JOINT BOOK OF AUTHORITIES OF THE PLAINTIFFS
VOLUME II

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
(Certification, Settlement Approval and Approval of Legal Fees)
Returnable August 29-31, 2006

THOMSON, ROGERS
3100-390 Bay Street
Toronto, Ontario
M5H 1W2

Craig Brown
Tel: (416) 868-3163
Fax: (416) 868-3134

KOSKIE MINSKY LLP
900 – 20 Queen Street West
Toronto, Ontario
M5H 3R3

Kirk M. Baert
Tel: 416-595-2115
Fax: 416-204-210109

DOANE PHILLIPS YOUNG
300 - 53 Jarvis Street
Toronto, ON M5C 2H2

John Kingman Phillips
Tel: 416-366-10229
Fax: 416-366-9197

MERCHANT LAW GROUP
#100 – Saskatchewan Drive Plaza
2401 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H10

E.F. Anthony Merchant, Q.C.
Tel: 306-359-7777
Fax: 306-522-3299

NELLIGAN O'BRIEN PAYNE
1900 – 66 Slater Street
Ottawa, Ontario
K1P 5H1

Janice Payne
Tel: 613-2310-100100
Fax: 613-2310-20910

PETER GRANT & ASSOCIATES
900 – 777 Hornby Street
Vancouver, B.C.
V6Z 1S4

Peter Grant
Tel: 604-6105-1229
Fax: 604-6105-0244

Solicitors for the plaintiffs

TO: **DEPT. OF JUSTICE CANADA**
Civil Litigation Section
234 Wellington Street, East Tower
Ottawa, ON K1A 0H10

Paul Vickery, Sr. Gen. Counsel
Tel: 1-613-9410-14103
Fax: 1-613-941-51079

Counsel for the Attorney General of Canada

AND TO: **CASSELS BROCK & BLACKWELL LLP**
Scotia Plaza, Suite 2100
40 King St. W.
Toronto, ON M5H 3C2

S. John Page
Phone: 416 869-5481
Fax: 416 640-3038

Counsel for the General Synod of the Anglican Church of Canada and Agent for service for other Religious Entity defendants

AND TO: **MCKERCHER MCKERCHER WHITMORE LLP**
374 Third Avenue
South Saskatoon, SK S7K 4B4

W. Roderick Donlevy
Tel: (306) 664-1331 dir
Fax: (306) 653-2669

Counsel for the Catholic Entities

Court File No. 00-CV-192059CP

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48. M. Eizenga et al., *Class Actions Law & Practice* (2006) at §13.12
49. Indian & Northern Affairs Canada, file E6757-18, volume 13, *A New Justice for Indian Children*, Child Advocacy Project, Children's Hospital, Winnipeg, 1987

Indexed as:

Hollick v. Toronto (City)

John Hollick, appellant;
v.
City of Toronto, respondent, and
Friends of the Earth, West Coast Environmental Law Association, Canadian Association of Physicians for the Environment, the Environmental Commissioner of Ontario and Law Foundation of Ontario, interveners.

[2001] 3 S.C.R. 158
[2001] S.C.J. No. 67
2001 SCC 68
File No.: 27699.

Supreme Court of Canada

2001: June 13 / 2001: October 18.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
(38 paras.)

Practice — Class actions — Certification — Plaintiff complaining of noise and physical pollution from landfill owned and operated by city — Plaintiff bringing action against city as representative of some 30,000 other residents who live in vicinity of landfill — Whether plaintiff meets certification requirements set out in provincial class action legislation — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5(1).

The appellant complains of noise and physical pollution from a landfill owned and operated by the respondent city. He sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill. The motions judge found that the appellant had satisfied each of the five certification requirements set out in s. 5 of the Act and ordered that the appellant be allowed to pursue his action as representative of the stated class. The Divisional Court overturned the certification order on the grounds that the appellant had not stated an identifiable class [page159] and had not satisfied the commonality requirement. The Court of Appeal dismissed the appellant's appeal, agreeing with the Divisional Court that commonality had not been established.

Held: The appeal should be dismissed.

The Class Proceedings Act, 1992 should be construed generously to give full effect to its benefits. The Act was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

In this case there is an identifiable class within the meaning of s. 5(1)(b). The appellant has defined the class by reference to objective criteria, and whether a given person is a member of the class can be determined without reference to the merits of the action. With respect to whether "the claims ... of the class members raise common issues", as required by s. 5(1)(c), 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. Further, an issue will not be "common" in the requisite sense unless the issue is a substantial ingredient of each of the class members' claims. Here, 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). The issue is whether there is a rational connection between the class as defined and the asserted common issues. While the putative representative must show that the class is defined sufficiently narrowly, he or she need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. The appellant has met his evidentiary burden. It is sufficiently clear that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. Moreover, while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries.

