plaintiff's premises, or his property thereon, occurs as a result of the activities of the defendant. The plaintiff is entitled to redress irrespective of locality.
>
> ...
>
> ... The causing of harm is of itself sufficient to impose liability in nuisance (as well perhaps in negligence, if negligence can be established). Whereas inconvenience will not necessarily suffice to ground an action in nuisance, damage to property will. Nor can the causation of damage to property be justified or excused by pleading that the defendant was making a lawful, reasonable, even a necessary or essential use of his property. Hence, the need to rely upon statutory authority as a defence to potential liability in nuisance for causing damage.
>
> ...
>
> Were liability for nuisance to be confined to instances where damage to property or the person resulted from the defendant's use of his land, the law of nuisance would be comparatively straightforward, and the problems of its application would be much reduced. When an alleged nuisance takes the form of interference with a plaintiff's enjoyment or use of his land, the task of the court becomes more complex. Since at least the middle of the nineteenth century, English cases, such as St. Helens Smelting Co. v. Tipping [(1865), 11 H.L.C. 642], have recognised that the determination whether or not a nuisance has been committed by a defendant depends upon a delicate balance of factors. The approach of the courts has been along the lines of "live and let live". A

> defendant is entitled to use his property for his own purposes and benefit, commercially or otherwise, only insofar as such use does not unreasonably inflict inconvenience or discomfort on his neighbour. When that occurs, the defendant is no longer acting lawfully; on the contrary, he is acting unlawfully, by committing a nuisance. (at pp. 126-30)
> This approach has also been adopted by Canadian courts. ...

¶ 101 Thus, Fridman suggests that where the alleged nuisance is interference with use and enjoyment of land, as opposed to physical harm to land, the courts may look at the nature of the locality to determine whether the plaintiff's expectations are reasonable, and may engage in a delicate task of balancing the necessity for protecting the plaintiff from the consequences of the defendant's behaviour and the desire to allow a defendant to carry on his otherwise legitimate operations on his own land in order to determine whether there has been an unreasonable interference with the plaintiff's convenience.

¶ 102 The distinction is not so sharply drawn by Allen M. Linden, Canadian Tort Law, 7th ed. (Toronto: Butterworths, 2001), and is not discussed at all by Beth Bilson, The Canadian Law of Nuisance (Toronto: Butterworths, 1991). Linden says only:

> The interference caused to the plaintiff's use of the land must be substantial. No compensation will be awarded for trivial annoyances. If tangible damage is caused by the defendant, the court is more likely to brand it as a nuisance, as where chemicals emitted from the defendant's foundry damaged the paint on vehicles in the plaintiff's yard, where salt on roads contaminated well water causing the loss of nursery stock, or where the defendant's driving of trucks on a dirt road damaged a house and made it impossible to cultivate land. (at p. 526)

¶ 103 In the case before me, para. 38 of the claim does not refer to actual damage to land, but to interference with organic farmers' use and enjoyment of their land. In argument, however, the plaintiffs took the position that there has been physical damage to the land of organic farmers and to organic crops as a result, at least, of the presence of invading GM volunteer plants, as alleged in para. 27(a). The same argument is not made in relation to the cross-pollination of organic crops by neighbouring GM canola, although the claim appears to be that this constitutes interference with organic farmers' use and enjoyment of their land.

¶ 104 In either case, however, there is authority for the proposition that no action can be brought by a plaintiff who is unduly reactive to the defendant's conduct because he is carrying on a business or operation that is particularly sensitive to the kind of intervention that is in question.

¶ 105 The defendants raise several arguments against the alleged cause of action in nuisance. In general terms, these raise the issues of (1) whether the harm claimed by the defendants (transfer of genetic material by pollen drift to the plaintiffs' organic canola crops and the unwanted presence of volunteer canola plants on the plaintiffs' organic fields) falls within the scope of the tort of nuisance, and (2) if so, whether the defendants are liable in nuisance for the harm alleged.

¶ 106 In relation to the first point, it is argued, first, that the damage alleged is not caused by the release of GM canola at all, but by the actions of third parties who have promulgated the standards affected by the inevitable adventitious presence of GM canola and by the decisions of individual organic farmers to seek to adhere to those standards. Implicit in this argument is the claim that the adventitious presence of GM canola is not inherently harmful to crops or to land. The defendants would on this basis distinguish cases that have imposed liability, for example, for the spread of weeds or for the drift of

herbicides, both of which have harmed or endangered the physical well being of growing crops.

¶ 107 A second and related argument is that the injury or interference alleged is not sufficiently "unreasonable" or "substantial" to sustain a claim in nuisance. The defendants point out that agricultural activity in Saskatchewan generally involves the production of open-pollinating crops, that the release of GM canola was subject to federal approval and that the growing of GM canola is, according to the pleadings, widespread. It is therefore a "usual and ordinary" activity. Pollen flow is a natural phenomenon. Further, the activities of organic farmers are said to raise the issue of hypersensitivity.

¶ 108 I do not discount these arguments or the difficulty the plaintiffs may have in meeting them. However, it is impossible for me to conclude that the defendants' success on these points is plain and obvious, which is the test that must be applied on the application to strike the pleading as disclosing no reasonable cause of action. The test for what constitutes nuisance is notoriously vague and changes over time. The plaintiffs' allegation is in effect that the crops and land of organic farmers is effectively contaminated by the presence of GM canola. The analogy to contamination of land by weeds is in my view too close to make it certain that the plaintiffs' argument on this point cannot succeed. It can be argued that just as weeds make it difficult or impossible to grow a conventional crop successfully, so too does contamination by GM canola make it impossible to grow organic crops. The significance of the distinctions argued by the defendants is one which must be assessed, in my view, by the trial judge on the whole of the evidence.

¶ 109 The same is true of the argument that the damage or interference alleged by the plaintiff is not sufficiently significant. This is an assessment to be made by the trial judge in the context of all the evidence at trial. It is impossible for me to say, at this point, that the plaintiffs have no chance of success on this point.

¶ 110 The plaintiffs' claim is novel, and there are difficult hurdles to overcome. However, I do not find it plain and obvious that they cannot succeed in showing that the damage or interference they have alleged constitutes a legal nuisance.

¶ 111 The further question, however, is whether, in any case, the defendants Monsanto and BCS can, at law, be found liable for the nuisance claimed. As the defendant BCS points out:

> There is no Canadian case law to suggest that a manufacturer of a product can be made liable in nuisance for simply distributing the product in its course of business, whereupon the product is then used by others and complaints are made about that use. If such were the case, any manufacturer of lawn equipment would be liable for the noise or grass clippings that an unreasonable neighbour might cause to be emitted onto adjoining land. (BCS brief of law at tab 4, para. 77)

¶ 112 The defendants argue that they cannot be liable unless the alleged nuisance emanated from land they occupied or controlled.

¶ 113 Although it is true that nuisance is typically a claim by one landowner or occupier against his neighbour, it seems clear that in Canada responsibility for private nuisance is not restricted to the occupiers of adjoining lands. Anyone who actively creates a nuisance whether or not in occupation of the land from which it emanates can be liable and this liability continues so long as the offensive condition remains regardless of his ability to abate it and stop the harm. See Bilson, supra, at pp. 10-14, citing Jackson v. Drury Construction Co. Ltd. (1974), 49 D.L.R. (3d) 183 (Ont. C.A.).

¶ 114 The defendants' true objection, however, is that no harm can be said to have been caused by the mere sale or marketing of GM canola. The adventitious presence of canola in the crops and on the land of organic farmers required the intervention of neighbouring farmers who cultivated GM canola. Holding the defendants liable in nuisance on the basis of the commercial marketing of the product would be equivalent to holding the manufacturers of pesticide responsible for the nuisance caused by the harmful drift of the pesticide. While the "release" of the GM varieties of canola by the defendants may have been a necessary condition for the occurrence of the harm alleged, it was far from sufficient, in itself.

¶ 115 The difficulty for the plaintiffs' claim in this regard seems to me to be significant. The question is whether it is sufficiently certain that the plaintiffs could not succeed in extending liability to the defendants that the cause of action should be struck. In Sapone v. Clarington (Municipality) (2001), 14 C.L.R. (3d) 254 (Ont. S.C.J.), Lane J. was confronted with a similar issue. The plaintiffs ' neighbours were granted building permits by the defendant municipality for a substantial extension to their home. The plaintiffs brought action against the municipality, alleging the building was a nuisance because it blocked their view and emitted noise, light and fumes onto their property and that the municipality made possible the nuisance by granting building permits knowing that they did not comply with zoning by-laws. The municipality moved to strike out the statement of claim on the ground that it failed to disclose a cause of action. Lane J. had this to say:

> Counsel for Clarington submitted that a municipality cannot be liable in nuisance to a landowner where it does not occupy the land from which the nuisance emanates. It is certainly true that nuisance is normally an action brought against a neighbouring landowner based upon some use being made of that land. The municipality here is not the occupier of the offending lands. It is possible, in some circumstances, for a non-occupier to become liable. In Jackson v. Drury Construction Co. Ltd. (1975), 4 O.R. (2d) 735 (Ont. C.A.) the court held that a road contractor whose blasting operation broke open fissures in rock which enabled pig farm effluent to pollute the plaintiff's well, was liable in nuisance even though he was not the occupier of the pig farm from which the effluent came. His non-natural use of the nearby county road had directly caused the problem. Dubin J.A. said that in an action for nuisance, liability attaches to anyone who either creates or causes a nuisance, and the cause of action is not dependent on that person being in occupation of the lands from which the nuisance emanates.
> In the present case, while the majority of their pleading revolves around the use of the premises, the plaintiffs have pleaded that the building itself causes a nuisance by obstructing their view, and that certain pipes discharge effluent onto the plaintiffs' lands. They further submit that Clarington made this nuisance possible by granting building permits "knowing that the said permits did not comply with ... the by-law." (paragraph 26 i). If that last sentence were proved, it is not plain and obvious to me that a municipality could not be liable for the results of such an act. The principle in Drury may not be broad enough to encompass a municipality issuing a permit, because in Drury there is reference to the defendant's non-natural use of the road, so that there was an occupation of land in the vicinity involved. But this stage of the action is not the place to resolve such issues of law. I think therefore, that paragraph 26 i should stand.

¶ 116 With respect, I cannot agree with the conclusion of Lane J. that support for the nuisance claim alleged in Sapone can be found in the decision of Dubin J.A. in Drury. Not only did the action complained of Drury emanate from neighbouring land, but the passage upon which Lane J. relies reads as follows:

> ... In an action for nuisance, liability attaches to anyone who either creates or causes a

> nuisance, and the cause of action is not dependent on that person being in occupation of the premises from which the nuisance emanates. ... It is sufficient that the defendant has caused or continued the nuisance if, by any act or omission on his part, he directly gives rise to it. (at para. 10) (Italics added)

¶ 117 It is possible that Lane J.'s receptivity to the possibility of liability in nuisance attaching to the remote and indirect role played by the municipality in issuing a building permit, in the causation of the alleged nuisance, relates to the fact that the action of the municipality was itself alleged to have been wrongful. This factor certainly seems to play a role in the American case law.

¶ 118 The decision in In re StarLink Corn Products Liability Litigation, Marvin Kramer v. Aventis CropScience USA Holding Inc. (2002), 212 F. Supp. 2d 828 (U.S. District Court, N.D. Illinois), raised this issue. The plaintiffs in that case sought to bring a class action claim against the defendant manufacturer and creator of genetically modified corn, StarLink corn. It was alleged that StarLink had contaminated the entire corn supply in many states resulting in increased farming costs and depressed corn prices. The genetic modification of StarLink corn caused it to produce a protein (Cry9C) toxic to certain insects and containing several attributes similar to known human allergens. Accordingly, it had obtained only qualified approval for release for use for animal feed, ethanol production and seed increase by the Environmental Protection Agency ("EPA") under the Federal Insecticide, Fungicide, and Rodenticide Act. The EPA prohibited its use for human consumption and imposed on the defendant manufacturer stringent requirements of warning and monitoring to ensure implementation of mandatory segregation methods in the cultivation, harvesting, handling, storage and transport of StarLink corn, including a mandatory 660-foot "buffer zone" around StarLink corn crops. It was alleged that the defendant had failed to comply with the EPA requirements resulting in the cross-pollination and other commingling of StarLink with non StarLink corn. The plaintiffs alleged causes of action in, inter alia, private nuisance, alleging that the defendant created a private nuisance by distributing corn seeds with the Cry9C protein, knowing that they would cross-pollinate with neighbouring corn crops. The defendant moved to have the claim dismissed as disclosing no cause of action, arguing that they could not be liable for any nuisance caused by StarLink corn because they were no longer in control of the seeds once they were sold to farmers. They did not succeed.

¶ 119 The Court first considered whether cross-pollination of a crop from neighbouring land could, in any case, constitute nuisance. In concluding that it could, it relied on the fact that StarLink corn was not considered fit for human consumption, commenting:

> Non-StarLink corn crops are damaged when they are pollinated by StarLink corn. The pollen causes these corn plants to develop the Cry9C protein and renders what would otherwise be a valuable food crop unfit for human consumption. ... (at p. 841)

¶ 120 On the question of whether liability in private nuisance could extend to a manufacturer after the point of sale, the Court relied on the American Restatement para. 834, stating that one can be liable in private nuisance "not only when he carries on the activity but also when he participates to a substantial extent in carrying it on." The question was what counted as "participation to a substantial extent" in carrying on the nuisance beyond the point of sale. It was clear that the general rule was that liability for nuisance could not be imposed on the manufacturer in these circumstances. However, the Court pointed to a number of cases in which the normal pattern of nuisance liability (imposed on a neighbouring land owner or occupier) had been extended. In the case of some manufacturers, the liability had been extended on the basis of foreseeability of the harm alleged coupled with some malfeasance on the part of the manufacturer. In this case, it was alleged that the defendant had itself violated the EPA's mandates in failing to adequately warn of the need for segregation and to enforce farmers' compliance with the EPA requirements. The Court concluded:

> ... All parties who substantially contribute to the nuisance are liable. The unique obligations imposed by the limited registration arguably put Aventis in a position to control the nuisance. On a motion to dismiss we may not speculate whether the as yet undeveloped facts will constitute substantial contribution. To the extent the allegations comport with our preemption analysis [on another unrelated issue] above, they do state a valid claim for private nuisance. (at p. 847)

¶ 121 The case at bar is distinguishable on both of the points crucial to the StarLink decision. It is not alleged that contamination of organic crops by GM canola is harmful per se or that it renders the organic crops unfit for consumption or otherwise harmful. Nor is it alleged that the defendants in this case failed in any way to conform to the requirements imposed on them. Indeed, it is conceded in the pleadings that they had received federal approval for the unconfined release of the GM canola varieties.

¶ 122 The tort of nuisance imposes strict liability when the conditions for its application are met. The implications of holding a manufacturer, or even inventor, liable in nuisance for damage caused by the use of its product or invention by another would be very sweeping indeed. It is my conclusion that where the activity complained of is the activity of one who is not in occupation or control of adjoining land, and no independent malfeasance is alleged, then, at the very least, direct causation of the damage alleged must be alleged. This is not the case. I conclude that there are no facts alleged in this case that could support a finding that the defendants substantially caused the nuisance alleged.

¶ 123 I must add that this conclusion does, of course, ignore two other causes of action alleged in the statement of claim: the alleged failure of the defendants to comply with the EMPA, and the alleged failure to obtain an environmental assessment under The Environmental Assessment Act, S.S. 1979-80, c. E-10.1 ("EAA"). These putative causes of action are addressed below. If either of these claims is well founded, it is conceivable that this could be seen to lend the necessary allegation of malfeasance required in the American cases to support liability in private nuisance. This would raise the further question, of course, as to whether the American cases were to be followed, but would be sufficient, in my view, to make an arguable case, precluding striking the claim at this stage. Of course, if either of these two statutory claims were found to be well founded, as will be seen, then the claim in nuisance would in any case be redundant, for the civil liability imposed by these statutes is both strict and sweeping in its scope. Nonetheless, my conclusion that no cause of action can lie in private nuisance on the basis of the facts alleged in the case before me must be qualified by the observation that the contrary conclusion could follow if the Court should conclude that either of the statutory claims is well founded.

¶ 124 Subject to this qualification, I conclude that it is plain and obvious that the claim in nuisance for the adventitious presence of GM canola in the crops and on the fields of organic farmers cannot be maintained as against these defendants.

4. Does the statement of claim disclose a cause of action in trespass?

¶ 125 The argument in relation to trespass is difficult to distinguish from the argument in relation to nuisance. The cause of action in trespass is contained in para. 39 of the claim:

> 39. Further or in the alternative, the Plaintiffs state that the Defendant's GM canola has trespassed on lands farmed by certified organic grain growers. The Plaintiffs therefore state that certified organic grain farmers represented in this action are entitled to damages from the Defendants in trespass for the introduction of GM canola and its unconfined release in the Saskatchewan environment.

¶ 126 There is no allegation that the defendants intended to trespass on lands farmed by organic farmers and in reply to a demand for particulars by the defendant Monsanto on this point the plaintiffs replied:

> Intention is not necessary in a complaint of trespass, was not plead and, therefore, no particulars are required. However, the Defendants released a self-propagating and proliferating product into the environment, without any, or in the alternative, inadequate, controls that they knew, or ought to have known, would eventually trespass on lands farmed by organic farmers.

¶ 127 To sustain a cause of action in trespass, the plaintiffs must establish an unauthorized entry upon another's land of a physical object or physical contact with land, and the defendants' act or interference must be voluntary and intentional or negligent.

¶ 128 Again, it is clear that the act of the defendants complained of is the commercial marketing and sale of GM canola seed, which, the plaintiffs argue, the defendants knew or ought to have known would inevitably "invade the land of the plaintiffs." The defendants' argument is that marketing of seed that subsequently finds its way onto the land of another is not an action sufficiently direct to constitute trespass. It was only after conventional farmers grew GM canola varieties and with the intervention of natural processes (or because of the actions of others who have processed or handled the seed) that the GM canola genes could find their way onto the land of organic grain farmers. Thus, the primary dispute between the parties is whether direct interference is required for an action in trespass.

¶ 129 Counsel for the plaintiffs frankly conceded in oral argument that if direct interference in the land of another is a requirement for trespass then his action on this basis is barred. He argued, however, that directness ought not to be required, for the spread of the GM gene onto land where it was not wanted was, it is alleged, foreseen by the defendants when they marketed their GM canola seed. It is also argued that the GM gene in Roundup Ready and Liberty Link is the property respectively, of the defendants. Thus, it is argued, the presence of the GM gene on land where it is not wanted is analogous to the "stray bull cases", which hold an owner strictly liable for damage caused by a bull which strays onto a neighbour's land.

¶ 130 On the general point of directness, the plaintiffs cite authorities that suggest that a defendant should be liable in trespass when he has deliberately placed a contaminant (oil, soot, pesticide, etc.) so that natural forces such as wind or water has then carried onto neighbouring land. See, generally, Bullen & Leake & Jacob's Precedents of Pleadings, 13th ed. (London: Sweet & Maxwell, 1990) at 923, and Lewis N. Klar, Tort Law, 3rd ed. (Toronto: Carswell, 2003) at 103. Against this is the authority of a number of English and Canadian cases that require more direct interference, such as Southport Corporation v. Esso Petroleum Co., [1954] 2 Q.B. 182, 2 All E.R. 561 (C.A.) where Lord Denning denied that oil jettisoned by the defendant from a ship, carried by waves to the plaintiff's shore, constituted trespass. In discussing these cases, Lewis Klar argues:

> ... The interferences in these cases were set in motion by the defendants, assisted only by natural and inevitable forces, and ought to have been treated as sufficiently direct to constitute a trespass. If the results were unexpected, or could not reasonably have been foreseen, this would defeat the claim, not, however, because the injury was not direct, but because it was neither intentional nor negligent. (at p. 103)

He adds, in a footnote:

> Where a person throws a stone into the sky over the plaintiff's land, and it comes down on the plaintiff's land, one would not deny that a trespass has been committed even though the force of gravity was an important factor in producing the result. Similarly, where one pours oil onto water, sprays a chemical into the air or points a rain spout in the direction of a neighbour's property, and waits for natural forces to produce an invasion of another's land, the results ought to be treated as sufficiently direct. ... (at p. 103)

¶ 131 This argument, which is essentially an argument for some degree of liberalization of the law of trespass, does not, by its own terms, go nearly as far as the plaintiffs would wish to take it, for it is clear that much more than "natural and inevitable forces" must intervene between merely marketing GM canola and its arrival on the plaintiffs' land.

¶ 132 Nor is the "stray bull" analogy apposite. These are not trespass cases. The imposition of strict liability for the consequences of stray bulls is clearly a policy decision intended to place a heavy onus on the owners and possessors of bulls to keep these animals confined and under control. Although the plaintiff claims that the defendants "own" their GM canola gene, (a claim that the defendants say is a misunderstanding of the nature of their interest under patent law), it can point to no similar public policy that would have, in effect, placed an onus on the defendants not to have commercially released GM canola, for the plaintiffs' claim is that, once GM canola was commercially released, cross-pollination of conventional canola crops was natural and inevitable.

¶ 133 It is my conclusion that action in trespass does not lie against the defendants as the inventors and marketers of GM canola for the adventitious presence of GM canola in the crops and on the lands of organic grain farmers, for even the liberalized requirement for direct interference proposed by Professor Klar cannot be met in the circumstances of this case.

5. Does the statement of claim disclose a cause of action under The Environmental Management and Protection Act ("EMPA")?

¶ 134 This claim is articulated in para. 40 of the statement of claim, which originally read:

> 40. Further, or in the alternative, the Plaintiffs state that the Defendants' genetic modifications are "pollutant", within the meaning of The Environmental Management and Protection Act (Saskatchewan) ("EMPA"), that has caused loss or damage to certified organic grain farmers because of its discharge into the Saskatchewan environment. The Plaintiffs state that at the time of its first discharge, the genetic modification was owned by the Defendants or, in the alternative, the Defendants were persons having control of the pollutant. The Plaintiffs therefore state that the Defendants are liable to certified organic grain farmers represented in this action pursuant to Section 13(3) of the EMPA for the damage sustained by them as the result of the introduction into the Saskatchewan environment of GM canola.

¶ 135 Just prior to the hearing of the certification application, the plaintiffs sought and obtained leave to amend this paragraph to add the following:

> In regard to discharges occurring after October 1, 2002, the Plaintiffs state that the Defendants' genetic modifications are a "substance" within the meaning of The Environmental Management and Protection Act, 2002 (Saskatchewan) ("EMPA, 2002")

that has caused loss or damage to certified organic grain farmers because of its discharge into the Saskatchewan environment. The Plaintiffs state that the Defendants were, at all material times, the "person responsible for a discharge" within the meaning of the EMPA, 2002. The Plaintiffs therefore states (sic) that the Defendants are liable to the certified organic grain farmers represented in this action pursuant to Section 15(3) of the EMPA, 2002 for the damage or loss sustained by them as a result of the discharge into the Saskatchewan environment of GM canola.

¶ 136 The two statutes are importantly different and must be considered separately.

A. The EMPA

¶ 137 Looking first at the original EMPA, the plaintiffs' claim is clearly intended to be pursuant to s. 13(3) of the Act. The relevant parts of s. 13 read as follows:

13(1) In this section, "loss or damage" includes:

(a) personal injury; (b) loss of life; (c) loss of use or enjoyment of property; and (d) pecuniary loss, including loss of income.

...

(3) ... any person, including Her Majesty in right of Saskatchewan or in right of Canada, has a right to compensation from:

(a) the owner of the pollutant and the person having control of the pollutant for loss or damage incurred as a result of:

(i) the discharge of a pollutant;
...

without proof of fault, negligence or wilful intent.

¶ 138 In order to establish a claim under this provision, the plaintiff must allege and prove:

(1) that the GM canola varieties of the defendants are "pollutants" within the meaning of the Act;
(2) that immediately before the first discharge of the "pollutant", the defendants were either the "owners" of the pollutants or "persons having control" of the pollutants;
(3) that the "pollutant" has been "discharged";
(4) that the discharge of the pollutant has been into the "environment;
(5) that the discharge has caused loss or damage to the plaintiffs.

¶ 139 The following statutory definitions are relevant:

2(d) "discharge" means a discharge into the environment and includes any drainage, deposit, release or emission into the environment;

(e) "environment" means:

(i) the atmosphere other than the atmosphere in a building or in the underground works of a mine;
(ii) water; or
(iii) soil and subsoil;

...

(r) "owner of a pollutant" means the owner of a pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of the owner;

...

(t) "person having control of a pollutant" means the person having the charge, management or control of the pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of that person;
(u) "pollutant" means a substance that causes or may cause pollution of the environment;
(v) "pollution" means the alteration of the physical, chemical, biological or aesthetic properties of the environment, including the addition or removal of any substance that:

(i) will render the environment harmful to the public health;
(ii) is unsafe or harmful for domestic, municipal, industrial, agricultural, recreational or other lawful uses of the environment; or
(iii) is harmful to wild animals, birds or aquatic life.

¶ 140 Accordingly, the "owner of the pollutant and the person having control of the pollutant" is liable for "loss or damage incurred as a result of ... the discharge of a pollutant ... without proof of fault, negligence or wilful intent." The plaintiffs have alleged, in general terms, that the defendants' products are "pollutants" within the meaning of the EMPA, that the defendants "discharged" the pollutant into the "environment" and that they were persons having control of the pollutants at the time of their first discharge. They allege that they have suffered loss or damage resulting from the discharge of the pollutants. It is the position of the plaintiffs that these general allegations are sufficient to raise a reasonable cause of action and that to delve further into the question of whether the statutory definitions of, for example, "pollutant", "environment" or "discharge" can be satisfied in the circumstances of this case would be to delve into the merits of the claim.

¶ 141 The defendants take the position that it is not sufficient for the plaintiffs to plead, as a conclusion, that GM canola is a "pollutant". They must plead sufficient facts to support that conclusion. The Act defines "pollutant" as a "substance that causes or may cause pollution of the environment". "Pollution", in turn, is the "alteration of the physical, chemical, biological or aesthetic properties of the environment" that will render the environment harmful or unsafe to the public health, for domestic, municipal, industrial, agricultural, recreational or other lawful uses of the environment or to wild animals, birds or aquatic life. The term "environment" is restrictively defined as meaning "the atmosphere ... water, or soil and subsoil."

¶ 142 As the pleadings stand, they contain no allegations that could satisfy these definitions and the facts that are alleged could not meet and, indeed, are inconsistent with these requirements. In effect, the

pleadings complain of the adventitious presence of GM canola in organic crops and fields caused, inter alia, by pollen drift.

¶ 143 The adventitious presence of GM canola is not alleged to have caused the alteration of the physical, chemical, biological or aesthetic properties of the atmosphere, water, soil or subsoil. The BCS argues:

> ... The adventitious presence of GM canola, wherever found, may constitute "the alteration of the physical, chemical, biological or aesthetic properties" of something, but it is not of water, soil or subsoil. In some cases it could be viewed as altering through cross-pollination the properties of other varieties of canola plants, but these canola plants themselves do not occur naturally. If Liberty Link canola varieties are "pollutants" so too is every other canola variety and likely every other open-pollinating plant developed by man. If the Plaintiffs are correct in asserting the applicability of the EMPA, all gene flow from one variety to another variety would constitute an "alteration". (BCS brief of law at tab 4, para. 172)

¶ 144 Of course, in order to satisfy the definition of "pollutant", it is necessary to allege not only "alteration" of the "environment" but also that the alteration renders the environment harmful or unsafe, as specified in s. 2(v)(i)-(iii). There is no allegation in the pleadings that the adventitious presence of GM canola is per se unsafe or harmful in the sense required by the definition of "pollution". To the contrary, the plaintiffs have pled at para. 15 of the statement of claim that Monsanto sought and obtained approval for the unconfined release of Roundup Ready canola from the Canadian Food Inspection Agency. That paragraph specifically refers to the decision document of the AAFC granting approval, which document is therefore incorporated by reference into the statement of claim. As I indicated in my introductory remarks, this decision included the finding that "this plant with novel traits does not present altered environmental interactions when compared to currently commercialized canola varieties and is considered substantially equivalent to canola currently approved as livestock feed." The AAFC concluded:

Unconfined release into the environment, including feed use of HCN92, and other B. napus lines derived from it, but without the introduction of any other novel trait, is therefore considered safe.

¶ 145 The same analysis applies to the equivalent pleading in relation to Liberty Link canola which is at para. 19.

¶ 146 In argument before me, counsel for the plaintiffs urged the Court to conclude that it was not necessary to allege or prove that GM canola is harmful or unsafe for the purpose of this cause of action except to the extent of alleging that the adventitious presence of canola has caused damage or loss to the plaintiffs in respect of loss of the market for organically grown canola and the costs related to removing volunteer GM canola plants from their fields, as already discussed. However, he indicated that if the Court were of a different view, the plaintiffs are prepared to amend the statement of claim to allege that GM canola is inherently unsafe. He pointed out that the plaintiffs have filed affidavit evidence that they intend to rely at trial on the testimony of Dr. Mae Wan Ho to this effect.

¶ 147 The affidavit in question is the third supplementary affidavit of the plaintiff Larry Hoffman sworn May 16, 2003. Mr. Hoffman deposed, in part, as follows:

> 3. One of the issues we are seeking to certify as a common issue is whether the Defendants' products are "pollutants" within the meaning of The Environmental

Management and Protection Act of Saskatchewan (the "EMPA"). Furthermore, we anticipate that the Defendants will argue that their products are safe, were adequately tested, and any prohibitions against them are unreasonable.

4. We intend to call expert opinion evidence in order to help establish the Defendants' products as "pollutants" and to rebut the Defendants' anticipated defences regarding the safety of their products. In that regard we have engaged Dr. Mae Wan Ho to help. Dr. Mae Wan Ho is a research scientist based in London, England who, based upon her Curriculum Vitae (a true copy of which is annexed hereto and marked as Exhibit "A", Tab 1 to this my affidavit), has studied and written extensively in the area of genetically modified crops and their dangers.
5. Based upon the Report that we have received from Dr. Mae Wan Ho ... we anticipate her evidence will be as follows:

...

(g) There are serious hazards associated with the Defendants' products. The transfer of transgenic constructs to the same or related species by ordinary cross-pollination has already been amply demonstrated. Less studied, but of greater concern, is "horizontal gene transfer" wherein the genetic construct is transferred to unrelated species interacting with GM crops such as microorganisms, earthworms and anthropods in the soil, insects, birds, mammals, and human beings.

(h) There is no evidence that horizontal gene transfer was adequately studied before the Defendants' products were released, no convincing evidence that it does not occur and, mounting evidence that it does in fact occur. This should cause very serious concern. The major hazards of horizontal gene transfer include

> the generation of new viruses and bacteria by recombination,

> spreading antibiotic resistant marker genes to pathogens,

> random insertion of transgenic DNA into genomes of cells leading to genetic damage, some of which may trigger cancer, and

> reactivation of dormant viruses which are in all genomes.

¶ 148 The proposed evidence of Dr. Ho continues in that vein and there is no need to set it out in detail. There is no question but that the defendants have been aware for a considerable period of time that the plaintiffs intend to rely on the opinion evidence of Dr. Ho and to allege and try to prove that GMOs in general and the defendants' GM canola in particular is inherently harmful and unsafe. For this reason, it is impossible for me to conclude that the plaintiffs' failure to plead this factor in relation to its claim under the EMPA is in itself fatal. It is at worst a technical flaw in the pleading, which does allege that the GM canola varieties are "pollutants", which can be addressed by an amendment to the pleading.

¶ 149 I agree that such a change would be a substantial change in relation to much of the statement of claim, which does not rely on any allegation that GM canola is inherently harmful or dangerous. However, the pleading of s. 13 of the EMPA does raise this issue and I am satisfied that the defendants are not caught by surprise by this allegation.

¶ 150 I agree with the defendant that the pleadings as they stand do not support a cause of action under s. 13 of the EMPA. However, I am unable to conclude that if the statement of claim were amended to allege as facts the opinions of Dr. Ho as described in the Hoffman affidavit, it would be plain and obvious that the claim that GM canola is a "pollutant" could not succeed. Certainly the plaintiffs' challenge would be formidable. However, if the opinions of Dr. Ho are alleged as fact and are assumed to be true, which they must be on this application, then it is reasonably possible, if not probable, that the plaintiffs' claim that these products are "pollutants" within the meaning of the Act would succeed. While the restricted definition of "environment" clearly remains a significant issue, I cannot conclude with certainty that, on the assumption that GM canola is harmful and unsafe in the ways claimed by Dr. Ho, that release of these species would not be found to constitute an "alteration" of the atmosphere or of the soil or subsoil.

¶ 151 However, there is a further issue raised by the defendants: whether, on the face of the pleadings, GM canola can be said to have been "discharged" into the environment and, if so, whether the defendants can be said to have been the "owners of a pollutant" or the "persons having control of a pollutant" immediately before the first discharge of the pollutants.

¶ 152 The plaintiffs take the position that there were two major "discharges": one occurring when the GM genes were first put into canola seed and sold to farmers, and the second when the IPP was dismantled. Further, they say that there is also arguably a "discharge" every time a pollen grain or seed containing one of the modified genes drifts from where it was planted.

¶ 153 Whether any of this can meet the definition of "discharge" in the Act is, to say the least, doubtful.

> 2(d) "discharge" means a discharge into the environment and includes any drainage, deposit, release or emission into the environment.

¶ 154 It is clear that "discharge" in this sense refers to a physical act that disperses the "pollutant" into the environment. It is important to remember that "environment" is also restrictively defined, as discussed above. It does, however, include the "atmosphere". Whether planting and growing open-pollinating GM canola satisfies the definition of discharge of the GM gene into the environment is at least arguable. However, simply marketing a product to be planted and grown by farmers cannot, in my respectful view, satisfy the definition of "discharge". Were it otherwise, merely marketing oil or toxic chemicals would be considered a "discharge" into the environment. Nor can dismantling, or abandoning, a program designed to keep GM canola separate from conventional canola for the purpose of the export market in itself constitute "discharging" something into the environment.

¶ 155 The further issue is whether either Monsanto or BCS can be said to have been an "owner of a pollutant" within the meaning of s. 2(r) ("the owner of a pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of the owner") or a "person having control of a pollutant" within the meaning of s. 2(t) ("the person having the charge, management or control of the pollutant immediately before the first discharge of the pollutant and includes a successor, assignee, executor or administrator of that person"). If the relevant "discharge" is confined to dissemination of the modified gene by cross-pollination or dispersal of GM canola seed during cultivation and harvest, as I believe is the only possible interpretation of the Act, it is difficult to see how either of the defendants, who sold the seed to farmers to cultivate, could be said to fit either of the relevant definitions.

¶ 156 The plaintiffs rely heavily on their belief that both defendants own the patent to their genetic

modification (although this is alleged in the statement of claim only as against the defendant Monsanto) and, in the case of Monsanto, on the fact that Monsanto has a contract with growers, "technology user agreements" which permit growers to grow Roundup Ready canola. Paragraph 16(a) of the statement of claim alleges:

> 16(a) The Technology User Agreement at all material times provided that the granting of a license to use the Roundup Ready gene did not grant ownership of the gene to the grower. Growers entering into the Technology User Agreement, furthermore, were not permitted to save canola for replanting with the Roundup Ready gene. The commercial production of Roundup Ready canola in Western Canada was, therefore, licensed by Monsanto Canada with ownership of the Roundup Ready gene at all times remaining with Monsanto Canada.

¶ 157 In my respectful view it is not reasonably arguable that ownership of a patent in the modified gene and enforcement of patent rights through "technology user agreements" are sufficient to constitute "ownership" or "control" of the "pollutant" (GM canola seed and resulting pollen) after the seed is sold to farmers and cultivated by them, as these words are used in the Act. The "control" asserted by the technology user agreement is not control of when and how GM canola is cultivated or harvested, but only control, or restriction, of the right to save and use seed from the GM crop.

¶ 158 It is my conclusion that, even if the plaintiffs were permitted to amend the statement of claim once again to assert facts sufficient to provide some support to the allegation that GM canola is inherently harmful or unsafe and is a "pollutant" within the meaning of the Act, the facts alleged in the statement of claim still would not be sufficient in law to sustain a claim under s. 13 of the EMPA, for they do not reasonably support the conclusion that the defendants owned or controlled the "pollutants" at the time they were discharged into the environment. At best, the action would lie against farmers who cultivate GM canola.

B. The Environmental Management and Protection Act, 2002, S.S. 2002, c. E-10.21 ("EMPA, 2002")

¶ 159 The EMPA was repealed and replaced by the EMPA, 2002 in 2002. The plaintiffs have amended the statement of claim to assert a cause of action under the new statute. The provision of the statute giving rise to civil liability is s. 15, which reads as follows:

> 15(1) In this section, "loss or damage" includes:
>
> (a) personal injury; (b) loss of life; (c) loss of use or enjoyment of property; and (d) pecuniary loss, including loss of income.
>
> (2) The amount of any costs and expenses incurred with respect to an investigation taken pursuant to section 8 is a debt due to and recoverable by the Crown in right of Saskatchewan from the persons responsible for the discharge.
>
> (3) Subject to subsections (4) and (5), any person, including the Crown in right of Saskatchewan or in right of Canada, has a right to compensation from:
>
> (a) the person responsible for a discharge for loss or damage incurred as a result of:
>
> (i) the discharge of a substance;
> (ii) neglect or default in the execution of a duty imposed pursuant to section 4; or

(iii) an investigation or action taken pursuant to section 8 or 52; and

...

(4) No person responsible for a discharge is liable pursuant to subsection (3) if that person establishes that:

(a) the person took all reasonable steps to prevent the discharge of the substance; or
(b) the discharge of the substance was wholly caused by all or any combination of the following:

(i) an act of war, civil war or insurrection, a terrorist activity or an act of hostility by the government of a foreign country;
(ii) a natural phenomenon of an exceptional, inevitable and irresistible character not reasonably foreseeable.

(5) Notwithstanding subsection (4), the person responsible for a discharge is liable for:

(a) loss or damage that is a direct result of the person's own neglect or default in carrying out a duty imposed pursuant to section 4 or 5 or an environmental protection order; and
(b) any costs and expenses described in subsection (2) or in section 51 or 52.

(6) No person is liable pursuant to this section or section 51 or 52 unless the action is commenced within six years from:

(a) if the claim arises pursuant to subsection (2) or section 51 or 52, the day when the last of the costs and expenses were incurred;
(b) if the person commencing the action incurred loss or damage as a result of the discharge of a substance, the day when the person knew or ought to have known of the loss or damage; or
(c) if the person commencing the action incurred loss or damage as a result of the execution or intended execution of, or neglect or default in the execution of, an environmental protection order, the day when the person knew or ought to have known of the loss or damage.

(7) The right of action granted pursuant to this section is in addition to, and not in derogation of, any other right of action or any other remedy available pursuant to any other Act or law.
(8) For the purposes of apportioning liability on a just basis, and recognizing that liability pursuant to this section or section 51 or 52 is not based on fault or negligence, The Contributory Negligence Act applies, with any necessary modification, to an action commenced pursuant to this section or section 51 or 52.

¶ 160 Sections 8, 51 and 52, referred to in s. 15, are not relevant to the plaintiffs' claim, but relate to certain remedies available to the Crown. It is, however, noteworthy that, unlike the civil liability

apparently arising pursuant to s. 15(3)(a)(i), these sections are restricted to circumstances where the discharge of a substance has caused or is causing an "adverse effect" within the meaning of the Act.

¶ 161 The Act includes the following definitions relevant to this discussion:

> 2 In this Act:
>
> (a) "adverse effect" means impairment of or damage to the environment, or harm to human health, caused by one or any combination of any chemical, physical or biological alteration;
>
> ...
>
> (h) "discharge" means a discharge into the environment and includes any drainage, deposit, release or emission into the environment;
> (i) "environment" means:
>
> (i) air and the layers of the atmosphere;
> (ii) land, including soil, subsoil, sediments, consolidated surficial deposits and rock;
> (iii) water;
> (iv) organic and inorganic matter and living organisms; and
> (v) the interacting natural systems and ecological and climatic interrelationships that include the components mentioned in subclauses (i) to (iv);
>
> ...
>
> (w) "person responsible for a discharge", with respect to a substance, includes:
>
> (i) an owner, or previous owner, of the substance;
> (ii) every person:
>
> (A) who has or had possession, charge, management or control of the substance, including the manufacture, treatment, sale, handling, use, storage, disposal, discharge, transportation, display or method of application of the substance; and
> (B) whose actions or omissions caused or contributed to the discharge;
>
> (iii) an owner, occupant or previous owner or occupant of land on which the substance is discharged;
>
> ...
>
> (bb) "substance" means any solid, liquid, particulate or gas that:
>
> (i) is capable of becoming dispersed in or discharged into the environment; or
> (ii) is capable of becoming transformed in the environment into matter defined in subclause (i).

¶ 162 It is to be noted that the terms "pollutant" and "pollution" no longer appear in this Act, replaced by the very liberally defined term, "substance", which, on its face, contains no reference to harmful or unsafe attributes. The definition of "discharge" is unchanged from the earlier Act, but the definition of "environment" had been enlarged to include, inter alia, organic and inorganic matter and living organisms. The definition of "person responsible for a discharge" with respect to a substance, if read literally, is dramatically broader than the comparable definitions in the former Act. Indeed, combined with other provisions of the Act, it appears to broaden the scope for civil liability in an astounding and therefore almost certainly unintended way, for it appears to sweep into the definition of "person responsible for a discharge" anyone who, at any time, owned or controlled the substance in question as well as anyone who, at any time, owned or occupied the land from which a substance was discharged. While almost all of the provisions of the EMPA, 2002 apply only in the circumstance where the discharge of a substance at issue causes "adverse effects", this requirement is conspicuously missing from s. 15(3)(a)(i) which in its relevant terms provides:

> ... any person ... has a right to compensation from ... the person responsible for a discharge for loss or damage incurred as a result of ... the discharge of a substance.