A class proceeding would not be the preferable procedure for the resolution of the common issues, however, as required by s. 5(1)(d). 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 [page160] to justice, and behaviour modification. The question of preferability must take into account the importance of the common issues in relation to the claims as a whole. The preferability requirement was intended to capture the question of whether a class proceeding would be preferable in the sense of preferable to other procedures such as joinder, test cases and consolidation. The preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions. The appellant has not shown that a class action is the preferable means of resolving the claims raised here. With respect to judicial economy, 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 landfill emitted physical or noise pollution, 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. 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. Nor would allowing a class action here serve the interests of access to justice. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. The argument that behaviour modification is a significant concern in this case should be rejected for similar reasons.

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Referred to: Rylands v. Fletcher (1868), L.R. 3 H.L. 330; Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46; Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314; Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389; Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63; Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379; Abdool v. Anaheim Management Ltd. (1995), 21 O.R. (2d) 453; Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69.

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APPEAL from a judgment of the Ontario Court of Appeal (1999), 46 O.R. (3d) 257, 181 D.L.R. (4th) 426 (sub nom. Hollick v. Metropolitan Toronto (Municipality)), 127 O.A.C. 369, 32 C.E.L.R. (N.S.) 1, 41 C.P.C. (4th) 93, 7 M.P.L.R. (3d) 244, [1999] O.J. No. 4747 (QL), dismissing an appeal from a decision of the Divisional Court (1998), 42 O.R. (3d) 473, 168 D.L.R. (4th) 760, 116 O.A.C. 108, 28 C.E.L.R. (N.S.) 198, 31 C.P.C. (4th) 64, [1998] O.J. No. 5267 (QL), allowing an appeal from a decision of the Ontario Court (General Division) (1998), 27 C.E.L.R. (N.S.) 48, 18 C.P.C. (4th) 394, [1998] O.J. No. 1288 (QL), granting a motion to have an action certified as a class proceeding. Appeal dismissed.

Michael McGowan, Kirk M. Baert, Pierre Sylvestre and Gabrielle Pop-Lazic, for the appellant.

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Graham Rempe and Kalli Y. Chapman, for the respondent.
Robert V. Wright and Elizabeth Christie, for the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment.

Doug Thomson and David McRobert, for the intervener the Environmental Commissioner of Ontario.
Written submissions only by Mark M. Orkin, Q.C., for the intervener the Law Foundation of Ontario.
Solicitors for the appellant: McGowan & Associates, Toronto.
Solicitor for the respondent: H. W. O. Doyle, Toronto.
Solicitors for the interveners Friends of the Earth, West Coast Environmental Law Association and Canadian Association of Physicians for the Environment: Sierra Legal Defence Fund, Toronto.
Solicitors for the intervener the Environmental Commissioner of Ontario: McCarthy Tétrault and David McRobert, Toronto.
Solicitor for the intervener the Law Foundation of Ontario:

Mark M. Orkin, Toronto.

The judgment of the Court was delivered by

¶ 1 **McLACHLIN C.J.**:— The question raised by this appeal is whether the appellant has satisfied the certification requirements of Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6, and whether the appellant should accordingly be allowed to pursue his action against the City of Toronto as the representative of some 30,000 other residents who live in the vicinity of a landfill owned and operated by the City. For the following reasons, I conclude that the appellant has not satisfied the certification requirements, and consequently that he may pursue this action only on his own behalf, and not on behalf of the stated class.

I. Facts

¶ 2 The appellant Hollick complains of noise and physical pollution from the Keele Valley landfill, which is owned and operated by the respondent City of Toronto. The appellant sought certification, under Ontario's Class Proceedings Act, 1992, to represent some 30,000 people who live in the vicinity of the landfill, in particular:

> A. All persons who have owned or occupied property in the Regional Municipality of York, in the geographic [page163] area bounded by Rutherford Road on the south, Jane Street on the west, King-Vaughan Road on the north and Yonge Street on the east, at any time on or after February 3, 1991, or where such a person is deceased, the personal representative of the estate of the deceased person; and
> B. All living parents, grandparents, children, grandchildren, siblings, and spouses (within the meaning of s. 61 of the Family Law Act) of persons who were owners and/or occupiers ... .