¶ 163 Coupled with the extremely liberal definition of "loss or damage" in s. 15(1), the scope for potential liability imposed, on a literal interpretation of this section, is staggering. The saving provisions in s. 15(4) do little to alleviate this result, for they would not necessarily exclude a manufacturer who only sold the "substance" and they make no mention of discharges which, apart from the loss or damage caused to the plaintiff, may be entirely benign in their environmental effect.

¶ 164 In this respect s. 15 giving rise to civil liability may be contrasted with s. 4 of the Act, which, by virtue of s. 74(2) creates an offence punishable by a fine up to $1,000,000, imprisonment up to three years or both:

> 4(1) No person shall discharge or allow the discharge of a substance into the environment in an amount, concentration or level or at a rate of release that may cause or is causing an adverse effect unless otherwise expressly authorized pursuant to:
>
> (a) this Act or the regulations;
> (b) any other Act, Act of the Parliament of Canada or the regulations made pursuant to any other Act or Act of the Parliament of Canada; or
> (c) any approval, permit, licence or order issued or made pursuant to:
>
> (i) this Act or the regulations; or
>
> (ii) any other Act, Act of the Parliament of Canada or the regulations made pursuant to any other Act or Act of the Parliament of Canada.
>
> (2) No person shall discharge or allow the discharge of a substance into the environment in an amount, concentration or level or at a rate of release that is in excess of that expressly authorized by an Act, Act of the Parliament of Canada, approval, permit, licence, order or regulations mentioned in subsection (1).

¶ 165 As can be seen, this provision applies only to discharges of substances that may cause an adverse effect, and does not apply to discharges authorized by governments or government agencies, (as was the release of GM canola in the case before me) so long as the discharge does not exceed the authority so conferred.

¶ 166 However, these limitations to criminal or quasi-criminal liability do not, on the face of the provision, appear to apply in relation to the civil liability imposed by s. 15(3)(a)(i). When this provision is combined with the broad definition of "person responsible for the discharge", the result appears to be to create a potential for civil liability in some respects much broader in scope than that arising under the law of nuisance or the rule from Rylands v. Fletcher.

¶ 167 Given this result, it is strongly arguable, in my view, that s. 15(3)(a)(i) is not intended to apply to "discharges" other than those prohibited in s. 4. I note that s. 15 is part of Part III of the Act, entitled "Protection against Unauthorized Discharges and Pollution". Part III is divided into three "Divisions". Division 1 of Part III, which begins with s. 4, quoted above, is entitled "Unauthorized Discharges". Division 2 is headed "Contaminated Sites" and includes ss. 10-14. Section 11(1) provides that a site may be designated by the minister as a "contaminated site" if he is of the opinion that a substance that may cause, is causing or has caused an adverse effect is present in an area. Section 15 is then the only section of Division 3 of Part III, which is headed "Civil Liability for Discharges". This organization supports an argument that the liability imposed by s. 15 is intended to arise only in relation to discharges of substances that are "unauthorized" and in some sense cause adverse effect.

¶ 168 Nonetheless, given the literal wording of s. 15, I am unable to say that it is plain and obvious that the plaintiffs' claim under this statute cannot succeed. This provision, so interpreted, would not require the plaintiffs to allege and prove that the "substance" at issue is inherently harmful or unsafe.

¶ 169 Having said that, it is important to note that, as this statute did not come into effect until 2002, the plaintiffs concede that this cause of action would not support a claim for loss of markets for organically grown canola. By 2002, GM canola was already widely grown and the damage alleged to have been caused to the organic canola market had, on the plaintiffs' pleadings, already irretrievably occurred. As the plaintiffs' counsel described the result, "The genie was already out of the bottle and could not be put back in." Accordingly, losses claimed for the continued "discharge" of GM canola into the environment after 2002 are limited to the alleged clean-up costs related to the presence of volunteer GM canola found on the land of organic farmers after the Act came into effect.

6. Does the statement of claim disclose a cause of action pursuant to s. 23 of The Environmental Assessment Act ("EAA")?

¶ 170 Paragraph 41 of the statement of claim provides as follows:

> 41. Further, or in the alternative, the Plaintiffs state that the testing and unconfined release of GM canola into the Saskatchewan environment was a "development" within the meaning of The Environmental Assessment Act (Saskatchewan) ("EAA"). The Defendants were therefore required to conduct and submit an environmental impact assessment for ministerial approval prior to proceeding. The Defendants failed to conduct and submit the required assessment and failed to obtain ministerial approval as required by the EAA. Pursuant to section 23 of the EAA, the Defendants are therefore liable for any loss or damage sustained by certified organic grain farmers represented by this action from the "development" without proof of negligence or intention. The Plaintiffs further rely upon the reverse burden of proof stipulated in section 23 of the EAA respecting whether the "development" caused such loss or damage.

¶ 171 The relevant provisions of the EAA are as follows:

8(1) Notwithstanding the requirements of any other Act, regulation or bylaw relating to any licence, permit, approval, permission or consent, a proponent shall obtain ministerial approval to proceed with a development, and no person shall proceed with a development until he has received ministerial approval.

(2) Where a conflict exists between any condition of any licence, permit, approval, permission or consent granted under any other Act, regulation or bylaw and a condition of the ministerial approval, the condition of the ministerial approval prevails.

(3) Notwithstanding subsection (1), a proponent may, subject to the regulations, conduct a feasibility study, including research and exploration, and may take any other necessary action to comply with this Act before obtaining ministerial approval to proceed.

9(1) The proponent of a development shall, in accordance with the regulations:

(a) conduct an environmental impact assessment of the development; and
(b) prepare and submit to the minister an environmental impact statement relating to the development.

(2) The proponent shall bear all costs incurred in carrying out an assessment and in the preparation and submission of a statement.

...

21 Any person who contravenes subsection 8(1) ... is guilty of an offence and liable on summary conviction to a fine of not more than $5,000 and, in the case of a continuing offence, to a further fine of not more than $1,000 for each day or part of a day during which the offence continues.

...

23(1) Where any person proceeds with a development for which ministerial approval is required without:

(a) being given ministerial approval; or

(b) being exempted pursuant to section 4;

he is liable to any other person who suffers loss, damage or injury as a result of the development, and that other person is not required to prove negligence or intention to inflict loss, damage or injury.

(2) The burden of proving that any loss, damage or injury was not caused by a development is on the person who proceeds with the development.

¶ 172 The following terms are among those defined in s. 2 of the Act:

(a) "assessment" means an environmental impact assessment required under section 9;
(b) "contaminant" means any substance, whether gaseous, liquid or solid, that:

(i) is foreign to or in excess of the natural constitutents (sic) of the environment; or
(ii) affects the natural, physical, chemical or biological quality of the environment;

and that is or may be injurious to the health or safety of persons or injurious or damaging to property or to plant or animal life;

...

(d) "development" means any project, operation or activity or any alteration or expansion of any project, operation or activity which is likely to:

(i) have an affect (sic) on any unique, rare or endangered feature of the environment;
(ii) substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose;
(iii) cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or regulation;
(iv) cause widespread public concern because of potential environmental changes;
(v) involve a new technology that is concerned with resource utilization and that may induce significant environmental change; or
(vi) have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment;

(e) "environment" means":

(i) air, land and water;

(ii) plant and animal life, including man; and

(iii) the social, economic and cultural conditions that influence the life of man or a community insofar as they are related to the matters described in subclauses (i) and (ii).

...

(j) "person" includes a body corporate or other legal entity, an unincorporated association, partnership or other organization, a municipality and the Crown, a Crown corporation or an agency of the Crown;
(k) "pollutant" means a substance, including a contaminant, which results, or is likely to result, in pollution of the environment;
(l) "pollution" means alteration of the physical, chemical, biological or aesthetic properties of the environment, including the addition or removal of any contaminant, that:

(i) will render the environment harmful to public health;
(ii) is unsafe for or harmful to domestic, municipal, industrial, agricultural, recreational or other lawful uses of the environment; or
(iii) is harmful to wild animals, birds or aquatic life;

(m) "proponent" means a person who proposes or desires to undertake a development.

¶ 173 Thus, s. 23 of the Act imposes civil liability on any "person" (a term which includes a corporate body) who proceeds with a "development" (a term defined in s. 2 (d)) for which ministerial approval is required without obtaining that approval. Section 8 of the Act requires ministerial approval before any person proceeds with any "development" unless a specific exemption is sought and obtained. Failure to comply with this section results in both quasi-criminal and civil liability, under ss. 21 and 23, respectively. The civil liability imposed by s. 23 is both strict and sweeping, for the section makes the person who proceeds with the development without approval liable to any other person who has suffered loss, damage or injury as a result of the development without proof of negligence or intention to inflict loss, damage or injury. Further, and even more remarkably, the section imposes the burden of proving that any loss, damage or injury was not caused by a development on the person who proceeds with the development without ministerial approval.

¶ 174 The statement of claim clearly alleges that the defendants tested, developed and commercially released GM canola to be grown on a widespread basis in Saskatchewan and that they did not obtain ministerial approval before doing so. The most significant question raised by this proposed cause of action is therefore whether the testing, development and commercial release of GM canola constitute a "development" within the meaning of the Act.

¶ 175 The general words of the statutory definition of "development", viz., "any project, operation or activity", are very sweeping and would appear, on their face, to be broad enough to encompass the testing, development and commercial release of GM canola or, for that matter, of any product whatsoever. The question then is whether this activity is or was (I set to one side the question, "At what point in time?") likely to result in any of the consequences set out in subclauses (i) to (iv) of s. 2(d).

¶ 176 Given the very serious criminal and civil liability that flow from failure to comply with s. 8(1), coupled with the sweeping scope of the general words of the statutory definition of "development", one might expect that the criteria defining precisely when the obligation to obtain ministerial approval arises would be clear and objective, leaving no room for doubt in the minds of those engaged in "any project, operation or activity" in Saskatchewan. This is far from the case. Rather, subclauses (i) to (iv) of s. 2(d) are replete with qualifications that require judgments of degree. They read, in fact, as if they were criteria to be employed in the exercise of a discretion. What, for example, constitutes a "unique, rare or endangered feature of the environment" and when can a project, operation or activity be said to have an "affect" on such a feature? (subclause (i)). What constitutes the "substantial" utilization of a provincial resource and what, in any case, is encompassed by the term "provincial resource"? (subclause (ii)). How much public concern of potential environmental changes must there be for it to be "widespread"? Need such concern be well founded? (subclause (iv)). How much environmental change or impact on the environment is "significant"? (subclauses (v) and (vi)).

¶ 177 This Act cries out for a mechanism to determine the scope of its application-a designated official, perhaps, who is given discretion to determine, in accordance with the overtly vague, flexible and general criteria set out in the statutory definition, when and whether a project, operation or activity constitutes a "development" requiring ministerial approval. No such mechanism is provided. Further, although s. 9 requires the proponent of a development to conduct an environmental impact assessment and prepare and submit an environmental impact statement relating to the development to the minister, "in accordance with the regulations", no regulations have been passed pursuant to this statute.

¶ 178 In its guide, The Environmental Assessment & Review Process (posted on the internet at http://www.se.gov.sk.ca/environment/assessment/reviewprocess.htm) Saskatchewan Environment suggests:

> The best approach for the proponent (person or group making the proposal) is to contact

> the Environmental Assessment Branch of Saskatchewan Environment before the project begins. After speaking to the project proponent, branch staff may request a project proposal. Staff of the Environmental Assessment Branch screen project proposals brought to them by developers, the public and other government departments. They also review government publications and the media for new projects that may be considered developments. A panel of technical experts within the provincial government then reviews the project proposal. Federal departments may also review a project if federal laws apply.
> The branch then advises the proponent whether or not the project is considered a "development" under the Act. If it's not a development Saskatchewan Environment will notify the proponent that further review will not be required. But the project must still meet all other applicable legislation (for example, fire, safety, health standards and hazardous substances regulations, etc.).

¶ 179 An example of the screening process of Saskatchewan Environment can be seen in the Quarterly Status Report in relation to project proposals received by Environmental Assessment for the fourth quarter of 2004 (published by the Environmental Assessment Branch of Saskatchewan Environment). It appears that projects screened by this Branch are coded either "NFS" (in which case an opinion is provided to the proponent that based on the information they have provided the project does not meet the definition of "development" under the Act and that they may now proceed with an application for all other regulatory permits or approvals required without seeking ministerial approval under s. 8 of the Act) or "EIA" (in which case the proponent is advised that their project is a "development" as defined by the Act and they will be required to conduct an Environmental Impact Assessment and seek ministerial approval before proceeding with the project).

¶ 180 As the case law makes clear, however, the advice given to project proponents by the Environmental Assessment Branch is not determinative of whether the Act applies.

¶ 181 In Saskatchewan Action Foundation for the Environment Inc. v. Saskatchewan (Minister of the Environment and Public Safety) (1992), 97 Sask.R. 135, the Saskatchewan Court of Appeal had to determine whether and to what extent the public has the right of access to documents relating to developments seeking ministerial approval. By way of background and context, Sherstobitoff J.A., writing for the majority, addressed the purpose and scheme of the Act. Noting that no regulations had been promulgated pursuant to the Act, he continued:

> ... As a matter of policy, the department screens project proposals to determine whether or not ministerial approval under the Act will be required for a particular project. If the screening indicates that approval will be required, in other words, that the project proposal is a "development" as defined by the Act, then s. 9(1) applies. (at para. 28)

¶ 182 In that case, the minister had taken the position that the Act did not apply to two of the projects for which the applicants had sought disclosure of documents. Sherstobitoff J.A. questioned whether the minister had power under the Act to make a determination binding on third parties as to whether a project was a "development" within the meaning of the Act. He noted that the Act is silent on the issue and, after examining the interaction and effect of ss. 4, 5, 8, 18, 21, and 23, concluded:

> ... Under each of these enforcement provisions [i.e., ss. 18, 21 and 23] a court would have to determine whether or not there was a development within the meaning of the Act. There is no provision that a determination of the question by the Minister under the provisions of s. 8(1) would be binding on the Court or conclusive of the question. In the absence of such a provision, the legislators must be deemed to have left the question, in

the case of a dispute, to be determined by the courts.
All of the foregoing indicates that the issue of development or no development, in the case of a dispute between interested parties, should be resolved, as in all other cases of statutory interpretation, by the courts, unless the authority to make that decision has been expressly conferred upon some other body. Since the necessary authority has not been explicitly confided to the Minister under the terms of the Act, the decision must rest with the courts.
Accordingly, the decisions by the Minister that Saferco and Island Falls were not developments within the meaning of the Act are not binding upon the appellant for the purposes of this application and, accordingly, the appellant may rely upon the provisions of the Act to demand access to the documents in question. ... (at paras. 69-71)

¶ 183 Although the dissent in this case noted, in a slightly different context, that the Act has "some rather obvious shortcomings" and "is not without its problems" (per Wakeling J.A. at paras. 106 and 108), the majority did not comment on the implications in relation to the enforcement provisions of the Act of its conclusion that ministerial determination of whether a project is a "development" is not binding on third parties and that this determination can only be made by the courts. These implications became more apparent, although still without much comment as to the shortcomings of the legislation, in subsequent cases.

¶ 184 The somewhat convoluted judicial history of an intensive pig operation undertaken by Kelvington Super Swine Inc. illustrates the difficulties in which parties relying upon departmental advice as to whether a project is a "development" may find themselves. Kelvington initially submitted its proposal to the provincial Department of Agriculture and Food and, after an intensive investigation, obtained approval pursuant to provisions of The Agricultural Operations Act, S.S. 1995, c. A-12.1, and the regulations thereunder. It then obtained an opinion from the Environmental Assessment Branch of Saskatchewan Environment and Resource Management that an environmental impact statement under the EAA was not required for the project. Relying on this advice, Kelvington proceeded to invest and commit nearly $8 million to three sites.

¶ 185 Its progress was interrupted when a group of individuals sought and obtained a declaration from the Court of Queen's Bench that the intensive livestock operation proposed by Kelvington was a "development" pursuant to the Act. Although this decision was subsequently overturned on appeal (see Irving v. Kelvington Super Swine Inc. (1997), 163 Sask.R. 87 (C.A.), a decision to which I will return), in the meanwhile the Minister responsible for the EAA, relying on the Queen's Bench declaration, sought an injunction enjoining Kelvington from proceeding with its project. In the event, the injunction was denied by Barclay J., who concluded as follows:

In the case at bar the Minister and his Department approved the intensive livestock operation and further specifically advised the respondents that the project was not a "development" within the meaning of the Act and therefore not in need of an environmental impact assessment. This was after one of "the most comprehensive review processes available for an (sic) livestock operation". It was in reliance on these assurances and the Minister's actions in other similar situations where no environmental assessment was sought for an intensive livestock operation that the respondents purchased the said lands, expended and committed millions of dollars and made commitments which require them to finish construction during the winter months of 1997.
Furthermore, after Sirois J., declared that the project was a "development" within the meaning of the Act, the respondents gave their undertaking not to commence the

intensive livestock operation until these issues were resolved.
I am therefore of the opinion that the injunction should not issue as the Minister in the exercise of his power has caused an injustice to the respondents without any countervailing benefit to the public. In my view there is an element of unfairness to the respondents when the Minister, after advising the respondents that there was no need for an environmental assessment, applies for an injunction to stop construction before the winter freeze in the face of an undertaking by the respondents not to engage in any activities which could in any way affect the environment until this matter is resolved.
Therefore, in the exercise of my discretion I am dismissing the application for an injunction. ... [Saskatchewan (Minister of Environment and Resource Management) v. Kelvington Super Swine Inc. (1997), 161 Sask.R. 111 at paras. 30-33].

¶ 186 This reprieve would only have been temporary, of course, except that when the earlier decision came before the Court of Appeal in Irving (supra), that Court concluded that the proposal was not a development as defined in s. 2(d) of the EAA, explaining:

An examination of the material filed indicates that the criteria for the project to be a development have not been met. An examination of each of the criteria set forth in s. 2 (d) which we set out in full indicates:

i) Have an effect on any unique, rare or endangered feature of the environment. There is no evidence of any unique, rare or endangered feature of the environment which may be affected by the project.
ii) Substantially utilize any provincial resource and in so doing preempt the use, or potential use, of that resource for any other purpose. There is evidence that the proposal will require the use of a large quantity of water on an ongoing basis, but Sask. Water has expressed no concern with respect to the water usage and therefore one can conclude that no preempted use of this or other provincial resources was indicated.
iii) Cause the emission of any pollutants or create by-products, residual or waste products which require handling and disposal in a manner that is not regulated by any other Act or Regulation. Liquid manure is a possible pollutant from this project. The storage and use of liquid manure as fertilizer is regulated by the Agricultural Operations Act which is administered by the Department of Agriculture. That department examined the project and gave its approval. It is unlikely, therefore, that there will be unregulated material being emitted from the site.
iv) Cause widespread public concern because of potential environmental changes. There was an indication of public concern related in part at least to the potential effects on the environment of the proposal. A great deal of information is contained in the affidavits and the supporting material concerning the number of public meetings which were held and the number of petitions which were circulated and signed by people in the area of the project. It is fair to conclude that while there has been some public concern expressed about the possible environmental effect of these proposals in the Kelvington area by some groups, that concern is not wide-spread. From the material we examined it is doubtful the number of people expressing concern may not even represent a majority of the residents in the area of the project. While there is local interest in the proposal and local concern about possible environmental effects, those concerns are not wide-spread.
v) Involve a new technology that is concerned with resource utilization and that may

induce significant environmental change. There was no evidence that the technology in the proposed project involved resource utilization. The technology proposed is not new and appears reliable. Several similar operations have been in place for many years.

vi) Have a significant impact on the environment or necessitate a further development which is likely to have a significant impact on the environment. The proposed activity falls under existing regulations and controls and no secondary developments are required.

¶ 187 It is apparent that, but for the restrictive interpretation given by the Court of Appeal to "widespread public concern", the reprieve accorded to Kelvington by the interim injunction would only have been temporary and its reliance upon the Department's initial interpretation of the Act would have proved costly indeed. What these cases clearly indicate is that there is no conclusive way for a proponent of a project to determine whether a project is a "development" under the Act, short of a court decision. The screening process recommended by Saskatchewan does not settle the matter conclusively and the minister's power to approve a project pursuant to s. 8 does not empower him or her to determine conclusively whether an activity is a "development" that requires ministerial approval.

¶ 188 Court decisions interpreting the scope of the definition of "development" offer limited guidance to date. The Court of Appeal in Irving, supra, found that an intensive pig operation that had been approved after an extensive review by the Department of Agriculture was not a "development". Key to its decision were a finding that the operation did not affect any unique, rare or endangered feature of the environment and the conclusion that merely local public concern as to possible environmental effect of the proposals, not representing a majority of residents in the project area, did not constitute "widespread public concern because of potential environmental changes" within the meaning of s. 2(d)(iv). In Saskatchewan (Minister of the Environment) v. Redberry Development Corp. (1987), 58 Sask.R. 134 (Q.B.), aff'd (1992), 100 Sask.R. 36 (C.A.), a resort development adjacent to a lake containing nesting grounds for endangered birds was held to be a "development" within the meaning of s. 2(d)(i), (iv) and (vi). In University of Regina Faculty Assn. v. University of Regina (1999), 182 Sask.R. 85 (Q.B.), the Court held that the construction of a petroleum facility on the campus of the university that would entail construction of water and sewer lines on nine research plots did not amount to "a project or activity which will impact on a unique or rare feature of the environment" within the meaning of s. 2(d)(i) even though these plots were used in a scientific experiment involving prairie grassland that might be considered unique. The Court commented, "The principles derived from the Redberry decision is that the Act exists to protect indigenous or natural features of the environment." (at para. 47)

¶ 189 In the case at bar, the plaintiffs argue that the two categories listed under s. 2(d) most likely to apply to this case are s. 2(d)(iv), a project, operation or activity that may cause "widespread public concern because of potential environmental changes" and s. 2(d)(v), one that "involve[s] a new technology that is concerned with resource utilization and that may induce significant environmental change."