The merits of the dispute between the appellant and the respondent are not at issue on this appeal. The only question is whether the appellant should be allowed to pursue his action as representative of the stated class.

¶ 3 Until 1983, the Keele Valley site was a gravel pit owned privately. It operated under a Certificate of Approval issued by the Ministry of the Environment in 1980. After the respondent purchased the site in 1983, the Ministry of the Environment issued a new Certificate of Approval. The 1983 Certificate

covers an area of 375.9 hectares, of which 99.2 hectares are actual disposal area. The remainder of the land constitutes a buffer zone. The Certificate restricts Keele Valley to the receipt of non-hazardous municipal or commercial waste, and it sets out various other requirements relating to the processing and storage of waste at the site. It also provides for a Small Claims Trust Fund of $100,000, administered by the Ministry of the Environment, to cover individual claims of up to $5,000 arising out of "off-site impact".

¶ 4 The Ministry of the Environment monitors the Keele Valley site by employing two full-time inspectors at the site and by reviewing detailed reports that the respondent is required to file with the Ministry. In addition, the City of Vaughan has established the Keele Valley Liaison Committee, which is meant to provide a forum for community concerns related to the site. Until 1998, the appellant participated regularly at meetings of the Liaison Committee. Finally, the respondent maintains a telephone complaint system for members of the community.

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¶ 5 The appellant's claim is that the Keele Valley landfill has unlawfully been emitting, onto his own lands and onto the lands of other class members:

(a) large quantities of methane, hydrogen sulphide, vinyl chloride and other toxic gases, obnoxious odours, fumes, smoke and airborne, bird-borne or air-blown sediment, particulates, dirt and litter (collectively referred to as "Physical Pollution"); and
(b) loud noises and strong vibrations (collectively referred to as "Noise Pollution");

The appellant filed a motion for certification on November 28, 1997. In support of his motion, the appellant pointed out that, in 1996, some 139 complaints were registered with the respondent's telephone complaint system. (Before this Court, the appellant submitted that "at least 500" complaints were made "to various governmental authorities between 1991 and 1996" (factum, at para. 7).) The appellant also noted that, in 1996, the respondent was fined by the Ministry of Environment in relation to the composting of grass clippings at a facility located just north of the Keele Valley landfill. In the appellant's view, the class members form a well-defined group with a common interest vis-à-vis the respondent, and the suit would be best prosecuted as a class action. The appellant seeks, on behalf of the class, injunctive relief, $500 million in compensatory damages and $100 million in punitive damages.

¶ 6 The respondent disputes the legitimacy of the appellant's complaints and disagrees that the suit should be permitted to proceed as a class action. The respondent claims that it has monitored air emissions from the Keele Valley site and the data confirm that "none of the air levels exceed Ministry of the Environment trigger levels". It notes that there are other possible sources for the pollution of which the appellant complains, including an active quarry, a private transfer station for waste, a plastics factory, and an asphalt plant. In addition, some farms in the area have private compost operations. The respondent also argues that the number of registered complaints -- it says that 150 people complained over the six-year period covered in the [page165] motion record -- is not high given the size of the class. Finally, it notes that, to date, no claims have been made against the Small Claims Trust Fund.

II. Judgments

¶ 7 The motions judge, Jenkins J., found that the appellant had satisfied each of the five certification requirements set out in s. 5(1) of the Class Proceedings Act, 1992: (1998), 27 C.E.L.R. (N.S.) 48. He found that the appellant's statement of claim disclosed causes of action under s. 99 of the Environmental

Protection Act, R.S.O. 1990, c. E.19, and under the rule in Rylands v. Fletcher (1868), L.R. 3 H.L. 330; that the appellant had defined an identifiable class of two or more persons; that the issues of liability and punitive damages were common to the class; and that a class action would be the preferable procedure for resolving the complaints of the class. Finally, he found that the appellant would be an adequate representative for the class and that the appellant had set out a workable litigation plan. Though Jenkins J. struck out the appellant's claim for injunctive relief on the ground that damages would be a sufficient remedy and rejected his claims under the Family Law Act, R.S.O. 1990, c. F.3, on the grounds that the facts pleaded "cannot ... establish a basis for a claim for loss of care, guidance, and companionship" (p. 62). Jenkins J. concluded that the appellant had satisfied the certification requirements of s. 5 (1). Accordingly he ordered that the appellant be allowed to pursue his action as representative of the stated class.