¶ 190 In my view it is plain and obvious that the activities of the defendants complained of do not fall into the categories identified under the statutory definition of "development" in subclauses (i), (ii) and (iii). In particular, the plaintiffs do not allege that GM canola is likely to have an effect on any unique, rare or endangered feature of the environment, as required by subclause (i); that the activities would likely substantially utilize any provincial resource ((ii)); or that they would cause the emission of pollutants or by products that require handling and disposal in a manner not regulated by any other Act or regulation ((iii), a provision clearly relating to hazardous substances or wastes). I am satisfied that subclause (v) may also be ruled out, for, although the development of GM canola might involve "new

technology", it clearly is not concerned with resource utilization.

¶ 191 It is not in my view plain and obvious that the plaintiffs could not prove that the development of GM canola caused widespread public concern because of potential environmental changes or that it is (or was) likely to have a significant impact on the environment, particularly given the relatively broad definition of "environment" in s. 2(e). The question, however, is whether the pleadings are sufficient to raise these issues. Just as it is not sufficient, in my view, for the plaintiffs to plead the conclusion that GM canola is a "pollutant", without more, in order to raise the issue of the application of the EMPA, neither is a general pleading that the testing, development and marketing of GM canola constitutes a "development" within the meaning of the EAA, in itself a sufficient pleading of facts sufficient to raise the issue of the application of this Act. Certainly, there is no explicit pleading that the testing or release of GM canola was, at the relevant time, likely to cause "widespread public concern" and the pleading that GM canola has been widely adopted by Saskatchewan farmers might be construed as a pleading to the contrary. Nonetheless, I am satisfied that this is a merely technical defect that can be easily cured by amendment, without prejudice to the defendants, who will not be caught by surprise that the plaintiffs intend to try to prove this allegation. On the other hand, it is pled that the open-pollinating nature of GM canola results in the cross-pollination (and, presumably, therefore some alteration) of conventional canola crops. Whether this might be found to be a "significant impact" on plant life is at least open to argument.

¶ 192 In conclusion, while the cases I have discussed suggest that it might well be very difficult for the plaintiffs to prove that the testing, development and commercialization of GM canola was a "development" within the meaning of the EAA, it is nonetheless impossible for me to conclude that it is "plain and obvious" that this statute does not apply in these circumstances, and that no cause of action under this Act can arise.

¶ 193 There is no definition of "loss or damage" in this Act comparable to s. 13(1) of the EMPA. Nor have there been any judicial interpretations of the scope of s. 23(1), which imposes civil liability where any person proceeds with a development without ministerial approval. It is therefore open to debate whether this section imposes liability for pure economic loss, such as the alleged loss of market for organic canola claimed by the plaintiffs in this case. Certainly, there is ample room for doubt that the Act was designed to address this type of loss. Nonetheless, I am unable to conclude that it is "plain and obvious" that this claim could not succeed. Similarly, the claim for loss or damage arising out of the adventitious presence of volunteer GM canola plants on the land of organic farmers cannot be ruled out at this stage. Accordingly, it is my conclusion that there is a reasonable cause of action in relation to both of these claims pursuant to the EAA.

Conclusion re causes of action

¶ 194 I have concluded that it is "plain and obvious" that the pleadings fail to disclose a reasonable cause of action in relation to the common law causes of action in negligence (as is asserted in paras. 34, 35 36 and 36(a) of the claim), in strict liability based on the rule in Rylands v. Fletcher (as is asserted in para. 37), or in trespass, (as is asserted in para. 39). I also concluded that the pleading in nuisance (at para. 38), is insufficient subject only to the very remote possibility that the claim can be linked to a failure on the part of the defendants to comply with the environmental protection requirements of the EMPA, 2002 of the EAA. I pointed out that, as this would require a determination that the defendants had failed to comply with the requirements of these statutes, giving rise to the civil remedies in the statutes, a claim in nuisance would, in that event, in any case be entirely redundant. With regard to the claims under the three environmental statutes, I concluded that there is no cause of action under the original EMPA, (pled in para. 40). However, I found that, given the uncertainties in statutory interpretation under the EMPA, 2002 and the EAA, it cannot be said that it is plain and obvious that the

claim in relation to these statutes (in paras. 40 and 41), could not succeed. The claim under the EMPA, 2002 is conceded to relate only to the losses claimed in relation to volunteer GM canola plants appearing in organic fields, and not to loss of markets for organic canola, since it did not come into effect until the year 2002. The claim under the EAA is not similarly restricted.

¶ 195 Accordingly, I conclude that the plaintiffs have succeeded in satisfying the court that the pleadings disclose a reasonable cause of action under the above said two environmental statutes. They have not satisfied the court that there is otherwise a reasonable cause of action in relation to any of the common law claims pled, or under the original EMPA.

B. Criterion 2: Is the Court satisfied that there is an identifiable class?

General Considerations

¶ 196 Subsection 6(b) of The Class Actions Act requires the plaintiffs to satisfy the Court that there is an "identifiable class". In the instant case, the plaintiffs have proposed a class defined as all organic grain farmers in Saskatchewan who were certified organic grain farmers at any time between January 1, 1996 and the date of certification by any of six named private certification organizations (see para. 2, supra). (The notice of motion actually says "between January 1, 1996 and December 31, 2001". However, the statement of claim was amended February 2, 2004, well after the date of the notice of motion, to assert the claim on behalf of the larger class. It appears that the notice of motion was not amended to take this change into account, but all parties treated the proposed class as the larger one.)

¶ 197 In Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 S.C.C. 46, the Supreme Court of Canada explained the rationale for the requirement of an identifiable class as follows:

> ... Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria. ... (at para. 38)

¶ 198 In the instant case I am satisfied that the proposed definition would provide an objective basis by which members of the proposed class could reasonably be identified without reference to the merits of the claims asserted. Essentially, each potential member of the class would have to establish that he or she grows or has grown certified organic grain and is or was certified to do so by one of the six named private organic certifiers.

¶ 199 Admittedly, there is considerable confusion on this point in the plaintiffs' material filed in support of the certification application. The affidavit of the plaintiffs' witness, J. Wallace Hamm (September 11, 2002), originally estimated the size of the proposed class as approximately 950. This was based on an estimate of the total membership among the six private organic certifiers for 2001, a figure that was itself later revised downward when challenged by BCS's witness, Peter Phillips. However, even the revised figure fails to distinguish organic grain farmers from other organic producers, such as organic cattle producers who have organic pasture land, producers of organically grown hay and

organic horticultural producers such as growers of organic herbs. Nor does the figure take into account data from any year other than 2001.

¶ 200 Despite these deficiencies in the plaintiffs' attempt to estimate the size of the class, I am satisfied that the narrow requirement of criteria that permits objective identification of potential class members, according to the proposed definition, is met. As Winkler J. pointed out in Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. J. (Gen. Div.)), all that is required is a class definition that would enable the Court to determine whether any person coming forward was or was not a class member. That the identity of many individuals who would come within the class definition are not presently known does not constitute a defect in the class definition. (at para. 11)

¶ 201 Although it is required that the criteria for identity as a class member be "objective", this does not mean that they cannot involve individual inquiry. They should not, however, depend upon the proof of an individual's state of mind.

¶ 202 That the proposed definition would provide objective criteria for determining class membership, however, is but the beginning of the inquiry. As Winkler J. pointed out in Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Ont. Ct. J. (Gen. Div.)), the mere fact that a group of people is identifiable is not sufficient to render them a class for the purposes of the Act. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. This is implicit, Winkler J. held, in the requirement that the claims or defences of the class members must raise common issues. In Lau v. Bayview Landmark Inc. (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.), Winkler J. pointed out that a class cannot exist absent a core element of commonality, which must arise from the cause or causes of action pled. This requirement has often been interpreted to mean that all members of the class must have at least a colourable claim and the class definition should not be "over-inclusive", sweeping in those who do not have a claim against the defendants.

¶ 203 In Mouhteros, the defendant operated a private post-secondary educational institution in Ontario and Alberta. The proposed representative plaintiff claimed that the defendant had misrepresented the quality of its programs, facilities and the marketability of its graduates. The claim was asserted for a proposed class of all persons who had attended the institutions as students over a period of six years, alleging that they had detrimentally relied on misrepresentations made by the defendant. Winkler J. held that the proposed class was over-inclusive, for it included as members many individuals who were satisfied with the program offered by the defendant and would therefore have no claim. In addition, as the alleged misrepresentations were found in 67 different television commercials, 30 different newspaper ads, and the verbal representations of 122 admissions officers over a six-year period, the question of whether the misrepresentations were false, misleading, made negligently or fraudulently would vary according to the context and therefore could not constitute common issues. Finally, it was held that a class proceeding was not the preferable procedure, for even if the question of whether misrepresentations had been made was held to be a common issue, its resolution would be only the beginning of the liability question, for each student's experience is idiosyncratic and liability would be subject to numerous variables for each class member. Such a class action would be completely unmanageable, overwhelming any advantage to be derived from a trial of the few common issues.

¶ 204 Pearson v. Inco Ltd. (2002), 33 C.P.C. (5th) 264 (Ont. S.C.J.), involved a claim for toxic contamination by dangerous carcenogenic chemicals into the environment that accumulated in nearby lands. The representative plaintiff proposed a class of homeowners and occupiers living within a defined area since 1975. This class was found to be improperly defined because it included some people who had no claim and arbitrarily excluded others who had an identical claim, but lived outside the defined boundaries, or had moved away before 1975.

¶ 205 See also Lacroix v. Canada Mortgage & Housing Corporation (2003), 36 C.P.C. (5th) 150 (Ont. S.C.J.), where the certification motion was dismissed because the plaintiffs failed to show that the class definition had a rational relationship to proposed common issues concerning loss of pension benefits as a result of "partial termination" when the proposed class included persons who were not affected by the partial termination.

¶ 206 In addition, it has been held that, while class proceedings legislation does not contemplate a detailed assessment of the merits of the claim of the representative plaintiff or of the claims of the members of the proposed class on the certification application, the representative plaintiff must provide a minimum evidentiary basis for a certification order, including sufficient factual basis for the Court to be satisfied that there is a class of more than one person and that the issues raised by members of the class satisfy the requirement that they raise common issues and that a class proceeding would be the preferable procedure for the resolution of the common issues.

¶ 207 Thus, in Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Ont. Ct. (Gen. Div.)), the proposed representative plaintiff sought certification for the class of all residents of an apartment building where she resided based on the alleged presence of a certain mould in the building. She presented no evidence that mould had been found in any apartment other than her own and no details of the harm alleged. Sharpe J. dismissed the application, holding that the representative plaintiff must provide a minimum evidentiary basis on a certification application to establish a factual basis for the Court to be satisfied that there is a class of more than one person and that the issues raised by the members of the class satisfy the requirement that they raise common issues and that a class proceeding would be the preferable procedure for the resolution of the common issue.

¶ 208 Both principles, that the class definition must bear a rational relationship to the cause of action and the proposed common issues (and therefore must not be unreasonably over-inclusive or under-inclusive), and that the representative plaintiffs must establish an evidentiary basis to permit the factual conclusion that such a class exists, were upheld by the Supreme Court of Canada in Hollick v. Toronto (City), supra, a case involving a claim in nuisance against the city in relation to noise and pollution from a landfill, sought to be certified as a class proceeding on behalf of a class of some 30,000 other residents who lived in the vicinity of the landfill. McLachlin C.J.C. commented as follows:

> ... The first question ... is whether there is an identifiable class. In my view, there is. The appellant has defined the class by reference to objective criteria; a person is a member of the class if he or she owned or occupied property inside a specified area within a specified period of time. Whether a given person is a member of the class can be determined without reference to the merits of the action. While the appellant has not named every member of the class, it is clear that the class is bounded (that is, not unlimited). ...
> A more difficult question is whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c) of the Class Proceedings Act, 1992. ...
> In this case there is no doubt that, if each of the class members has a claim against the respondent, some aspect of the issue of liability is common within the meaning of s. 5 (1)(c). For any putative class member to prevail individually, he or she would have to show, among other things, that the respondent emitted pollutants into the air. At least this aspect of the liability issue (and perhaps other aspects as well) would be common to all those who have claims against the respondent. The difficult question, however, is whether each of the putative class members does indeed have a claim-or at least what might be termed a "colourable claim"-against the respondent. To put it another way, the issue is whether there is a rational connection between the class as defined and the asserted common issues. ...

> The respondent is of course correct to state that implicit in the "identifiable class" requirement is the requirement that there be some rational relationship between the class and common issues. Little has been said about this requirement because, in the usual case, the relationship is clear from the facts. In a single-incident mass tort case (for example, an airplane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock). In a case such as this, however, the appropriate scope of the class is not so obvious. It falls to the putative representative to show that the class is defined sufficiently narrowly.
>
> 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. ...
>
> The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. ...
>
> ...
>
> I agree that the representative of the asserted class must show some basis in fact to support the certification order. ... In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the Act, other than the requirement that the pleadings disclose a cause of action. ... (at paras. 17-25)

¶ 209 In Hollick, the Chief Justice concluded that the representative plaintiff had met the evidentiary burden of establishing the existence of a common class. He had submitted 115 pages of complaint records documenting almost 300 complaints between July 1985 and March 1994, 200 complaints in 1995, and 150 complaints in 1996. The Chief Justice concluded that while it was difficult to determine exactly how many separate complaints were brought in any year, it was clear that many individuals besides the appellant, from many different areas within the specified boundaries, were concerned about noise and physical emissions from the landfill.

¶ 210 The Chief Justice nonetheless concluded that a class proceeding was not the preferable procedure, largely because any common issue in the case would be negligible in relation to the individual issues, pointing out that it was likely that some areas were affected more seriously than others, and some areas were affected at one time while other areas were affected at other times. Some class members were close to the site, others far away. She concluded: "Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action." (at para. 32)

¶ 211 As these and other cases indicate, the requirement of a rational connection between the class definition and the proposed causes of action and common issues is an issue that overlaps the two criteria for certification in s. 6(b) and (c): that there be an identifiable class and that the claims of the class members raise common issues. It is referred to by McLachlin C.J.C. in Hollick, for example, as the "commonality requirement" and is dealt with in a discussion that incorporates the two questions, whether the claims of the class members raise common issues, and whether the class is defined sufficiently narrowly. This discussion follows the Court's earlier conclusion that there was in that case an "identifiable class". Nonetheless, it is clear that, however one classifies the issue, in addition to offering a class definition that would permit objective determination of whether an individual is a member of the class, the proposed representative plaintiff must provide evidence that the class members,

so identified, have, in common, the claims alleged in the statement of claim.

¶ 212 Problems associated with perceived lack of rational connection, or lack of commonality, are also frequently seen as relevant to the further requirement for certification, that a class proceeding be shown to be the preferable procedure. Thus, the more the interests and issues among the members of the identified class are seen to vary from individual to individual, the less likely is the Court to conclude that a class proceeding is the preferable procedure for resolving the conflicts. See for example, MacDonald (Litigation Guardian of) v. Dufferin-Peel Catholic District School Board (2000), 20 C.P.C. (5th) 345 (Ont. S.C.J.), where, on an application to certify a claim in relation to mould contamination on behalf of approximately 22,000 students in 1000 portable classrooms in 120 schools, (and where the certification judge was not satisfied that there was widespread illness caused by the mould), certification was rejected on the basis that a class proceeding was not the preferable procedure because of the difficulty of separating common issues from individual ones.

¶ 213 Accordingly, there is some inevitable overlap in the discussion of these three criteria for certification. Nonetheless, I have concluded that it is possible to separate the question of whether there is a rational relationship between the proposed class definition and the claims raised by the statement of claim from the questions discussed in the next section of this judgment, whether the "common issues" proposed by the representative plaintiffs satisfy that requirement for certification. The question raised at this point, in my view, is the question of the extent to which the proposed class definition is related to the two principal claims in the statement of claim: the claim for loss by organic farmers of a market for organic canola due to the alleged inability to produce, or to guarantee, a crop free from the adventitious presence of GM canola, and the claim for loss, including clean-up costs and other restrictions on organic production imposed by private certifiers, caused by the presence of "volunteer" GM canola in organic fields.

¶ 214 What evidence is there, then, on this application, that members of the proposed class have, in common, suffered the losses claimed?

¶ 215 This discussion must begin with the observation that the theory of the plaintiffs' claim in this case has changed and evolved since the statement of claim was issued in January 2002, and since the application for certification and supporting affidavits were initially filed on December 19, 2002. Since that time, the statement of claim has been twice amended as well as supplemented by replies to demands for particulars, the notice of motion for certification has been amended, redefining, inter alia, the common issues sought to be certified, many replacement, supplementary and reply affidavits have been filed and a number of the plaintiffs' affiants have been cross-examined by the defendants.

¶ 216 Initially, the claim was, essentially, that the widespread adventitious presence of GM canola rendered impossible the production of organic canola that would comply with the certification standards of the private organic certifiers, resulting in the loss of a valuable crop to organic grain farmers. This was coupled with a claim that the then anticipated introduction of GM wheat would have a similar result in relation to the production of organic wheat. The plaintiffs sought to enjoin the introduction of GM wheat.

¶ 217 Under the current pleadings and certification application, the claims in relation to the potential introduction of GM wheat have been abandoned. This is of some significance in understanding the original definition of the proposed class, for there is evidence that wheat is a crop much more widely grown by organic farmers than canola ever was. It is therefore arguable that the number of organic farmers who might have been harmed by the introduction of GM wheat would have been considerably larger than those affected by an inability to grow organic canola, and this may provide some explanation for the original, but still unamended, definition of the potential class proffered by the plaintiffs in this

case.

¶ 218 In addition, the demands for particulars and replies given by the plaintiffs gradually and increasingly made it clear that, at the time of the original introduction of GM canola, none of the named organic certifiers expressly prohibited either the use or the adventitious presence of GMOs, and such restrictions that now exist were only introduced gradually, over a number of years following 1995. As a result, those restrictions vary widely from year to year and from certifier to certifier. Further, there is no evidence before me of any case where an organic certifier in Saskatchewan declined to certify organic canola because of either the use of or the adventitious presence of GMOs. In light of these problems, the plaintiffs' focus shifted from an alleged inability to meet the standards of private certifiers, to an alleged inability to meet the demands of the organic marketplace, and, particularly, on the inability to market Canadian organic canola in Europe due to restrictions imposed by European regulators both of the organic market and of the import market more generally, even for conventionally produced Canadian canola. This refocusing of the claim was reflected, inter alia, in the addition to the statement of claim of para. 35(a), alleging that the defendants' abandonment of an identity preservation program, initially introduced to protect export markets for non-GM canola, resulted in the loss of the European canola market. In addition, as late as September 2004, the plaintiffs sought and were granted leave to substitute a new list of proposed "common issues" on the certification application, replacing the original emphasis upon certification standards with a new emphasis on market standards. For example, proposed common issues No. 1 and No. 2 now read as follows:

> (1) What is the nature, extent, and scope of the prohibitions against GMOs in certified organic production in the United States under its National Organic Program (the "N.O.P."), in the European Union under its EEC No 2092/91 (the "European Organic Standard"), or in Japan under its Japanese Agricultural Standard (the "J.A.S.") and when did such prohibitions come into effect?
> (2) What was the nature, extent and scope of the general European ban on the importation of grain containing GMOs and when did it come into effect?

¶ 219 In the result, the claim as now asserted is that intolerance or restricted tolerance in the marketplace generally, and the export market particularly, to the adventitious presence of GMOs has made it impossible or impractical for organic farmers to produce and market organic canola, resulting in a loss to the entire class of organic grain farmers of a profitable crop and of a valuable tool in crop rotation.

¶ 220 The second major aspect of the plaintiffs' refocus was the addition of a claim in relation to alleged harm caused to organic farmers (interestingly, para. 27(a) of the statement of claim, which incorporates this amendment, does not confine the claim to "organic grain farmers") by the "prevalence of Roundup Ready canola or Liberty Link canola "volunteers" growing on their land. Although the loss alleged in the statement of claim in relation to such volunteers is limited to past and future clean-up costs, there is some suggestion in the affidavits filed on behalf of the plaintiffs of a further allegation that certification status could be compromised or restricted by the presence of such volunteers in the fields of organic farmers.

¶ 221 As these two claims raise different issues, I will discuss them separately.

A. Evidence that members of the proposed class have suffered loss of market for organic canola

¶ 222 There is considerable evidence that, given the growing prevalence of GM canola grown in Western Canada, and given the open-pollinating nature of canola, some adventitious presence of the GM

gene in conventionally grown canola, including organically grown canola, is extremely likely, if not inevitable. The defendants do not deny this.