¶ 8 The Ontario Divisional Court, per O'Leary J., overturned the certification order on the grounds that the appellant had not stated an identifiable class and had not satisfied the commonality requirement: (1998), 42 O.R. (3d) 473. O'Leary J. interpreted the identifiable class requirement to require that "there be a class that can all pursue the same cause of action" against the defendant. He noted that "[t]o pursue such cause of action the members of the class must have suffered the interference with use and enjoyment of property complained of in the [page166] statement of claim" (p. 479). O'Leary J. concluded that the appellant had not stated an identifiable class (at pp. 479-80):

> [T]he evidence does not make it likely that th[e] 30,000 [class members] suffered such interference. It cannot be assumed that the complaints made to Toronto make it likely that the landfill was the cause of the odour or thing complained about... . [E]ven if one were to assume that the Keele Valley landfill site was the source of all the complaints, 150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with.

For the same reasons, he concluded that the appellant had not satisfied the commonality requirement, writing that "[b]ecause the class that was certified ... bears no resemblance to any group that was on the evidence likely injured by the landfill operation, there are no apparent common issues relating to the members of the class" (p. 480). O'Leary J. set aside the certification order without prejudice to the plaintiff's right to bring a fresh application on further evidence.

¶ 9 The Court of Appeal for Ontario, per Carthy J.A., dismissed Hollick's appeal ((1999), 46 O.R. (3d) 257), agreeing with the Divisional Court that commonality had not been established. Citing Bywater v. Toronto Transit Commission (1998), 27 C.P.C. (4th) 172 (Ont. Ct. (Gen. Div.)), Carthy J.A. noted that the definition of a class should not depend on the merits of the litigation. However, he saw no bar to a court's looking beyond the pleadings to determine whether the certification criteria had been satisfied. "If it were otherwise", he noted, "any statement of claim alleging the existence of an identifiable group of people would foreclose further consideration by the court" (p. 264). Carthy J.A. acknowledged that a court should not test the existence of a class by demanding evidence that each member of the purported class have, individually, a claim on the merits. The court should, however, demand "evidence to give some credence to the allegation that ... 'there is an identifiable class ...'" (p. 264) (emphasis deleted).

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¶ 10 Carthy J.A. did not find it necessary to resolve the issue of whether the appellant had stated an identifiable class, because in his view the appellant had not satisfied the commonality requirement. In Carthy J.A.'s view, proof of nuisance was essential to each of the appellant's claims. Because a nuisance claim requires the plaintiff to make an individualized showing of harm, there was no commonality

between the class members. Carthy J.A. wrote (at pp. 266-67):

> This group of 30,000 people is not comparable to patients with implants, the occupants of a wrecked train or those who have been drinking polluted water. They are individuals whose lives have each been affected, or not affected, in a different manner and degree and each may or may not be able to hold the respondent liable for a nuisance... .
>
> No common issue other than liability was suggested and I cannot devise one that would advance the litigation.

Carthy J.A. dismissed the appeal, affirming the Divisional Court's order except insofar as it would have allowed the appellant to bring a fresh application on further evidence.

III. Legislation

¶ 11 Class Proceedings Act, 1992, S.O. 1992, c. 6

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,

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(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.

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.

IV. Issues

¶ 12 Should the appellant be permitted to prosecute this action on behalf of the class described in his statement of claim?

V. Analysis

¶ 13 Ontario's Class Proceedings Act, 1992, like similar legislation adopted in British Columbia and Quebec, allows a member of a class to prosecute a suit on behalf of the class: see Ontario Class Proceedings Act, 1992, s. 2(1); see also Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book IX; British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50. In order to commence such a proceeding, the person who seeks to represent the class must make a motion for an order certifying the action as a class proceeding and recognizing him or her as the representative of the class: see Class Proceedings Act, 1992, s. 2(2). Section 5 of the Act sets out five criteria by which a motions judge is to assess whether [page169] the class should be certified. If these criteria are satisfied, the motions judge is required to certify the class.