¶ 223 There is also evidence that, certainly by 2001, export market standards prohibited the "use" of GMOs in organic production. It is far less clear that this prohibition constituted a zero tolerance for trace amounts of adventitiously present GMOs in organic products. The evidence filed leads me to conclude that the standards themselves do not impose zero tolerance of adventitiously present GMOs, but that tolerance of individual buyers of organic products may vary from zero tolerance to tolerance of trace amounts of GMOs.

¶ 224 There is also some debate as to when the international market standards came into effect. It is undisputed that the NOP (US standard) came into effect in 2001. While the plaintiffs claim that the European organic standard relating to GMOs came into effect in 1991 (the apparent date of European Union Council Regulation No. 2092/91), I am satisfied on the evidence that the European Organic Standard has been amended since that date and that the amendment relating to prohibition of the use of GMOs was not passed until 1999. This is the expert evidence of BCS's witness Edward Korwek, who cites the relevant regulatory amendment. The plaintiffs' witnesses, while not willing to admit that date, are unable to refute it. There is no evidence as to other international organic market standards, such as Japan or Mexico.

¶ 225 There is clearly some evidence to support the plaintiffs' allegation that, at the present time, Canadian producers of organic canola run some degree of risk that their product will be rejected by organic buyers because of the adventitious presence of GMOs and that this is the result of the widespread cultivation of the defendants' GM varieties of canola. The evidence is considerably less satisfactory as to: (1) the extent of this risk (there is evidence that purchasers of organically produced canola had and have different tolerances for the presence of GMOs and also that organic canola continues to be produced in Saskatchewan and marketed as organic to the present date); (2) the extent to which the risk has varied over time since the first introduction of GM canola in 1995; and, most significantly, (3) the extent to which this risk has caused loss to members of the proposed class of organic grain farmers.

¶ 226 The last point is particularly troublesome. The evidence is that very little canola was grown as part of organic rotations prior to the introduction of GM canola. For example, in 1990, only seven farms produced canola organically out of a total of 93 certified organic farms. In 1991 it was 7 of 83; in 1992, 2 of 81; in 1993, 6 of 83; in 1994, 15 of 84; and 1995, 13 of 105. Production rose in the 1996-2001 period, but remained low, peaking at 20 farms producing organic canola in 1999. Records produced by the plaintiffs show that only 76 individual producers produced any organic canola at any point in the 1990-2001 period. Most reported very small amounts of acreage planted to canola. Of the 76 producers of organic canola, 53 grew it for only one year. Thirteen produced certified organic canola in two crop years, seven in three seasons and one each for four, five and eight seasons. (See affidavit of plaintiffs' witness J. Wallace Hamm, Exhibit "A", tab 1, p. 6; cross-examination of Hamm, Q. 458; affidavit of BCS witness Peter W.B. Phillips, paras. 55-56.)

¶ 227 While it is the plaintiffs' contention that the continuing low number of canola producers after 1995 was the result of the risk of adventitious presence of GMOs, there is evidence that many other factors could be relevant to the decision whether or not to grow organic canola. The defendants have submitted expert evidence to the effect that canola is a particularly challenging crop for organic farmers for a number of reasons. This does not mean, of course that it cannot be grown profitably, as the plaintiffs insist. Nonetheless, the challenges present alternative reasons to the market risks created by the potential adventitious presence of GMOs why an organic farmer might choose not to produce organic canola. Canola has high moisture demands that might be adversely affected by the organic practice of

controlling weeds by tillage. It is generally considered pesticide dependent due to the threat imposed by certain weeds and pests. For example, wild mustard, which is easily controlled with herbicide, presents a particular challenge to organic growers of canola because there is no practical way to separate wild mustard from canola. There is a maximum tolerance level of wild mustard in canola in order for canola to be sold as canola due to the presence in wild mustard of glucosinolate and erusic acid, the two quantities in rape that canola was developed to reduce in order to make canola consumable by animals and humans. (See cross-examination of plaintiffs' affiant Brenda Frick, at Q. and A. 66, 67, 225-234.) Several of the plaintiffs' affiants admitted, under cross-examination, that the choice of crops to grow was very dependent on the situation of an individual farmer and that these decisions were as much art as science.

¶ 228 In the result, as the defendants argue, it is impossible to know, of any individual organic grain farmer who does not grow canola, whether he or she would have grown canola but for the market risks created by the risk of the adventitious presence of GM canola, without an extensive inquiry of that individual farmer. Moreover, the limited data available suggests that the number of organic farmers who fit this description is small.

¶ 229 The evidence filed by the plaintiffs in relation to individual claims is quite limited. Dale Beaudoin, one of the named plaintiffs, deposed that he grew and marketed organic canola in 1995-1999 and suffered no loss caused by the adventitious presence of GM canola until 1999. In that year, his crop of organic canola was rejected by the initial purchaser because it had a small amount of GMO presence, even though it had been certified as organic by OCIA, his organic certifier. He was able to sell the canola as organic to another buyer, still commanding a premium price although at a lower price than under the original contract ($13.25 per bushel instead of $16.50). The other named plaintiff, Larry Hoffman, last grew organic canola in 1994 and sold it in 1994-95. He deposed that he would have grown it in 1997 on the same land but did not because of concerns about GM contamination, and has not grown it since for the same reason.

¶ 230 One other individual, Douglas Sawatsky, deposed that in the year 2000 he arranged for tests on his crop of organic brown mustard, with positive results for GMO contamination. As a result, he did not attempt to market the product as organic.

¶ 231 That is the full extent of the evidence of this loss in relation to individual organic grain farmers. It is further apparent that the plaintiffs did attempt to obtain more specific evidence of losses to organic farmers caused by the adventitious presence of GM canola, but that these efforts failed to produce more convincing results. In Novermber 2001, (two months prior to the commencement of this lawsuit) the Saskatchewan Organic Directory ("SOD") published an advertisement in its newsletter, distributed to about 550 SOD members, as follows:

> SOD is interested in hearing of your personal experiences growing certified organic canola. We are also interested in hearing about any problems you may have had with GMO contamination.
>
> * Have you had product rejected?
> * Have you had problems getting non-GMO-contaminated seed?
> * If you don't grow canola organically any more, why did you stop?
> * What has the loss of canola cost you?
>
> These stories may be relevant to the class action suit, so we'd like to hear from you as soon as possible. Please contact Larry Hoffman, Box 53, Spalding, SK, SOK 4CO. Phone: (306) 872-2229; Fax: (306) 872-2286; Email: lbh@sk.sympatico.ca.

(at http://www.saskorganic.com/oapf.htm)

¶ 232 Mr. Hoffman conceded on cross-examination that he received fewer than five replies.

¶ 233 The plaintiffs' affiant, J. Wallace Hamm, conducted a survey of organic traders. BCS expert witness Peter W.B. Phillips commented on this survey in his reply affidavit of November 20, 2003, responding to a number of Hamm's criticisms of an earlier Phillips' affidavit. The matter was covered in some detail in the cross-examinations of both Hamm and Phillips and it is my conclusion that the Phillips' analysis is just. I quote it at some length, to illustrate the difficulty in relation to this proffered evidence:

> The "Organic Trader Survey Data"
>
> 9. Mr. Hamm also expresses concerns in paragraph 4 of his reply affidavit that I "completely ignore" what he refers to as the "organic trader survey data". However, the original darWall report did not provide any analysis or report of when, how and who conducted the survey, who filled in the survey questionnaires, or how the source population and sample was identified, and only some of this information can be gleaned from the survey documents themselves. Nor does the original darWall report appear to critically analyze the survey.
> 10. In light of Mr. Hamm's criticism of my report, I have reviewed the survey and its data. I have a number of concerns with the methodology of the survey and the results of the survey as reported by Mr. Hamm in his report.
> 11. From the information provided to me I can extrapolate that somehow 58 persons presumed to be within the organic industry in both Canada (several provinces) and the United States were identified and contact information was assembled in regard to these persons. The methodology and sampling techniques which identified the 58 processors and traders is not discussed anywhere within the actual survey data or in Mr. Hamm's report. However:
>
> (a) It appears from the survey information that a darWall employee would initially contact a person within this survey pool by telephone and make a record of this call on what was designated as a "telephone script". Attached and marked as Exhibit "B" is an example copy of the telephone script.
> (b) The survey material package would then be sent out to the contacted persons who expressed a willingness to complete the survey. From the number of completed survey packages that were provided to me it appears that many of the packages that were sent out were not returned. 55 Telephone Scripts are provided but there is no such information provided for the three remaining identified organic traders and processors.
> (c) Of the 58 processors and traders identified, only 14 responded or answered any of the questions on the survey form.
> (d) Of the 14 who responded, only five respondents reported having sold any organic canola during the 12 years under review and one had processed a little organic canola. One trader (Sunrise Foods International Inc., code as #17 in the survey) had 8 years' experience trading canola (1994-2001), one trader had two years' experience trading canola (1998-99) and three traders had only one year of experience in canola (1997, 1998 and 1999 respectively).

(e) In aggregate, the five respondents who completed table A1 of the survey form (Actual Organic Canola Trade) accounted for 1,278 tonnes of trade in the 12 years under review. One additional trader (code 29) reported 18 containers of canola trading during 1998-89 (sic) but it is not clear what volume would be included in a container. The 1,278 tonnes identified by the survey (excluding the 18 containers) is equivalent to approximately 5% of the total organic canola production that had been reported in the "certification records" (1,278 tonnes x 0.5 tonne per acre yield equals 639 acres, compared with 13,272 organic acres reported in the "certification records" over the period).

12. Beyond this, in my professional opinion, the revealed purpose of the survey and the structure of the questions contained in the survey were leading:

(a) The telephone script (Exhibit "B") began with a short introduction which stated in part as follows:
"... we [darWall Consultants] are working with the Organic Agricultural Protection Fund to estimate the economic losses caused by the introduction of genetically modified canola."

"These data are crucial to this action and the future of the organic food industry in Western Canada"

(b) After the introduction, the survey script has a section that says "<Allow for Response-> If positive, then continue>". Many of the survey sheets were annotated at this point by what appeared to be comments from respondents. Many appeared to offer active support to the court case. Many of the surveys that were not completed did not have similar annotations. This causes a concern to me that those responses that did not support the case may not have been as actively solicited as those that supported the action.

13. Beyond questions relating to the methodology of the survey, the responses to most questions are very hard to interpret, and Mr. Hamm is selective in his reporting of what results can be obtained from the responses themselves. I noted the following from my review of the survey results:

(a) The survey results presented a very broad range of views with respect to the potential for growth in the organic canola market, apart from GM-related issues. Numerical estimates of market growth offered in the survey forms ranged from 5% to 60%. (It is also not clear whether these responses were per annum or over some other period). A number of other respondents suggested growth in the organic canola market would mirror that of organic wheat or flax, but did not quantify that growth rate.
(b) The survey results presented varying reasons for the difficulties in the organic canola trade. Whiles (sic) some respondents suggested GMOs made canola trading more difficult, there were also other reasons offered.

In his report, Mr. Hamm isolates one quotation from one of the respondents (see

section 3.1, page 8, of his report). According to the survey forms, this respondent (Biorginal (sic) Food & Science Corp. (Code #13 in the survey)) had only one year's experience in trading organic canola, although it stated that it had been involved in the organic industry since 1984.
In contrast, the trader identified in the survey results with the largest volume of experience with canola over the longest period of time (Sunrise Foods International Inc. - Coded as #17 in the survey) expressed reasons other than the introduction of GM technologies for the lack of the EU market for organically grown canola, stating in part in its reply to the survey:

> "I would describe the volume of organic canola that I have traded as small. Back in 1993, 1994 there really was no organic market established for canola for oil production. Europe gives us inquiries once in a while, but the cost of freight has made our canola expensive as compared to the Eastern European product. We quote, but generally the price to the USA market seems to be better ... Canola is a small seeded crop which tends to have a lot of weed seed admixtures which can easily cause downgrading. Wild mustard being the worst. In our producer group there has always been a little grown-but it is not a "favourite crop" in this area.
> I believe the GM conventional canola wave of varieties has made an already small market even less attractive ... GM canola has forced organic canola growers to select isolated fields which have no proximity to GM varieties. This causes less to be grown because of the lack of field choices."

The survey completed by this trader (Sunrise Foods International Inc.) records trade in organic canola for every year from 1994 up to and including 2001.

(c) To the extent that the survey supports loss of an EU market, the results suggest that this occurred in or around 2000. Select Agri Marketing Ltd. (Code #55) reports that they started trading organic canola in 1998 and continued to trade organic canola into 1999. It is the opinion of this trader that the introduction of Roundup Ready Canola in "1999" caused its decline in organic canola trading. American Health & Nutrition (Code #29) reports that it entered into the organic industry in 1998 and traded in organic canola in 1998 and 1999. It states that "Europe has not been interested in Canadian canola since 2000."

(d) While the telephone scripts appear only to represent a darWall employee's recording of an initial telephone conversation with a prospective survey respondent, the record of contact with Vandaele Seeds Ltd. (Code #57) reports that it was a former organic trader but now was a "promoter of GMO canola" and did "not think canola can be grown organically, need weed control."

(e) In another Telephone Script, Byron Hamm of darWall recorded that a Maple Creek area organic trader (Schmidt Flour - Code #10) indicated that it didn't "handle canola" and that there was "none in the area".

14. In result, without the necessary information about the methodology behind the survey it is impossible to opine on an informed basis whether this sample was representative of organic traders and processors and to what extent the data can be relied upon. If the survey could be relied upon at all (which I would conclude

is highly doubtful), it would provide evidence to support the conclusions expressed in my earlier report that:

(a) the market for organically grown canola was limited before the introduction of GM canola and would continue to be limited for reasons apart from the "GM issue";
(b) despite the introduction of GM canola an organic canola market still existed throughout the late 1990s and into 2001;
(c) the high cost of shipping to the EU presents a barrier to that market, irrespective of the GM issue;
(d) organic canola is not uniformly grown in all areas of Saskatchewan; and
(e) canola is a difficult crop to grow organically because of weed control issues.

15. My analysis (sections 1 and 2 of my earlier report) identifies the root causes of any potential market change. Even if transgenic canola varieties had not been approved in Canada, the darWall analysis provides no evidence that there would otherwise have been a market for organic canola in the EU.

¶ 234 It is my conclusion that, while there may be some individual farmers within the proposed class who have suffered loss due to the inability, or perceived inability, to produce canola sufficiently free from GMO contamination to be marketed as organic, there is no evidence before me to indicate that all, a majority, or even a significant minority, of the proposed class of all organic grain farmers certified by one of the six named private certifiers have suffered such a loss. Only farmers who have had an organically grown crop of canola rejected because of GMO contamination, or farmers who, but for the risk of rejection due to GMO contamination, would have grown organic canola but did not, and thereby suffered a loss, have even a colourable claim pursuant to the statement of claim. All of the evidence before me indicates that there are many reasons why an organic farmer might choose not to grow canola, that these vary widely according to the circumstances of the farmer, and that there are no objective criteria by which one could determine whether an individual farmer would have grown canola but for the risk of GMO contamination. Further, there is no evidence before me to support a conclusion that the number of such farmers would be large. There is evidence of only one instance of an organic canola crop having been rejected by a buyer due to GMO contamination, and in this case the crop was sold to another buyer as organic. Attempts to solicit additional evidence have been to no avail.

¶ 235 In Hollick, Chief Justice McLachlin commented, in the passage quoted above, that the requirement to show that the class is defined sufficiently narrowly, "is not an onerous one." She continued:

> ... 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. ... (at para. 21)

¶ 236 It is important to note that, although the Court in Hollick appears to liberalize, to some extent, the principle expressed in some of the Ontario decisions to the effect that a class definition is over-inclusive if it includes anyone who would not have a claim, the Court nonetheless emphasized that the evidence filed in Hollick established the existence of both numerous and widespread complaints from members of the proposed class. I note also that in the same paragraph just quoted, the Chief Justice went on to cite with approval the decision in Mouhteros, supra, which had held that the proposed class

definition in that case was over-inclusive because it included students who had found work after graduation.

¶ 237 In Lau v. Bayview Landmark Inc., supra, Winkler J. explained the special difficulty for class definition that arises when the existence of a claim would require an individualized inquiry:

> Since the cause of action may be objective, that is determinable without direct reference to the personal characteristics of the defendant, or alternatively, subjective and thus dependent on the particular plaintiff's idiosyncracies (sic), the threshold for establishing the existence of the class, and the number of members which comprise it, will vary from case to case.
> For example, a products liability case, an action arising from a mass disaster or other similar situations represent what may be categorized as "objective" or objectively determinable claims. The harm alleged is not dependent on the plaintiff having certain characteristics but rather arises from the existence of a state of affairs outside the norm, the facts of which are sufficient to establish on the "plain and obvious test" that a cause of action exists. Hence, the evidence of the class, to adopt the words of Sharpe J. in Taub, may be "inherent in the claim itself."
> On the other hand, a subjective claim requires more extensive evidence to establish the existence, and size, of the proposed class. A subjective claim is characterized by allegations of the plaintiff's injury from a reaction to a situation that is neither inherently harmful nor apparently wrongful. The subjective class of claims encompass those where a plaintiff's allegations of harm raise a question as to the tolerance level of other individuals, as was the case before Sharpe J. in Taub. In such cases, defining a class in mere geographical or temporal terms will rarely be sufficient without further evidence. Although location or time parameters are objective, a subjective cause of action, by its very nature, may not be shared by all, or for that matter, any of the persons so described. As a result, the class would not be defined with sufficient precision. (at paras. 27-29)

¶ 238 In addition to these problems, it must be recalled that the plaintiffs seek to define the class temporally, i.e., to include all organic grain farmers certified from 1996 to the date of certification. This definition would clearly include organic grain producers and even organic canola producers who were certified at a time when they were subject to no GMO restrictions either by their individual certifiers or by the export markets into which they sold organic canola. The evidence before me establishes that even today organic canola is grown and marketed as organic. There is no evidence of any loss predating Mr. Hoffman's claim that in 1997 he would have grown organic canola but did not due to the risk of contamination. It is clear that the class is, from a temporal perspective, overly broad.

B. Evidence in relation to the claim of loss to organic grain farmers as a result of GM canola volunteers on organic farmland

¶ 239 This claim was added to the statement of claim by amendment in January 2004, two years after the statement of claim was first issued. The evidence before me of volunteer GM canola in organic fields is confined to affidavits from four organic farmers, who experienced variable consequences from the presence of the volunteers:

> Dale Beaudoin deposed that he experienced both volunteer Roundup Ready and volunteer conventional Clearfield canola on his organic lands, but this does not appear to have affected his organic status;
> Martin Pratchler deposed that he experienced volunteer Roundup Ready canola but

does not depose as to any negative consequences. I note that Mr. Pratchler was growing organic alfalfa, and would not appear to fall within the proposed class of organic grain farmers. Mr. Pratchler complains that Monsanto was slow in responding to his request to remove the volunteers.
Pat Neville deposed that he experienced Roundup Ready volunteers on his farm and that this has delayed certification of his entire 2003 crop.
Marc Loiselle deposed that he experienced volunteer Roundup Ready canola and was required by his certifier not to grow any crop on the affected field that might cross pollinate with canola for three years. The fields may be used for other organic crops. It is unclear whether this will result in any loss to Mr. Loiselle.

¶ 240 This evidence is limited to members of only two of the private certifiers, COCC and OCIA. There is no evidence of any volunteer contamination by Liberty Link canola.

¶ 241 The plaintiffs seek to generalize this claim to the entire proposed class on the basis of statistical evidence of the prevalence of volunteer canola in other crops in Western Canada. The plaintiffs' expert witness, Rene Van Acker deposed that there is approximately a 15 percent probability that a particular non-canola crop will have some volunteer canola. He adds that, given that approximately 70 percent of canola grown in Western Canada is GM canola, the likelihood that a volunteer will be GM canola is high. However, other evidence points out that the majority of volunteer canola plants result from dormant seed remaining in the ground from having grown canola on the same field in previous years. Accordingly, it would seem to follow that the likelihood of an organic field experiencing volunteer GM canola is considerably less than the statistical average because little canola is grown by organic farmers and what is grown is not GM canola. Further, the likelihood of volunteer canola varies according to many factors including the geographical area within Saskatchewan, weather, cropping practices, tillage practices, harvest practices, herbicide usage and weed management practices. (See affidavit of Phillip Maurice Thomas sworn October 7, 2004.) In fact, there is no evidence before me of the statistical probability of contamination of organic fields from GM canola blown over from a neighbouring field, the source of the contamination in the four cases deposed to.

¶ 242 In any case, in my respectful view, it is not possible to certify a class on the basis of a statistical likelihood that a small portion of that class may, in the future, experience certain losses. Certainly there is evidence before me that some organic fields have in fact been contaminated by GM canola, in each case blown over from a neighbouring field where GM canola was grown. However, the claim asserted in relation to volunteer GM canola on organic farmland is essentially an individual claim. There is no evidence that the problem is widespread among members of the proposed class. As to the risk of future contamination (if such could conceivably be considered a viable claim, for which there is some doubt), this would certainly vary according to farming practices, including the use of buffer zones to protect from contamination from neighbouring fields.

¶ 243 It is my conclusion that there is no evidence before me that this claim is widely shared by members of the proposed class.

¶ 244 It is my conclusion that many and probably most of the members of the proposed class do not share in the causes of action asserted in the statement of claim. Those that do could only be determined upon an extensive individual inquiry.

¶ 245 I also note that in certain respects the proposed class is under inclusive. There is evidence that the list of six private certifiers in the class definition is not exhaustive of the organic certifiers who were or are active in Saskatchewan in the period in question. In addition, the claim in relation to the presence of volunteer GM canola plants in organic fields would not appear to be limited to organic grain farmers,

but might affect other organic farmers as well. I noted above that one of the complaining affiants, Martin Pratchler, was, at the time in question, growing alfalfa.

¶ 246 I conclude that the plaintiffs have failed to provide a factual basis upon which I can conclude that there is an identifiable class in relation to the claims asserted.

C. Criterion 3: Common Issues

General Considerations

¶ 247 Section 6(c) of The Class Actions Act requires that the Court be satisfied that "the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members." "Common issues" is defined in s. 2:

> "common issues" means:
>
> (a) common but not necessarily identical issues of fact; or
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

¶ 248 The plaintiffs have sought certification for 20 proposed common issues of fact and 21 common issues of law, as follows:

> Common Issues of Fact
>
> (1) What is the nature, extent, and scope of the prohibitions against GMOs in certified organic production in the United States under its National Organic Program (the "N.O.P."), in the European Union under its EEC No 2092/91 (the "European Organic Standard"), or in Japan under its Japanese Agricultural Standard (the "J.A.S.") and when did such prohibitions come into effect?
> (2) What was the nature, extent and scope of the general European ban on the importation of grain containing GMOs and when did it come into effect?
> (3) Under the N.O.P., the European Organic Standard, or the J.A.S., if a certified organic grain farmer suffers infiltration of his or her organic fields by volunteer GM canola, is that organic farmer required to:
>
> a. remove any such plants from his or her land?
>
> b. clean such canola seeds from his or her grain?
> c. pay for additional inspections?
> d. file additional organic plans of production?
> e. monitor his or her fields in the future to ensure that such pants (sic) have been completely removed?
> f. not grow any future crops on the same field that can cross with canola or from which canola seed cannot be easily cleaned post-harvest?
>
> And what is the duration of any such requirements?
>
> (4) What are the agrological challenges and benefits of growing canola

organically, how suitable is it for organic production?

(5) What was the potential of the European Union market for organic canola from Saskatchewan certified to the European Organic Standard in the years in question absent GMOs?

(6) What premiums would such certified organic canola have commanded?

(7) As a result of the widespread dissemination of the Defendants' GM crops in Saskatchewan, is it reasonably possible for organic grain farmers in Saskatchewan to (a) obtain canola seed free from infiltration by the Defendants' GMOs and (b) produce organically grown canola free from infiltration by the Defendants' GMOs?

(8) What is the prevalence of volunteer canola in Saskatchewan?

(9) What is the statistical probability that such volunteer canola contains a transgene owned by one of the Defendants (and their relative percentages)?

(10) How much GM canola did each Defendant sell in Saskatchewan in the years in question?

(11) What licensing arrangements did the Defendants enter into with producers and/or seed companies regarding the sale of their products in the years in question?

(12) What corporate policies and procedures did the Defendants have in the years in question to address complaints of "adventitious presence"?

(13) What instructions, education, and warnings did the Defendants give to farmers purchasing their GM products in the years in question regarding use, containment, and pollen flow?

(14) What was the nature, extent, scope, design and aim of the Identity Preservation Program ("IPP") and the Defendants' involvement in its introduction, maintenance and repeal?

(15) To what extent did the Defendants profit from the IPP or its repeal?

(16) Did the Defendants have any express, imputed or implied knowledge of how their GM canola would infiltrate conventional canola if released without an IPP?

(17) Did the Defendants have any express, imputed or implied knowledge of the potential damage that dismantling the IPP could have on the European export market for Canadian canola?

(18) Did the Defendants have any express, imputed or implied knowledge of the reliance of organic canola producers on the European market?

(19) What regulatory approvals did the Defendants receive from the Federal Government of Canada or the Provincial Government of Saskatchewan pertaining to the testing, licensing and release of their GM crops?

(20) Are the Defendants' GM canola lines environmentally unsafe notwithstanding any such approvals?

Common Issues of Law

Negligence

(1) Did the Defendants owe a duty of care to certified organic grain farmers in Saskatchewan as a class not to harm their access to the European Union market and in that regard:

a. to ensure that their products were not released in a way that they would infiltrate conventional canola? and/or

b. to warn farmers purchasing their products about cross-pollination? and/or
c. to introduce their products with an IPP designed to protect the foreign markets that have not approved their GMOs for import? and/or
d. to preserve the IPP to protect the European Union market until import approvals were obtained?

(2) Did the Defendants breach such duties of care?
(3) If an organic farmer sustains a loss resulting from not growing organic canola because of unacceptable risks of GM infiltration (but before such infiltration has occurred), is such a loss barred by the "pure economic loss" doctrine?

Strict Liability

(4) Was the development and subsequent release of canola containing the Defendants' transgenes a non-natural use of land?
(5) Did the transgenes escape?
(6) Are the transgenes something likely to cause mischief?
(7) Was the Defendants' ownership and control of the confined field trials from which the transgenes were initially released sufficient for there to be liability?
(8) Alternatively, did the Defendants continue to own and/or control their transgenes after commercial release sufficient for there to be liability?

Nuisance

(9) Do the Defendants sufficiently own and/or control their transgenes rendering them potentially liable should their transgenes interfere with an organic farmer's use and enjoyment of his or her land?
(10) Is organic farming an overly sensitive land use so as to preclude any potential liability?
(11) Are the Defendants entitled to rely upon The Agricultural Operations Act as a defence to a nuisance claim?

Trespass

(12) Do the Defendants have sufficient ownership or control of the transgenes that they have created and released into the environment to make them liable for the tort?
(13) Is there a "directness" requirement for the tort and, if so, was infiltration sufficiently inevitable to satisfy the requirement?
(14) Does the propensity of the released genetic material to propagate and proliferate obviate a "directness" requirement?

The Environmental Management Protection Act (EMPA) and The Environmental Management and Protection Act, 2002 (EMPA, 2002)

(15) Are the Defendants' transgenes "pollutants" within the meaning of the EMPA and/or a "substance" within the meaning of the EMPA, 2002?

(16) If so, did the Defendants own or control the transgenes when they were first discharged into the environment under the EMPA or were they persons responsible for the discharge under the EMPA, 2002?
(17) Does the responsibility for any discharge under either Act extend to the progeny of plants containing the transgenes?
(18) Are claims based on canola plants or seeds containing the Defendants' transgenes that have spread onto organic fields after October 1, 2002 to be governed by the EMPA, 2002, and ones occurring before by the EMPA?

The Environmental Assessment Act (the "EAA")

(19) Was the testing and release of GM canola into the Saskatchewan environment a "development" within the meaning of the EAA?
(20) Were the Defendants therefore required to conduct and submit an environmental impact assessment for ministerial approval prior to proceeding?
(21) Did the Defendants fail to conduct and submit such an assessment and did they fail to obtain ministerial approval as required by the EAA?

¶ 249 It is clear that the question of whether any of these issues presents a common issue raised by "the claims of the class members" is closely tied to earlier findings in relation to (1) whether and to what extent the pleadings disclose a reasonable cause of action (for that affects what "claims" may be relevant to certification) and (2) whether there is an identifiable class. Issues can be common only insofar as they are relevant to a reasonable cause of action arising from the pleadings and they cannot be issues common to "the claims of the class members" unless and to the extent that there is an identifiable class. Thus, the question of whether the plaintiffs have identified "common issues" arises only on the assumption that a number of my earlier determinations are erroneous. In particular, if there is no identifiable class, there can be no common issues, and where a particular pleading fails to disclose a reasonable cause of action, any issue relevant only to that particular pleading will not be pertinent to the claim of any class member. In addition, as we will see, many of the perceived problems in relation to class definition find new expression in the attempt to define certain issues as "common" to members of the class, even if the class is somehow redefined, more narrowly, to include only those who have suffered a loss as a result of the introduction of GM canola. Accordingly, there will necessarily be considerable overlap in this portion of the judgment.

¶ 250 In general, the Supreme Court has held that an issue will be common only where its resolution is necessary to the resolution of each class member's claim, and where the issue is a "substantial ingredient" of each of the class members' claims. The Court is to apply this test "purposively", bearing in mind that the principal question is whether allowing the suit to proceed as a class action will avoid duplication of fact-finding or legal analysis. (See Hollick, supra, at para. 18, quoting from the Court's earlier decision in Dutton, supra, at para. 39.)

¶ 251 In this case, as we have seen, the plaintiffs have sought certification for a class defined as all Saskatchewan organic grain farmers certified by any of six named private certifiers in any of the years from 1996 to the present time. In addition to the difficulties in relation to over-inclusiveness already noted, it is clear that the class so defined includes individuals in widely different circumstances. The certification standards of private certifiers varied not only from certifier to certifier, but from one year to the next as standards in relation to GMOs evolved only gradually, over time, promulgated in each case after 1996. The same can be said of market standards put in place by the principal export markets, Europe and the United States. (I note that the plaintiffs also include Japan in this category, but they have produced no evidence as to the existence of organic export standards for the Japanese market related to

GMOs and no evidence that any member of the class has lost a sale or the opportunity for a sale destined to that market.) Further, some certifiers may have been able to sell canola into the European market, at a particular time, while others were not, and the ability to sell certified canola to Europe would therefore vary among members of the proposed class and for a particular member might vary from time to time. The proposed class includes individuals who were organic grain farmers before the introduction of GM canola in Saskatchewan as well as those who became certified to grow organic grain at widely various times, some conceivably as much as nine years after the introduction of GM canola. It includes individuals who may have been certified to grow organic grain for only one year in the period specified as well as those who did so for multiple years. It includes organic grain farmers who at some time grew and marketed organic canola and those who never did so. It includes many, perhaps a large majority, who never would have grown organic canola. It includes some individuals who still today grow and market organic canola.

¶ 252 Accordingly, it is clear that, even if it were possible to objectively define a class confined to members who have suffered a loss as a result of the introduction of GM canola, the circumstances of such members would vary widely from one to another and would vary over the time period for which certification is sought.

¶ 253 The plaintiffs have conceded, in the brief filed for this motion, that an originally proposed common issue, "What is the economic impact on organic grain growers in Saskatchewan as a consequence of genetic contamination from GM crops marketed and sold by the Defendants?", was a question "hopelessly mired in individual variables to be a suitable candidate as a common issue", conceding:

> ... Each member of the class may have a different likelihood of growing organic canola and differing alternative crops to replace it. Moreover, a major portion of the Plaintiffs' claim now includes clean-up costs and that would vary greatly from farm to farm. The organic farmer's global loss cannot realistically be determined without having to examine all the individual claims. (Memorandum of law in support of the certification application on behalf of the plaintiffs, at p. 90)

¶ 254 To this difficulty could be added other, related, challenges to the "commonality" of the proposed common issues. The alleged economic impact would also vary according to when a potential sale of organic canola is alleged to have been lost, and according to the specific market into which such canola was destined. Whether and when any loss at all was suffered, either as to lost opportunity to market organic canola or as to clean-up costs related to the "volunteer" problem, cannot be determined without individual inquiry. As has been earlier held, the proffered class clearly includes many individuals, probably a large majority of the class, who cannot claim to have suffered either of these losses.

¶ 255 In general, the defendants' objections to the proposed common issues are as summarized in the BCS brief, as follows:

(a) The large majority of questions are incapable of an objective application across the class defined by the plaintiff;
(b) The remainder of the questions, if answered, do not significantly advance the litigation;
(c) The proposed common issues in relation to the "Identity Preservation Programs" fail to assert a cause of action known at law and, in any event, lack a factual foundation;
(d) A number of the questions are framed in such an expansive way that, by

necessity, if certified would result in the breakdown of the action into individual proceedings.

¶ 256 The problem of applying an issue across a class that is inherently diverse has resulted in denial of certification in a number of cases. Representative of these is the decision of Bauman J. in Samos Investments Inc. v. Pattison, 2001 BCSC 1790, (2001), 22 B.L.R. (3d) 46 (S.C.); aff'd 2003 BCCA 87, [2003] 4 W.W.R. 39 (C.A.). In that case, a dispute arose after the conversion of a company from one which was widely-held to one of a private nature. The conversion was accomplished by several steps over a three-year period and was alleged to have been accomplished through unlawful acts, including a conspiracy. There were allegations of many different misrepresentations having been made over the course of the three-year period. The application for certification was dismissed in the first instance on a number of grounds, including the lack of common issues and preferability. On appeal, the plaintiff attempted to cure the problem by narrowing the proposed class definition, but was not successful, the Court of Appeal holding that there was no common issue among a changing group of minority shareholders who had different interests depending on the timing of their share purchases and dispositions.

¶ 257 In Spencer v. Regina (City), 2003 SKQB 109, (2003), 231 Sask.R. 68 (Q.B.), the plaintiffs sought certification for the class of all persons in Saskatchewan who purchased a Norlawn home from the corporate predecessors of the corporate defendant and also on behalf of any persons who subsequently purchased such homes. They submitted that the common issue was whether the homes built by the defendant were negligently designed and constructed. It was held that there were no common issues, the Court noting that there were "important and numerous factual and legal issues ... applicable to each individual plaintiff ... with respect to each individual Norlawn home", including individual issues pertaining to the duty of care, the standard of care, the breach of the duty, causation, contributory negligence, damages and the issue of the limitation periods.

¶ 258 For other cases in which the courts have held that individual factors were essential to the determination of proposed common issues of liability, see also Bittner v. Louisiana-Pacific Corp. (1997), 43 B.C.L.R. (3d) 324 (S.C.), Fehringer v. Sun Media Corp. (2002), 27 C.P.C. (5th) 155 (Ont. S.C.J.), Huras v. COM DEV Ltd. (1999), 36 C.P.C. (4th) 31 (Ont. S.C.J.), Price v. Panasonic Canada Inc. (2002), 22 C.P.C. (5th) 379 (Ont. S.C.J.), and Chada v. Bayer Inc. (2001), 200 D.L.R. (4th) 309 (Ont. S.C.J. (Div. Ct.)).

¶ 259 The last two of these cases involved claims under the Competition Act for price fixing. In both cases it was held that, as proof of actual loss or damage was an essential element of the statutory right of action, the proposed common question of liability necessarily required individual inquiry and was not common across the class.

¶ 260 In Fehringer, the representative plaintiff sought damages from an individual defendant said to have abused his authority to force women to pose topless in order to be included as a "Sunshine Girl" in the defendant newspaper. The proposed class consisted of all persons who claimed to have been subjected to harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks during photographing sessions with the defendant Betts, while Betts was an employee of The Sun. This was estimated to be about 15 percent of persons photographed over many years (since 1971) for a total of approximately 375 individuals. The employer newspaper was sued on the basis of vicarious liability, as well as negligence and breach of fiduciary duty for improper management and maintaining operations which facilitated the harassment. The plaintiff sought to certify the following issues as common:

(a) Were the Defendants negligent, in breach of their duty of care and/or in breach

of their fiduciary duty in failing to take reasonable steps or measures in the operation or management of The Sun to protect class members from harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks during photography sessions?

(b) Is The Sun vicariously liable for the actions of Betts?

(c) Is The Sun liable to the Class members by virtue of being the owner and/or operator of the premises in which the harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks, occurred?

(d) What information or knowledge did the Defendants have regarding the harassment, intimidation, breach of privacy and inappropriate contact, behaviour, conduct and remarks occurring to Class members and when was it available to them or reasonably available to them?

(e) Were the defendants so negligent, reckless and/or guilty of conduct that justifies an award of punitive damages?

(f) Did the defendants make negligent, reckless and/or fraudulent misrepresentations regarding the nature and safety of their photography sessions and of being a Sunshine Girl?

¶ 261 The Court found that the proposed common issues all depended on individual determinations as to whether any harassment had actually occurred and how it had occurred in the circumstances concerning each of the proposed class members. It was not possible to make a blanket determination of the liability of any of the defendants without first engaging in an individual examination of the specific events which underlay each member's claim. As a result, the Court held that it was virtually impossible to embark on a trial of the common issues until the facts which form the basis for all of the individual claims were presented. The Court also stressed that if an individual examination of each claim was necessary this would defeat the very purpose of a class action.

¶ 262 One decision that would appear to have taken a more liberal view on this point is Rumley v. British Columbia (1999), 180 D.L.R. (4th) 639 (B.C.C.A.); aff'd [2001] 3 S.C.R. 184, 2001 SCC 69, a proposed class action for damages for sexual abuse suffered by children resident in a provincially operated residential school for the disabled over a period of many years. Certification was denied by the British Columbia Supreme Court, but allowed on appeal to the Court of Appeal. The Supreme Court of Canada upheld the certification on the basis of the common issues, identified in the Court of Appeal, of whether the provincial government owed a duty to the plaintiffs, whether it had breached that duty and whether punitive damages were appropriate. The Court acknowledged that issues of injury and causation would have to be litigated in individual proceedings, but was of the view that the individual issues would be a relatively minor aspect of the case, commenting, "There is no dispute that abuse occurred at the school. The essential question is whether the school should have prevented the abuse or responded to it differently." (at para. 36)

¶ 263 However, the facts and circumstances of this case were quite unique. There had already been findings by the provincial Ombudsman and by a special inquiry that made it clear that sexual and physical abuse of children took place at the school throughout its history. In response, the government had acknowledged responsibility for the abuse that occurred and had established a compensation scheme (found, in the case, to be inadequate). Further, the plaintiffs had limited their claim to systemic negligence-the failure to have in place management and operations procedures that would reasonably have prevented the abuse-as opposed to vicarious liability. As was subsequently pointed out in Joanisse v. Barker (2003), 38 C.P.C. (5th) 386 (Ont. S.C.J.):

> ... It is one thing to accept a common issue framed in terms of systemic breaches of duty when - as in Rumley ... only the conduct of the defendants is relevant; it is, I

believe, much more difficult to justify when the issue concerns the effect of such conduct on the mind and will of each of the class members. (at p. 32)

¶ 264 In addition to the requirement of commonality across the class, it has also been frequently held that the common issues certified must be issues that will materially advance the litigation. This was emphasized by McLachlin C.J.C. in Dutton:

> ... Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. (at para. 39) (Emphasis added)

¶ 265 This issue is variably treated in the case law as part of the analysis of the requirement for common issues, or the requirement that a class proceeding be the preferable proceeding, or an amalgam of the two. There is clearly an overlap of the two concerns. It is clear that the common issue(s) need not be wholly determinative of any liability issue, but the courts have generally recognized that if the proposed common issues, on the whole, accomplish little to resolve the liability issue in light of the remaining individual issues, they are not common in the required sense.

¶ 266 Gariepy v. Shell Oil Co. (2002), 23 C.P.C. (5th) 360 (Ont. S.C.J.), was a proposed class action against manufacturers of resin used in fittings and pipes in plumbing systems, alleging negligent design, failure to warn, misrepresentation, and breach of warranty resulting in defective pipes. Nordheimer J. commented:

> The fundamental problem with the plaintiffs' position on the common issues is that the determination of whether the defendants' products are defective does not, in my view, materially or significantly advance the overall determination of the ultimate liability issue. It does not do so because of the fact that there are a myriad of reasons why any given class member's plumbing system might fail. This fact is made clear by the plaintiffs' own experts. ... (at para. 61)
>
> ...
>
> In the end result, therefore, while the determination of whether the defendants' resins are inherently defective might answer a scientific question of interest, it does not assist greatly in answering the question that is of primary interest to this court, which is the question of liability. Given the presence of different manufacturers, different designs, different installations, intervening events including improper maintenance or improper repair, varying water conditions including varying or no chlorine levels, varying mineral contents, varying water temperatures and varying water pressures, answering the scientific question only starts you on the necessary journey to find the final answer to the liability question in any given case. (at para. 67)

¶ 267 Nordheim J. reiterated the point in Pearson:

> The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. There will always be common issues raised by any common event, otherwise presumably no one would suggest that the ensuing action could ever be treated on a class basis. Instead, the issue is whether the resolution of the proposed common issues sufficiently advances the overall determination of liability so as to justify the certification of the action as a class proceeding. An important consideration in this regard is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined is sufficiently extensive that the determination of the common issues essentially marks the commencement as opposed to the completion of the liability inquiry. ... (at para. 104)

¶ 268 With these general considerations in mind, I turn to examination of the issues proposed by the plaintiffs as common issues.

A. Proposed common issues of fact

> (1) What is the nature, extent, scope of the prohibitions against GMOs in certified organic production in the United States under its National Organic Program (the "N.O.P."), in the European Union under its EEC No 2092/91 (the "European Organic Standard"), or in Japan under Japanese Agricultural Standard (the "J.A.S.") and when did such prohibitions come into effect?