¶ 14 The legislative history of the Class Proceedings Act, 1992, makes clear that the Act should be construed generously. Before Ontario enacted the Class Proceedings Act, 1992, class actions were prosecuted in Ontario under the authority of Rule 12.01 of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. That rule provided that

> [w]here there are numerous persons having the same interest, one or more of them may bring or defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

While that rule allowed courts to deal with relatively simple class actions, it became clear in the latter part of the 20th century that Rule 12.01 was not well-suited to the kinds of complicated cases that were beginning to come before the courts. These cases reflected "[t]he rise of mass production, the diversification of corporate ownership, the advent of the mega-corporation, and the recognition of environmental wrongs": Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 26. They often involved vast numbers of interested parties and complex, intertwined legal issues -- some common to the class, some not. While it would have been possible for courts to accommodate moderately complicated class actions by reliance on their own inherent power over procedure, this would have required courts to devise ad hoc solutions to procedural complexities on a case-by-case basis: see Western Canadian Shopping Centres, at para. 51. The Class Proceedings Act, 1992, was adopted to ensure that the courts had a procedural tool sufficiently refined to allow them to deal efficiently, and on a principled rather than ad hoc basis, with the increasingly complicated cases of the modern era.

¶ 15 The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. As I discussed at some length in Western Canadian Shopping Centres (at paras. [page170] 27-29), 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. In proposing that Ontario adopt class action legislation, the Ontario Law Reform

Commission identified each of these advantages: see Ontario Law Reform Commission, Report on Class Actions (1982), vol. I, at pp. 117-45; see also Ministry of the Attorney General, Report of the Attorney General's Advisory Committee on Class Action Reform (February 1990), at pp. 16-18. 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.

¶ 16 It is particularly important to keep this principle in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": Report on Class Actions, supra, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclos[e] a cause of action": see Class Proceedings Act, 1992, s. 5(1)(a). Thus the certification stage is decidedly [page171] not meant to be a test of the merits of the action: see Class Proceedings Act, 1992, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also Caputo v. Imperial Tobacco Ltd. (1997), 34 O.R. (3d) 314 (Gen. Div.), at p. 320 ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the form of the action. The 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: see generally Report of the Attorney General's Advisory Committee on Class Action Reform, at pp. 30-33.

¶ 17 With these principles in mind, I turn now to the case at bar. The issue is whether the appellant has satisfied the certification requirements set out in s. 5 of the Act. The respondent does not dispute that the appellant's statement of claim discloses a cause of action. The first question, therefore, 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). There is, therefore, an identifiable class within the meaning of s. 5(1)(b): see J. H. Friedenthal, M. K. Kane and A. R. Miller, Civil Procedure (2nd ed. 1993), at pp. 726-27; Bywater, supra, at pp. 175-76; Western Canadian Shopping Centres, supra, at para. 38.

¶ 18 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. As I wrote in Western Canadian Shopping Centres, 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" (para. 39). Further, [page172] an issue will not be "common" in the requisite sense unless the issue is a "substantial ... ingredient" of each of the class members' claims.

¶ 19 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: see

Western Canadian Shopping Centres, at para. 38 ("the criteria [defining the class] should bear a rational relationship to the common issues asserted by all class members"). In asserting that there is such a relationship, the appellant points to the numerous complaints against the Keele Valley landfill filed with the Ministry of Environment. In the appellant's view, the large number of complaints shows that many others in the putative class, if not all of them, are similarly situated vis-à-vis the respondent. For its part the respondent asserts that "150 people making complaints over a seven-year period does not make it likely that some 30,000 persons had their enjoyment of their property interfered with" (Divisional Court's judgment, at pp. 479-80). The respondent also quotes the Ontario Court of Appeal's judgment (at p. 264), which declined to find commonality on the grounds that

> [i]n circumstances such as are described in the statement of claim one would expect to see evidence of the existence of a body of persons seeking recourse for their [page173] complaints, such as, a history of "town meetings", demands, claims against the no fault fund, [and] applications to amend the certificate of approval ... .

¶ 20 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.

¶ 21 The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad -- that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended: see W. K. Branch, Class Actions in Canada (1996), at para. 4.205; Webb v. K-Mart Canada Ltd. (1999), 45 O.R. (3d) 389 (S.C.J.) (claim for compensation for wrongful dismissal; class definition overbroad because included those who could be proven to have been terminated for just cause); Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Gen. Div.) (claim against school for misrepresentations about marketability of students after graduation; class [page174] definition overinclusive because included students who had found work after graduation).