¶ 269 There can be no doubt that the nature and extent of organic standards of export markets in relation to the adventitious presence of GM canola (if this is what is meant by "prohibitions against GMOs") are generally relevant to the plaintiffs' claims. However, this question is an amalgam of many questions, for it asks about three different international organic markets, the standards of each which would or could have varied over the time period for which certification is sought. As membership in the proposed class also varied over the same time period, it is clear that no particular answer can be common across the class, even if it is assumed that all members of the proposed class would have the same interest in all three markets, which is not established on the evidence before me. In short, the appearance of commonality, or perhaps generality, in relation to this question is misleading.

¶ 270 In addition, the literal organic standards relating to GMOs and the dates of adoption in relation to the N.O.P. and the European Union are a matter of public record and are in evidence on this application. These issues therefore would not, in my view, significantly advance the litigation. What may be more significant is the manner and extent to which such standards have, in fact, been applied and how they have affected proposed or potential sales. However, there is no evidence before me that would indicate that the answer to that question is common across members of the class. To the contrary, the evidence of the plaintiffs' witness Debbie Miller indicates that the application of the N.O.P. standard, as an example, has been flexible, and has depended more on the individual purchasers. Accordingly, the question could not be answered without individual inquiry.

¶ 271 As I have already indicated, there is no evidence on this application as to the existence of a Japanese organic standard in relation to GMOs nor is there any evidence that Saskatchewan organic farmers have lost any sales, or the potential for sales, of organic canola to Japan.

¶ 272 I conclude that there is no answer to this question that would be common or relevant across the class. I would not certify it as a common issue.

(2) What was the nature, extent and scope of the general European ban on the importation of grain containing GMOs and when did it come into effect?

¶ 273 It is not clear what is meant by "the general European ban on the importation of grain containing GMOs." The evidence before me on this application, as I understand it, is that the EU in fact approved the first of BCS' Liberty Link varieties for import and that these, could they be effectively segregated, could still be exported to Europe. Thus, there is no general ban of grain containing GMOs. However, subsequently, in 1998, the EU adopted an informal moratorium against further approvals of GM products. Because canola is open-pollinated, and conventionally grown canola is not segregated for the purpose of marketing, the resulting disparity of treatment of GMOs between Canada and the EU has effectively prevented the export of all Canadian canola to the EU. (See affidavit of Peter W.B. Phillips at paras. 24-26.)

¶ 274 It is not clear, in any case, exactly how this matter relates to the plaintiffs' claim. They plead that organic grain crops are processed and marketed separately from conventional grain crops, and that this segregation of organic products is an essential part of organic production and marketing. The plaintiffs seem to tie the issue of a general European ban to the claim that they were caused loss by the abandonment of the "identity preservation program", (the "IPP"), which had been put in place to segregate GM canola from conventional canola in the first two years following the introduction of GM canola in order to protect the export market for conventional canola.

¶ 275 I have already held that this aspect of the plaintiffs' claim fails to disclose a reasonable cause of action, for the plaintiffs do not and apparently cannot plead that they relied on the introduction of this program. In any case, however, the plaintiffs have not established a factual basis to suggest that the abandonment of the IPP is relevant to the losses they claim. While there is evidence that the failure to maintain this program may have been relevant to the loss of the EU market for conventional Canadian canola, generally, it is difficult to see how the failure to maintain segregation of GM crops from conventionally grown crops could have affected the organic growers in particular, as organic crops are segregated in any event to keep them separate, not only from GM canola, but from all conventionally grown canola.

¶ 276 It is my conclusion that all questions relating solely to the portion of the plaintiffs' claim relating to the abandonment of the IPP lack the factual matrix to relate this aspect of the claim to the losses alleged to have been suffered, and therefore cannot raise certifiable common issues.

(3) Under the N.O.P., the European Organic Standard, or the J.A.S., if a certified organic grain farmer suffers infiltration of his or her organic fields by volunteer GM canola, is that organic farmer required to:

a. remove any such plants from his or her land?
b. clean such canola seeds from his or her grain?
c. pay for additional inspections?
d. file additional organic plans of production?
e. monitor his or her fields in the future to ensure that such plants have been completely removed?
f. not grow any future crops on the same field that can cross with canola or from which canola seed cannot be easily cleaned post-harvest?

And what is the duration of any such requirements?

¶ 277 This question, or series of questions, is subject to the same objections as question No. 1. In addition, most of the evidence on this issue before me relates not to requirements imposed by foreign markets, but to restrictions or requirements imposed by private certifiers. Clearly, as these may vary from certifier to certifier, they cannot be common to the class as a whole. The only evidence in relation to foreign markets relates to the requirements under the NOP and suggests that these are flexible and variable, and therefore not amenable to a common or single answer across the class.

(4) What are the agrological challenges and benefits of growing canola organically, how suitable is it for organic production?

¶ 278 Although it is clearly possible to obtain some scientific evidence leading to some general conclusions on this issue, which could have some limited probative value in determining of any member whether he or she would or could have grown organic canola but for the introduction and dominance of GM canola in Western Canada, it is difficult to see how such generalizations could significantly advance the claim of any member of the class, for it would always remain to be established to what extent these generalizations apply to a particular member. The evidence on this application convinces me that whether and to what degree canola is suitable for organic production is essentially an individual inquiry, for this would vary depending on the particular circumstances of each farmer. I would not certify this as a common issue.

(5) What was the potential of the European Union market for organic canola from Saskatchewan certified to the European Organic Standard in the years in question absent GMOs?

¶ 279 The defendant BCS rightly objects that this question is inherently ambiguous in that it is not clear whether the word "potential" refers to future prospects (or counter-factual prospects, had GM canola not been introduced), or simply to an actual range of pricing from time to time.

¶ 280 It is my view that either question could have some limited relevance to the claim for lost sales, or lost opportunity to sell, to the European market, in the sense that general or statistical information of this sort would have some probative value in attempting to value any loss of this nature proved at trial. The information could not, however, in any way avoid a case by case consideration of the circumstances of individual farmers either in determining whether they have suffered such a loss, or the value of that loss in the particular circumstances. Accordingly, it is my view that this question is essentially one that would involve individual inquiry, and to the extent that it can be answered generally it would be of only limited significance in advancing the claims of the class members.

(6) What premiums would such certified organic canola have commanded?

¶ 281 The same considerations in relation to question No. 5 apply here. Although a finding of a general range of premiums, over the period in question, would have some limited probative value in relation to all such claims, this is essentially a question that depends on the individual circumstances of each claim of loss and would obviously vary from one date to the next. It is not a question the answer(s) to which would be uniform across the class.

(7) As a result of the widespread dissemination of the Defendants' GM crops in Saskatchewan, is it reasonably possible for organic grain farmers in Saskatchewan to (a) obtain canola seed free from infiltration by the Defendants' GMOs and (b) produce organically grown canola free from infiltration by the Defendants' GMOs?

¶ 282 This question is obviously actually two, quite distinct questions. There is no evidence at all before me as to the difficulty of obtaining canola seed free from infiltration by GMOs, except for evidence that some organic farmers in Saskatchewan do continue to grow canola and market it as organic. Presumably, organically grown canola seed could, at least in theory, (and, I have no reason not to believe, in practice) be obtained from anywhere in the world where GM canola is not grown, even if it proved to be difficult to produce in Saskatchewan.

¶ 283 The question of the statistical likelihood of "infiltration" of organically grown canola by GM canola pollen is related to the plaintiffs' claim that organic grain farmers have lost the ability to grow and market organic canola, and have lost the value of this crop for ordinary crop rotation, due to the risk of AP of GM canola that would adversely affect their ability to market the crop as organic. Like many of the proposed questions, statistical evidence of the likelihood of AP would be of some relevance in determining whether and to what extent this risk assessment is reasonable, but it would also vary over time and in relation to the individual circumstances of farmers. More significantly, the evidence suggests that there is, generally, no absolute prohibition, either by organic certifiers or organic buyers, of trace amounts of AP, and that, in general, the relevant prohibitions (which, as we have already noted, evolved over time after 1995) relate to "use" of GM products in the production of organic crops. There is some limited evidence of rejection by organic buyers of particular organic canola crops due to AP of GMOs, but it is clear that the tolerance for trace amounts of AP of GM canola varies from buyer to buyer and may be flexible. Accordingly, while statistical evidence of the potential, from time to time, of AP may have some probative value in assessing the risk faced by an individual farmer deciding whether to grow organic canola, it is far from determinative of this issue, which is one requiring individual inquiry, and would not, in my view, significantly advance the claims of the class as a whole.

(8) What is the prevalence of volunteer canola in Saskatchewan?
(9) What is the statistical probability that such volunteer canola contains a transgene owned by one of the Defendants (and their relative percentages)?

¶ 284 I am of the view that statistical evidence of this type could not advance the plaintiffs' claim in relation to the clean-up costs related to volunteer GM canola at all. These are claims that are essentially individual. Either a farmer has suffered this loss or he or she has not. The statistical probability of such a problem is simply irrelevant. In any case, there is no evidence before me to suggest that many members of the proposed class have had a problem with volunteer GM canola plants. I would not certify these as common issues.

(10) How much GM canola did each Defendant sell in Saskatchewan in the years in question?

¶ 285 The plaintiffs have not identified how this issue is relevant to any of the claims advanced. It is conceivable, although not obvious, that it might be relevant to the defendants' proportionate liability for damages, should the case reach that point. There is also an implied argument that a "profit motive" is relevant to the plaintiffs' claim in relation to the abandonment of the IPP, but this argument is not convincing. I would not certify this as a common issue that would significantly advance a claim or claims of the class members.

(11) What licensing arrangements did the Defendants enter into with producers and/or seed companies regarding the sale of their products in the years in question?

¶ 286 Again, it is not entirely clear how the answer to this question, is intended to advance the

plaintiffs' claim(s). The plaintiffs have specifically pled that the defendant Monsanto entered into technology user agreements with farmers who bought Roundup Ready canola seed, with the result of "ownership of the Roundup Ready gene at all times remaining with Monsanto Canada." (Statement of claim, para. 16) There is no similar pleading in relation to BCS, (nor is there any evidence before me that such agreements exist), although the plaintiffs have suggested in argument that it is likely that BCS retains some patent protection of its GM canola varieties. Counsel for the plaintiffs frequently pressed, in argument, the proposition that "with ownership comes responsibility" and the resulting view that the patent protection and control of production enjoyed by one or both of the defendants enhanced the arguments for liability in trespass or in nuisance in relation to AP of GM canola in organically grown crops. In finding that the pleadings fail to disclose a reasonable cause of action in either nuisance or trespass, I have rejected these arguments. Accordingly, it appears that this question is relevant to the plaintiffs' claim only if I am in error in so concluding.

(12) What corporate policies and procedures did the Defendants have in the years in question to address complaints of "adventitious presence"?
(13) What instructions, education, and warnings did the Defendants give to farmers purchasing their GM products in the years in question regarding use, containment, and pollen flow?

¶ 287 These questions are, in my view, clearly relevant to the claim in negligence, and would constitute a common issue were it found that the pleadings disclosed a reasonable cause of action in negligence. While it may be that the answer to the question is that these measures varied from year to year or from purchaser to purchaser, as it is the absence of any such measures that the plaintiffs would seek to prove, this possibility is not fatal to the question and there is clearly no onus upon the plaintiffs on this application to present evidence that such measures were in place.

(14) What was the nature, extent, scope, design and aim of the Identity Preservation Program ("IPP") and the Defendants' involvement in its introduction, maintenance and repeal?
(15) To what extent did the Defendants profit from the IPP or its repeal?
(16) Did the Defendants have any express, imputed or implied knowledge of how their GM canola would infiltrate conventional canola if released without an IPP?
(17) Did the Defendants have any express, imputed or implied knowledge of the potential damage that dismantling the IPP could have on the European export market for Canadian Canola?
(18) Did the Defendants have any express, imputed or implied knowledge of the reliance of organic canola producers on the European market?

¶ 288 As I have already commented, not only have the plaintiffs failed to provide any evidence that the abandonment of the IPP in any way affected the export market for organic canola, it is contrary to the logic of the claim as presented to suppose that it could have done so. The purpose of the program was to segregate GM canola from non-GM canola (by separately processing GM canola and inserting grain "confetti") to ensure, in the early years, that the export market for non-GM canola was preserved. Cessation of this segregation could not affect organically grown canola, because that continued and continues to be segregated, and marketed separately, from all non-organically grown canola whether or not it is GM canola.

¶ 289 When this point was raised in argument, plaintiffs' counsel responded that, because the IPP program apparently contained some limitations on the amount of GM canola that could be planted in the two years it was in operation, had it been continued (assuming the same limitations), it would have limited the amount of AP to which non-GM canola is exposed in Saskatchewan. This argument

(apparently reflected in proposed common issue No. 16) has no merit. It is clear, on the evidence before me, that the purpose of this program was not to restrict the future production of GM canola. In any case, the plaintiffs' pleading, in para. 36(a) of the statement of claim, clearly describes this program as voluntarily developed "export rules" designed to ensure access to foreign markets (as opposed to "production limitation rules", designed to prevent the adventitious presence of GM canola in non-GM crops), and claims the plaintiffs were obliged to maintain the program "to preserve the European canola export market." The reformed argument appears to be a claim that the defendants, having originally introduced GM canola on a limited acreage basis, were obliged, solely by reason of having initially so limited production, to continue those limitations forever in order to limit the adventitious spread of the GM gene. This basis for a duty is not pled and it has no basis in law.

(19) What regulatory approvals did the Defendants receive from the Federal Government of Canada or the Provincial Government of Saskatchewan pertaining to the testing, licensing and release of their GM crops?

¶ 290 This question undoubtedly has general application (assuming an identifiable class), but, again, is entirely a matter of public knowledge. Federal approval is pled by the plaintiffs. Although it would likely be relevant to the plaintiffs' claims, it is unlikely that the answer to the question would significantly advance those claims.

(20) Are the Defendants' GM canola lines environmentally unsafe notwithstanding any such approvals?

¶ 291 This question is clearly not relevant to the majority of the plaintiffs' claims, as these are pled. In general, the plaintiffs seek to establish that the defendants had a duty to ensure that the plaintiffs' ability to grow and market organic canola was not harmed by the adventitious presence of GM canola in organic crops, or the presence of GM volunteer canola plants in organic fields. Most of the causes of action advanced in the statement of claim do not allege and do not rely on proving that the GM canola is "environmentally unsafe", but allege only that, due to restrictions of organic certifiers or organic buyers, any degree of adventitious presence of GMOs prevents their marketing canola as organic.

¶ 292 The exception is the plaintiffs' pleading in para. 40 of the statement of claim that the defendants' GM canola varieties are "pollutants" within the meaning of the EMPA. While I have held that this pleading does not disclose a reasonable cause of action, if I am in error on this point, then, as the statutory definition of "pollutant" includes the notion of unsafe or harmful to the environment, this question would become quite relevant to the plaintiffs' claim. (I held, in the context of considering whether this pleading would disclose a reasonable cause of action, that the plaintiffs would be obliged to amend the statement of claim to allege specific harm to the environment were this cause of action to proceed, but that such an amendment would be allowed.) The answer to this question does not require individual inquiry and would be relevant across the class, again, assuming, contrary to my earlier conclusion, that there is an identifiable class.

¶ 293 Accordingly, it is my conclusion that if I am in error in holding, (1) that there is no identifiable class, and (2) that para. 40 of the statement of claim does not disclose a reasonable cause of action, then question No. 20 is clearly a common issue, the resolution of which would significantly advance the claims of all members of the class.

B. Proposed common issues of law

Negligence

(1) Did the Defendants owe a duty of care to certified organic grain farmers in Saskatchewan as a class not to harm their access to the European Union market and in that regard:

a. to ensure that their products were not released in a way that they would infiltrate conventional canola? and/or
b. to warn farmers purchasing their products about cross-pollination? and/or
c. to introduce their products with an IPP designed to protect the foreign markets that have not approved their GMOs for import? and/or
d. to preserve the IPP to protect the European Union market until import approvals were obtained?

(2) Did the Defendants breach such duties of care?
(3) If an organic farmer sustains a loss resulting from not growing organic canola because of unacceptable risks of GM infiltration (but before such infiltration has occurred), is such a loss barred by the "pure economic loss" doctrine?

¶ 294 Many of the difficulties with this question arise from the diversity of the class defined by the plaintiffs, as I have indicated above. As the defendants argue, this renders impossible any question about duty owed by the defendants, the answer to which would be necessarily common across the class. For example, the class definition includes persons who were organic grain farmers (and who may or may not have grown canola) in 1995 and 1996 when the defendants' organic canola was first introduced and persons who began farming organically only much later, after GM canola was introduced and even after it was well established, representing 70 percent of the canola grown in Western Canada. It includes those farming when there were no express organic standards, either by private certifiers or by organic markets, generally, in relation to either the presence or use of GMOs. The concept of duty in the tort of negligence depends on the relationship between the defendant and the plaintiff and the circumstances which exist at the time the duty arises. These variables would clearly be relevant to any analysis of duty. These questions cannot be common across the class as defined by the plaintiffs.

¶ 295 In addition, I note that no duty "to introduce their products with an IPP designed to protect the foreign markets that have not approved their GMOs for import" is pled. I have already noted that the presence or absence of an IPP is not apparently relevant to the position of organic grain farmers, who necessarily, in order to maintain their certification and their access to organic markets, segregate their crops, although it might, of course, be relevant to the different and potentially much larger class of conventional farmers who do not grow GM canola.

¶ 296 The defendants also point out that the first of these questions, unlike the pleadings, seems to confine the negligence claim to the loss of the European market. There is no evidence before me as to which members of the class, or how many individuals, could or would have sold organic canola into the European market. There is some evidence that few did so, due to the high cost of transportation and the existence of a more favourable market in the United States. The defendants could only have owed a duty not to harm the European organic canola market to those who had an interest in participating in that market and an ability to do so. The evidence before me is that not all private certifiers had or have access to the EU market.

¶ 297 The third of these questions would raise a question common to all of those who have sustained the loss in question, relevant to the further question of whether liability of the defendants can be

established for such loss. However, as has already been held, the identity of the individuals who would have grown canola but for the risk of GM infiltration would require an individual inquiry into the circumstances of individual farmers. The evidence on this application would lead me to conclude that the loss would have been suffered by, at most, only a minority of the identified class.

Strict Liability

(4) Was the development and subsequent release of canola containing the Defendants' transgenes a non-natural use of land?
(5) Did the transgenes escape?
(6) Are the transgenes something likely to cause mischief?
(7) Was the Defendants' ownership and control of the confined field trials from which the transgenes were initially released sufficient for there to be liability?
(8) Alternatively, did the Defendants continue to own and/or control their transgenes after commercial release sufficient for there to be liability?

¶ 298 These questions are intended to relate to the proposed cause of action based on the principle in Rylands v. Fletcher. The serious problems faced by the plaintiffs in relation to this cause of action, and the approach taken by the plaintiffs in this regard, are discussed in the section of this judgment dealing with whether the pleadings disclose a reasonable cause of action, supra. Clearly, if I am correct that the pleadings disclose no reasonable cause of action on this basis, these questions are irrelevant, and cannot advance the plaintiffs' claim.

¶ 299 In any case, it is clear that any "escape" of transgenes during the period of laboratory testing or field trials could only have affected a tiny portion (if any, which is not shown) of the class sought to be certified. I noted above that the plaintiffs abandoned, in argument, any allegation that liability could arise on this basis of "escapes" of transgenes from the fields of conventional farms. As a result, I assume that question No. 8 has, in any case, been abandoned.

¶ 300 I conclude that the questions in relation to "strict liability" cannot be common questions in relation to the class sought to be certified.

Nuisance

(9) Do the Defendants' sufficiently own and/or control their transgenes rendering them potentially liable should their transgenes interfere with an organic farmer's use and enjoyment of his or her land?
(10) Is organic farming an overly sensitive land use so as to preclude any potential liability?
(11) Are the Defendants entitled to rely upon The Agricultural Operations Act as a defence to a nuisance claim?

¶ 301 If my analysis of the tort of nuisance and its application in this context in the earlier section of this judgment dealing with causes of action is correct, then proposed common question No. 9 is not a question that arises in relation to this tort. There is simply no legal basis for claiming that mere ownership of an alleged offending substance, let alone mere patent protection, without more, creates liability for nuisance when another party controls and owns the land from which the nuisance emanates, and the use of the offending substance.

¶ 302 However, the primary issue at this stage of the analysis is whether, assuming that the pleadings

disclose a reasonable cause of action in nuisance, and that there is an identifiable class, liability for nuisance would, in any case, be a question for which there is a common answer across the class.

¶ 303 Question No. 10 might be answered in a general way, applicable across the class, but the issue of over-sensitivity is primarily one that would be variable, as between farmers, depending on the level of tolerance of the presence of GMOs, or of volunteer GM canola plants, to which each farmer was subject, and over time, as standards of tolerance varied over time. This factor affects both whether a farmer has suffered harm as a result of the presence of GMOs and also whether his sensitivity to that presence is or is not reasonable, in the context. Accordingly, I would conclude that this question cannot be answered in a uniform way across the class.

¶ 304 As no statement of defence has been filed in this matter, it would be premature to certify question No. 11 as a common issue.

Trespass

(12) Do the Defendants have sufficient ownership or control of the transgenes that they have created and released into the environment to make them liable for the tort?
(13) Is there a "directness" requirement for the tort and, if so, was infiltration sufficiently inevitable to satisfy the requirement?
(14) Does the propensity of the released genetic material to propagate and proliferate obviate a "directness" requirement?