¶ 22 The question arises, then, to what extent the class representative should be allowed or required to introduce evidence in support of a certification motion. The recommendations of the Ontario Law Reform Commission's 1982 report on this point should perhaps be given limited weight because, as discussed above, those recommendations were made in the context of a proposal that the certification stage include a preliminary merits test: see Report on Class Actions, supra, vol. II, at pp. 422-26 (recommending that both the representative plaintiff and the defendant be required, at the certification stage, to file one or more affidavits setting out all the facts upon which they intend to rely, and that the parties be permitted to examine the deponents of any such affidavits). The 1990 report of the Attorney General's Advisory Committee is perhaps a better guide. That report suggests that "[u]pon a motion for certification ... , the representative plaintiff shall and the defendant may serve and file one or more affidavits setting forth the material facts upon which each intends to rely" (emphasis added): see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 33. In my view the Advisory Committee's report appropriately requires the class representative to come forward with sufficient evidence to support certification, and appropriately allows the opposing party an opportunity

to respond with evidence of its own.

¶ 23 This appears to be the existing practice of Ontario courts. In Caputo, supra, the representative brought a class action against cigarette manufacturers claiming that they had knowingly misled the public about the risks associated with smoking. In support of the certification motion, the class representative filed only a solicitor's affidavit based on information and belief. The court held that the evidence adduced by the class representative was insufficient to support certification, and that the defendant manufacturers should be allowed to examine the individual class members in order to obtain the information required to allow the court [page175] to decide the certification motion. The "primary concern", the court wrote, is "[t]he adequacy of the record", which "will vary in the circumstances of each case" (p. 319).

¶ 24 In Taub v. Manufacturers Life Insurance Co. (1998), 40 O.R. (3d) 379 (Gen. Div.), the representative sought to bring a class action on behalf of the residents in her apartment building, alleging that mould in the building was exposing the residents to health risks. The representative provided no evidence, however, suggesting that the mould had been found anywhere but in her own apartment. The court wrote (at pp. 380-81) that "the CPA requires the representative plaintiff to provide a certain minimum evidentia[ry] basis for a certification order" (emphasis added). While the Class Proceedings Act, 1992 does not require a preliminary merits showing, "the judge must be satisfied of certain basi[c] facts required by s. 5 of the CPA as the basis for a certification order" (p. 381).

¶ 25 I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in Taub held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). 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. That latter requirement is of course governed by the rule that a pleading should not be struck for failure to disclose [page176] a cause of action unless it is "plain and obvious" that no claim exists: see Branch, supra, at para. 4.60.

¶ 26 In my view the appellant has met his evidentiary burden here. Together with his motion for certification, the appellant submitted some 115 pages of complaint records, which he obtained from the Ontario Ministry of Environment and Energy and the Toronto Metropolitan Works Department. The records of the Ministry of Environment and Energy document almost 300 complaints between July 1985 and March 1994, approximately 200 complaints in 1995, and approximately 150 complaints in 1996. The Metropolitan Works Department records document almost 300 complaints between July 1983 and the end of 1993. As some people may have registered their complaints with both the Ministry of Environment and Energy and the Metropolitan Works Department, it is difficult to determine exactly how many separate complaints were brought in any year. It is sufficiently clear, however, that many individuals besides the appellant were concerned about noise and physical emissions from the landfill. I note, further, that while some areas within the geographical area specified by the class definition appear to have been the source of a disproportionate number of complaints, complaints were registered from many different areas within the specified boundaries. I conclude, therefore, that the appellant has shown a sufficient basis in fact to satisfy the commonality requirement.

¶ 27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the

resolution of the common issues", as required by s. 5(1)(d). The parties agree that, 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 (Div. Ct.); compare British Columbia Class Proceedings Act, s. 4(2) (listing factors that court must consider in [page177] 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.

¶ 28 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.

¶ 29 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] distinctio[n] can be seen as creating a lower [page178] 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 para. 4.690. I would endorse that approach.

¶ 30 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: see Federal Rules of Civil Procedure, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also British Columbia Class Proceedings Act, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). 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 of 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" (emphasis added): M. G. Cochrane, Class Actions: A Guide to [page179] the Class Proceedings Act, 1992 (1993), at p. 27.

¶ 31 I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture 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": see Report of the Attorney General's Advisory Committee on Class Action Reform, supra, at p. 32; see also Cochrane, supra, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, Class Actions Law and Practice (loose-leaf), at para. 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.

¶ 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, "[e]ven 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 [page180] context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

¶ 33 Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action -- even if the compensatory scheme promises to provide redress more quickly: see Rumley v. British Columbia, [2001] 3 S.C.R. 184, 2001 SCC 69, at para. 38. The existence

of such a scheme, however, provides one consideration that must be taken into account when [page181] assessing the seriousness of access-to-justice concerns.

¶ 34 For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in Western Canadian Shopping Centres, supra, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see Environmental Bill of Rights, 1993, S.O. 1993, c. 28, and Environmental Protection Act. I am not persuaded, however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.

¶ 35 I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see Environmental Bill of Rights, 1993, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be [page182] amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister"); Environmental Protection Act, s. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect"); s. 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation"); and s. 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").

¶ 36 I conclude that the action does not meet the requirements set out in s. 5(1) of Ontario's Class Proceedings Act, 1992. Even on the generous approach advocated above, the appellant has not shown that a class action is the preferable means of resolving the claims raised here.

¶ 37 I should make one note on the scope of the holding in this case. The appellant took pains to characterize this case as raising the issue of whether Ontario's Class Proceedings Act, 1992 permits environmental class actions. I would not frame the issue so broadly. While the appellant has not met the certification requirements here, it does not follow that those requirements could never be met in an environmental tort case. The question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the [page183] facts of the case. In this case there were serious questions about preferability. Other environmental tort cases may not raise the same questions. Those cases should be decided on their facts.

¶ 38 The appeal is dismissed. There will be no costs to either party.

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Indexed as:

Hunt v. Carey Canada Inc.

Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd.; appellants;

v.

George Ernest Hunt, respondent, and T & N, P.L.C. and Flintkote Mines Limited; respondents.

And between

Flintkote Mines Limited, National Gypsum Co., Atlas Turner Inc., Asbestos Corporation Limited, Bell Asbestos Mines Limited and Lac d'amiante du Québec Ltée, formerly known as Lake Asbestos Company Ltd., appellants;

v.

George Ernest Hunt, respondent, and T & N, P.L.C. and Carey Canada Inc., formerly known as Carey-Canadian Mines Ltd., respondents.

[1990] 2 S.C.R. 959
[1990] S.C.J. No. 93
File Nos.: 21508, 21536.

Supreme Court of Canada

1990: February 22 / 1990: October 4.

Present: Lamer C.J.* and Wilson, La Forest, L'Heureux-Dubé, Sopinka, Gonthier and Cory JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA
(57 paras.)

* Chief Justice at the time of judgment.

Practice — Motion to strike — Action brought by person suffering from disease allegedly caused by exposure to asbestos fibres — Allegation of conspiracy to withhold information of potential health risks — Allegations of other nominate torts — Circumstances in which a statement of claim (or portions of it) could be struck out — Whether allegations based on the tort of [page960] conspiracy should be struck out — Rules of Court [British Columbia], Rule 19(24).

Respondent Hunt, a retired electrician, brought an action alleging that he had contracted mesothelioma because of exposure to asbestos fibres over the course of his employment. The defendants had been involved in the mining of asbestos and the production and supply of a variety of asbestos

products between 1940 and 1967. It was alleged that they knew from 1934 that asbestos fibres could cause disease in those exposed to the fibres. Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N, P.L.C. were sued not only in negligence but also for their alleged conspiracy to withhold information about the dangers associated with asbestos which ultimately resulted in Mr. Hunt's contracting mesothelioma. Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal by order of the British Columbia Court of Appeal.

Carey Canada Inc. successfully applied to have the action against it struck for want of a reasonable claim. (The action had been based solely on allegations of conspiracy.) The Court of Appeal allowed an appeal from that decision. The issues here dealt with the circumstances in which a statement of claim (or portions of it) could be struck out, and whether the allegations based on the tort of conspiracy should be struck out.

Held: The appeals should be dismissed.

The test to be applied is whether it is "plain and obvious" that the plaintiff's statement of claim discloses no reasonable claim. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

Here, it was not "plain and obvious" that the plaintiff's statement of claim failed to disclose a reasonable claim, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim of conspiracy. Nor was it plain and obvious that allowing this action to proceed would amount to an abuse of process. Whether or not there is good reason to extend the tort to the present context is for the trial judge to consider in light of the evidence.

[page961]

It is not for this Court on a motion to strike to reach a decision as to the plaintiff's chances of success. It is enough that the plaintiff has some chance of success. Whether or not a predominant purpose had been established and whether or not Quebec's Business Concerns Records Act limited the range of information that the defendants could produce at trial was not relevant to whether the plaintiff's statement of claim disclosed a reasonable claim. Striking out cannot be justified because a pleading reveals "an arguable, difficult or important point of law". On the contrary, it may well be critical that the action be allowed to proceed.