¶ 305 I have earlier held that the pleadings do not disclose a reasonable cause of action in trespass. The questions posed by the plaintiffs (all three of which are, in my respectful view, the same question, differently worded) would be relevant to whether there is a cause of action, if I am mistaken that it is "plain and obvious" that there is not. However, it is clear, in my view, that there cannot be a claim in trespass across the class defined by the plaintiffs, for trespass requires the actual (and not merely the potential) presence of a foreign object on the plaintiffs' land. The evidence on this application suggests that very few organic farmers have experienced the "contamination" of which the statement of claim complains. Rather, it is alleged that most choose not to grow canola because of the risk of future contamination. Mere risk cannot, in my view, found a claim in trespass. Accordingly, the answer to these questions has no application across the class as a whole.

The Environmental Management Protection Act (EMPA) and The Environmental Management and Protection Act, 2002 (EMPA, 2002)

(15) Are the Defendants' transgenes "pollutants" within the meaning of the EMPA and/or a "substance" within the meaning of the EMPA, 2002?
(16) If so, did the Defendants own or control the transgenes when they were first discharged into the environment under the EMPA or were they persons responsible for the discharge under the EMPA, 2002?
(17) Does the responsibility for any discharge under either Act extend to the progeny of plants containing the transgenes?
(18) Are claims based on canola plants or seeds containing the Defendants' transgenes that have spread onto organic fields after October 1, 2002 to be governed by the EMPA, 2002, and ones occurring before by the EMPA?

¶ 306 I have concluded earlier that there is no reasonable cause of action under the EMPA, and, accordingly, the questions relating to that Act can only arise if I am in error on that point. The plaintiffs

have conceded in argument that, as the EMPA, 2002, did not come into effect until well after GM canola was widely grown in Western Canada, it cannot apply to the claim for loss of markets for organic canola, but, at best, applies only to the alleged clean-up costs incurred as a result of volunteer GM canola plants. As has been noted above, only a small percentage of the class as proffered have suffered this loss and they are identifiable only on individual inquiry. Questions in relation to the EMPA, 2002, therefore do not apply across the class as proffered. In other words, the "commonality" of these questions is subject to the points already raised in regard to the identification of the class. As the defendants point out, s. 15 of the EMPA, 2002 creates liability only if there has been "loss or damage incurred" as the result of a discharge of a substance. Therefore, any consideration of s. 15 would require inquiry into the circumstances of the proposed class members. It simply does not apply on a class- wide basis, unless the definition of the class is narrowed to include only those who have suffered the losses alleged. I have concluded, above, that this narrowing is not possible on an objective basis.

¶ 307 However, if it is assumed that there is a cause of action under both Acts, and that the plaintiffs have defined an appropriate class, then question Nos. 15 and 16 would in my view be appropriate common questions, for they would clearly be relevant to the determination of liability. Question Nos. 17 and 18, which attempt to address the scope of the two Acts would also be appropriate.

The Environmental Assessment Act (the "EAA")

(19) Was the testing and release of GM canola into the Saskatchewan environment a "development" within the meaning of the EAA?
(20) Were the Defendants therefore required to conduct and submit an environmental impact assessment for ministerial approval prior to proceeding?
(21) Did the Defendants fail to conduct and submit such an assessment and did they fail to obtain ministerial approval as required by the EAA?

¶ 308 These questions all address the more general question as to whether the EAA is intended to apply to the commercial release of GM canola. I have earlier held that this issue cannot be determined on this application, for, given the sweeping provisions of the statute on literal reading, it is not plain and obvious that the Act does not apply. It is common ground that no ministerial approval was sought or received prior to the commercial release of GM canola by either of the two defendants. As with s. 15 of the EMPA, 2002, s. 23 of the EAA creates liability only toward a person "who suffers loss, damage or injury as a result of the development." Again, whether an individual has suffered a loss would inevitably involve an inquiry into the individual circumstances of the farmer. There is no evidence before me to conclude that more than a minority of the proffered class have suffered the losses claimed. Thus, these questions cannot have uniform application across the class as proffered.

¶ 309 Again, however, if it is assumed, contrary to my analysis, that the class of those suffering the losses claimed is or can be properly defined, then these questions would, in my view, be common questions, for even if individual losses would have to be determined, it is clear that the question of whether this Act can apply to such claims would, if answered in the plaintiffs' favour, substantially advance the claims.

Conclusion re common issues

¶ 310 The question of whether the requirement to identify common issues has been satisfied by the plaintiffs on this application is inextricably tied to my earlier findings in relation to whether the pleadings disclose reasonable causes of action and whether they have proffered an identifiable class. Many, but not all, of the proposed common issues relate to proposed causes of action that I have rejected as not being reasonable causes of action. All of the issues proposed fail the test of commonality on the

basis of my analysis of whether the plaintiffs have properly identified a class, for clearly no issue can be common across a class unless there is a properly identifiable class.

¶ 311 In addition, in many cases, I have indicated that a proposed common issue would, in any case, inevitably require an individual inquiry and could not be answered across any generally defined class. This problem arises both with proposed questions of fact, and with proposed questions of law. Examples of this are proposed questions of fact No. 3 and Nos. 4-9, proposed questions of law No. 1 (relating to the existence of a duty owed by the defendants to the plaintiffs in negligence) and No. 10 (sensitivity of land use by organic farmers). Questions relating to the EMPA, 2002 and EAA are relevant only on the individual showing of loss, if at all, but do raise questions that can, themselves, be answered without individual inquiry.

¶ 312 I have held that all questions relating to the introduction or abandonment of an IPP lack a factual matrix showing their relevance to the losses claimed by the plaintiffs. This includes questions of fact No. 2 and Nos. 14-18, as well as question of law No. 1(c). Other proposed common issues have been held to lack relevance to the claim as it is pled, including questions of fact No. 2 and No. 10 and question of law No. 11.

¶ 313 Other proposed common issues raise the question whether their resolution would substantially advance the case for the plaintiffs. Ultimately, this is a question more relevant to the criterion of preferred procedure than the question of whether a proposed issue is a common issue. Section 6(c) of the Act requires the Court to be satisfied that "the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members." Accordingly, an issue can satisfy this criterion even where its resolution might leave many individual issues to be decided. However, it is clear that if the resolution of none or few of the proposed common issues would substantially advance the plaintiffs' case, this would count heavily against a class action being the preferred procedure for resolving the issues raised in the statement of claim.

¶ 314 In the end result questions clearly relevant to some claims advanced (including those I have found not to be reasonable causes of action) and susceptible to being answered without individual inquiry would include proposed questions of fact No. 11 (arguably relevant to nuisance and trespass or to the claims under the environmental statutes), Nos. 12 and 13 (relevant to the claim in negligence), No. 19, and No. 20 (relevant to the claim under the EMPA), and proposed questions of law No. 3 (re pure economic loss), Nos. 4-8 (re strict liability), No. 9 (nuisance), Nos. 12-14 (trespass), and Nos. 15-21 (re the three environmental statutes). Each of these suffers from the problem that it relates to a loss or losses suffered by only a minority of the class members, as the class is presently defined, and individual inquiry would be necessary to determine which class members are affected. This is the general problem of the over-inclusiveness of the class definition proffered. Of these, questions of fact Nos. 12, 13 and 20, and questions of law Nos. 3, 4-8, 9, 12-14, and parts of Nos. 15-18, are relevant only to claims that I have held disclose no reasonable cause of action.

¶ 315 I conclude that, if one were to set aside the problem of class definition, the only issues that could constitute common issues for the purpose of certification are proffered questions of fact No. 19, and proffered questions of law Nos. 15-21 (excluding those portions of Nos. 15-18 that relate only to the claim under the original EMPA). These would, as I have indicated, have application to a more limited class of persons who, in my view, could only be identified after individual inquiry.

D. Criterion 4: Is a class action the preferable procedure?

¶ 316 Subsection 6(d) requires that the Court be satisfied on an application for certification that a

class action would be the preferable procedure for the resolution of the common issues. Section 9 of the Act is relevant to this criterion, providing as follows:

> 9 The court shall not refuse to certify an action as a class action by reason only of one or more of the following:
>
> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
> (b) the relief claimed relates to separate contracts involving different members;
> (c) different remedies are sought for different class members;
> (d) the number of class members or the identity of each class member is not ascertained or may not be ascertainable;
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all the class members.

¶ 317 The purposes of class proceedings and the relationship of these purposes to the issue of preferability were discussed by the Supreme Court of Canada in Hollick, supra, at para. 15:

> ... class actions provide three important advantages over a multiplicity of individual suits. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behaviour to take full account of the harm they are causing, or might cause, to the public.

¶ 318 The Court went on to make these comments about the criterion of preferability:

> ... in the absence of legislative guidance, the preferability inquiry should be conducted through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behaviour modification: see also Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453, 121 D.L.R. (4th) 496 (Div. Ct.); compare British Columbia Class Proceedings Act, s. 4(2) (listing factors that court must consider in assessing preferability). Beyond that, however, the appellant and respondent part ways. In oral argument before this Court, the appellant contended that the court must look to the common issues alone, and ask whether the common issues, taken in isolation, would be better resolved in a class action rather than in individual proceedings. In response, the respondent argued that the common issues must be viewed contextually, in light of all the issues - common and individual - raised by the case. The respondent also argued that the inquiry should take into account the availability of alternative avenues of redress.
> The Report of the Attorney General's Advisory Committee makes clear that "preferable" was meant to be construed broadly. The term was meant to capture two ideas: first the question of "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation, and so on": Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 32. In my view, it

would be impossible to determine whether the class action is preferable in the sense of being a "fair, efficient and manageable method of advancing the claim" without looking at the common issues in their context.
The Act itself, of course, requires only that a class action be the preferable procedure for "the resolution of the common issues" (emphasis added), and not that a class action be the preferable procedure for the resolution of the class members' claims. I would not place undue weight, however, on the fact that the Act uses the phrase "resolution of the common issues" rather than "resolution of class members' claims". As one commentator writes:

> The [American] class action [rule] requires that the class action be the superior method to resolve the "controversy." The B.C. and Ontario Acts require that the class proceeding be the preferable procedure for the resolution of the "common issues" (as opposed to the entire controversy). [This] distinction ... can be seen as creating a lower threshold for certification in Ontario and B.C. than in the U.S. However, it is still important in B.C. and Ontario to assess the litigation as a whole, including the individual hearing stage, in order to determine whether the class action is the preferable means of resolving the common issues. In the abstract, common issues are always best resolved in a common proceeding. However, it is important to adopt a practical cost-benefit approach to this procedural issue, and to consider the impact of a class proceeding on class members, the defendants, and the court.

See Branch, supra, at s. 4.690. I would endorse that approach.
The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues. ... I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings". ... (at paras. 27-30) (Emphasis added)

¶ 319 While it is clear that these passages were written in relation to the Ontario statute, I am confident that the same principles are applicable to the Saskatchewan Act, which is largely based on the Ontario Act.

¶ 320 In view of my earlier findings in relation to whether and to what extent the pleadings disclose a reasonable cause of action, whether there is an identifiable class and whether there are common issues, where, in each case, I have found that the application before me is deficient, it is difficult to address the issue of preferability other than abstractly. Clearly, to the extent that I am in error on any of these findings, the analysis of whether a class action is the preferable procedure could be affected.

¶ 321 As I indicated in the analysis of the criterion of common issues, supra, were it possible to find an identifiable class with regard to the losses claimed by the plaintiffs, the only issues which appear to be even conceivably certifiable as common issues, relevant to the allowable causes of action and capable

of resolution without inquiry into the individual circumstances of the members of the putative class, would be proffered questions of fact No. 19, and proffered questions of law Nos. 15-21, i.e.:

> (19) What regulatory approvals did the Defendants receive from the Federal Government of Canada or the Provincial Government of Saskatchewan pertaining to the testing, licensing and release of their GM crops?
>
> The Environmental Management and Protection Act (EMPA) and The Environmental Management and Protection Act, 2002 (EMPA, 2002)
>
> (15) Are the Defendants' transgenes ... a "substance" within the meaning of the EMPA, 2002?
> (16) If so, ... were [the defendants] persons responsible for the discharge under the EMPA, 2002?
> (17) Does the responsibility for any discharge under [the Act] extend to the progeny of plants containing the transgenes?
> (18) Are claims based on canola plants or seeds containing the Defendants' transgenes that have spread onto organic fields after October 1, 2002 to be governed by the EMPA, 2002, and ones occurring before by the EMPA?
>
> The Environmental Assessment Act (the "EAA")
>
> (19) Was the testing and release of GM canola into the Saskatchewan environment a "development" within the meaning of the EAA?
> (20) Were the Defendants therefore required to conduct and submit an environmental impact assessment for ministerial approval prior to proceeding?
> (21) Did the Defendants fail to conduct and submit such an assessment and did they fail to obtain ministerial approval as required by the EAA?

¶ 322 In considering the questions of judicial economy and of access to justice, it is useful to consider what would be gained from determining these issues in a class action. With regard to the question of fact, governmental approvals obtained by the defendants are a matter of public record and are already, to a great extent, in evidence on this application. There would be little evidence necessary to establish these facts, and little chance of inconsistent results.

¶ 323 The application of the EMPA, 2002 or the EEA, while categorized by the plaintiffs as questions of law, also contain significant factual elements. Certainly there would be some advantage in relation to judicial economy and access to justice to have the applicability of these statutes determined in a single procedure.

¶ 324 However, there can be no doubt that the individual issues that would remain to be determined would involve substantial individual inquiry, for the individual claimants would first have to prove that they have suffered a loss as a result of the introduction of GM canola and would then have to establish the value of that loss. Particularly the first of these issues is not, in my view, amenable to a simple procedure, for it requires inquiry into all the circumstances under which the individual claimant has farmed over any of the years for which a claim is advanced.

¶ 325 In Hollick, the Chief Justice offered this analysis of preferable procedure, at para. 32:

> I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any

common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted: "Even if one considers only the 150 persons who made complaints - those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

¶ 326 The variations among possible claimants in the matter before me vastly exceed those described in Hollick. Members of the class sought to be certified farmed at various times, in various areas of the province, in various circumstances, were certified by various certifiers with varying standards (both among themselves and over time) and sold or tried to sell produce into various markets with varying standards (both among themselves and over time). The proceedings in this case would, in my view, inevitably break down into individual proceedings, requiring full discovery rights and a trial of the factual issues.

¶ 327 I do not accept that behaviour modification is a concern in this case. All of the evidence on this application is to the effect that the defendants did all that was expected of them in obtaining governmental approvals.

¶ 328 I conclude that a class action would not be the preferable procedure in this case.

E. Criterion 5: Adequacy of the representative plaintiffs

¶ 329 Pursuant to s. 6(e) of The Class Actions Act, the Court must be satisfied that:

(e) there is a person willing to be appointed as a representative plaintiff who:

(i) would fairly and adequately represent the interests of the class;
(ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

¶ 330 Although several objections are raised by the defendants in relation to the proposed representative plaintiffs, there is a major issue in this case that is sufficient, in my view, to dispose of the question.

¶ 331 Both of the individual proposed representative plaintiffs, Larry Hoffman and Dale Beaudoin, have executed a two-part document, titled "Legal Costs Indemnity Agreement" and "Agreement to Act as Representative Plaintiff", (attached as Exhibit 17 to the affidavit of Mr. Hoffman and Exhibit 5 to that of Mr. Beaudoin) the contents of which make it clear that neither of these individuals is instructing counsel nor assuming any responsibility for this action, but, rather, that both have assigned that right to a

group called the Saskatchewan Organic Directorate Organic Agriculture Protection Fund ("SOD-OAPF"). The Saskatchewan Organic Directorate is an umbrella organization created to support the organic movement in Saskatchewan. There is no evidence before the Court as to the governing structure of SOD. It established a committee, the Organic Agriculture Protection Fund, to direct this lawsuit and instruct counsel. According to the evidence of Larry Hoffman, on cross-examination, the exact relationship between SOD and the OAPF committee is unclear, should there be a conflict between the committee and the umbrella organization.

¶ 332 In effect, these proposed representatives are not directing the litigation and have relinquished control over the conduct of the action to a committee whose own powers are unclear. They have agreed only "to be named" as plaintiffs and to attend court when required and produce all information relevant to the claim.

¶ 333 The text of the document executed by Mr. Hoffman (Mr. Beaudoin's is identical) reads as follows:

> LEGAL COSTS OF INDEMNITY AGREEMENT
>
> In consideration of Larry Hoffman agreeing to act as a representative plaintiff in a class action brought on behalf of all certified organic grain farmers in Saskatchewan to seek compensation against Monsanto Canada Inc. and Aventis Cropscience Canada Holding Inc. for damages to certified organic grain farmers caused by the introduction of genetically-modified canola, an (sic) against Monsanto Canada Inc. seeking to enjoin the introduction of genetically-modified wheat, the Saskatchewan Organic Directorate Organic Agriculture Protection Fund ("SOD-OAPF"), to the extent of any funds held by SOD-OAPF, without liability to its members or directors, hereby agrees to indemnify and save harmless "Larry Hoffman" from any award of costs which may be made against Larry Hoffman for acting as a plaintiff in the said class action.
>
> SASKATCHEWAN ORGANIC DIRECTORATE ORGANIC AGRICULTURE PROTECTION FUND
>
> Per: "Arnold Taylor"
> Name: "Arnold Taylor"
> Title: "SOD Pres."
>
> AGREEMENT TO ACT AS REPRESENTATIVE PLAINTIFF
>
> I, Larry Hoffman agree to be named as a representative plaintiff in a class action brought on behalf of all certified organic grain farmers in Saskatchewan to seek compensation against Monsanto Canada Inc. and Aventis Cropscience for damages to certified organic grain farmers caused by the introduction of genetically-modified canola, and against Monsanto Canada Inc. seeking to enjoin the introduction of genetically-modified wheat, and for that purpose I will attend Court when required and produce all information relevant to my claim. I further appoint and authorize the SOD-OAPF Committee to retain and instruct counsel on my behalf on all matters pertaining to said class action.
>
> Per: "Larry Hoffman"
> Name: "Larry Hoffman"

¶ 334 The extent to which the named plaintiffs have assigned any responsibility for this lawsuit to others was confirmed on cross-examinations of Mr. Beaudoin and Mr. Hoffman.

¶ 335 Mr. Beaudoin, for example admitted that he agreed to be named as a plaintiff when approached by Marc Loiselle, an active member of SOD-OAPF. He is not aware of the identities of all members of the SOD-OAPF committee and never met with the committee itself. He has no meetings with the committee to discuss the lawsuit. He knows there were "one or two" court applications previously in the action, but had not, prior to the certification hearing, attended any of the court proceedings. He does not receive periodic reports on the progress of the litigation from the committee, and does not receive reports of the committee's fundraising efforts for the lawsuit. I cannot conclude, in these circumstances, that Mr. Beaudoin "would fairly and adequately represent the interests of the class."

¶ 336 Mr. Hoffman has been somewhat more involved in SOD-OAPF and, indeed, had some small part in the formation of OAPF. It is the committee, and not Hoffman who is raising money to fund the lawsuit, who has chosen and hired the experts who have sworn affidavits for the plaintiffs. He concedes that he is one of 12 members of the OAPF committee and that it is the majority of the committee that decides matters pertaining to the action. He concedes that he has no independent right to conduct the action and that his only voice in the conduct of the litigation is as a member of the OAPF committee. There is no election process for the committee and it is unclear how members are chosen.

¶ 337 The representative plaintiff under The Class Actions Act has the responsibility to prosecute the lawsuit, once certified, in the interests of the members of the class. Their duty is akin to that of a fiduciary. They must have adequate knowledge and ability to instruct counsel and they must act in the interests of the members of the class. They are answerable to the Court for the adequate performance of these obligations. These are duties that cannot, in my view, be delegated to another party who is not answerable to the Court.

¶ 338 Faced with questioning on this point from the Court, counsel for the plaintiffs urged the Court, if it was concerned about this issue, to permit him to "tear up" the two above-referenced agreements which, he insisted, were drafted on his advice. I cannot see how this could address the problem, for there is no evidence before me that such an act would change the manner in which the litigation is conducted or that the two individuals in question are either able or willing to assume the responsibility for this action on behalf of all members of a certified class.

¶ 339 I conclude that the proposed representative plaintiffs are not appropriate representative plaintiffs for the proposed class action.

Conclusion

¶ 340 Of the seven causes of action asserted in the statement of claim, I have concluded that only two disclose a reasonable cause of action. I have held that the proposed representatives have failed to satisfy the Court that there is an identifiable class rationally related to the claims of losses in the statement of claim. Most of the proposed common issues have been found not to be common across the proposed class. I have concluded that a class action would not be the preferable proceeding in light of the nature and the predominance of individual issues that would remain to be resolved after any remaining common issues were determined. Finally, I have held that the proposed representative plaintiffs are not appropriate representative plaintiffs for a class action.

¶ 341 Accordingly, the application for certification is dismissed. Leave is granted to the parties to address the issue of costs.

G.A. SMITH J.

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ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JOINT BOOK OF AUTHORITIES
(Motion for Settlement Approval returnable August 29, 30 and 31, 2006)

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