Alleging the tort of conspiracy is not precluded by the allegation of another tort. While it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. Whether the plaintiff should be barred from recovery under the tort of conspiracy can only be determined when the question of whether it has established that the defendant did in fact commit the other alleged torts has been decided.

Cases Cited

Considered: Dyson v. Attorney-General, [1911] 1 K.B. 410; Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094; Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308; Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735; Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173; Canada Cement LaFarge Ltd. v. British

Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452; *distinguished*: Frame v. Smith, [1987] 2 S.C.R. 99; *referred to*: Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86; Attorney-General of the Duchy of Lancaster v. London & North Western Railway Co., [1892] 3 Ch. 274; Evans v. Barclays Bank and Galloway, [1924] W.N. 97; Kemsley v. Foot, [1951] 1 T.L.R. 197; Nagle v. Feilden, [1966] 2 Q.B. 633; Rex ex rel. Tolfree v. Clark, [1943] O.R. 501; Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289; Minnes v. Minnes (1962), 39 W.W.R. 112; McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17; Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441; Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279; [page962] Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563; Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598.

Statutes and Regulations Cited

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Rules of Civil Procedure, O. Reg. 560/84, Rule 21.01.
Rules of Court [British Columbia], Rule 19(24).
Rules of the Supreme Court [England], R.S.C. 1883, O. 25, r. 4 [rep. & sub. R.S.C. (Revision) 1962, O. 18, r. 19].
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Milsom, S. F. C. Historical Foundations of the Common Law, 2nd ed. Toronto: Butterworths, 1981.

APPEALS from a judgment of the British Columbia Court of Appeal reversing the judgment of Hollinrake J. dismissing the action against Carey Canada Inc. on the basis that it disclosed no reasonable claim. Appeals dismissed.

Jack Giles, Q.C., and Robert McDonell, for Carey Canada Inc.
D. M. M. Goldie, Q.C., for Lac d'amiante du Québec Ltée.
Marvyn Koenigsberg, for National Gypsum Co.
David Martin and Michael P. Maryn, for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited.
James A. Macaulay, c.r., and K. N. Affleck, for T & N, P.L.C.

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Robert Ward and S. E. Fraser, for Flintkote Mines Limited.
J. J. Camp, Q.C., and P. G. Foy, for George Ernest Hunt.
[Quicklaw note: Please see complete list of solicitors appended at the end of the

judgment.]

The judgment of the Court was delivered by

¶ 1 **WILSON J.**:— The issue raised in these appeals is whether it is open to the respondent to proceed with an action against the appellants for the tort of conspiracy. In particular, the appeals raise the question whether those portions of the respondent [Hunt's] statement of claim in which he alleges that the appellants conspired to withhold information concerning the effects of asbestos fibres disclose a reasonable claim within the meaning of Rule 19(24)(a) of the British Columbia Rules of Court.

1. The Facts

¶ 2 The respondent, George Hunt, is a retired electrician who alleges that he was exposed to asbestos fibres over the course of his employment. Mr. Hunt has brought an action against Atlas Turner Inc., Asbestos Corporation Limited, The Asbestos Institute, Babcock & Wilcox Industries Ltd., Bell Asbestos Mines Limited, Caposite Insulations Ltd., Carey Canada Inc., Flintkote Mines Limited, Holmes Insulations Ltd., Johns-Manville Amiante Canada Inc., Lac d'amiante du Québec Ltée., National Asbestos Mines Limited, The Quebec Asbestos Mining Association and T & N, P.L.C. ("the defendants").

¶ 3 Mr. Hunt alleges that the defendants were involved in the mining of asbestos and the production and supply of a variety of asbestos products between 1940 and 1967. He alleges that after 1934 the defendants knew that asbestos fibres could cause disease in those exposed to the fibres. In addition to suing Atlas Turner, Babcock, Caposite, Holmes, Johns-Manville and T & N in negligence, Mr. Hunt alleges that all of the defendants conspired to withhold information about the dangers associated with asbestos and that as a result of that conspiracy he contracted mesothelioma.

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¶ 4 The relevant portions of Mr. Hunt's statement of claim read as follows:

> 16. At various times, the particulars of which are well known to the defendants, including the period between 1940 and 1967, the defendants mined and processed asbestos and designed, manufactured, packaged, advertised, promoted, distributed and sold a variety of products containing asbestos fibres (the "Products"), the particulars of which are also well known to the defendants.
> 17. After about 1934 the defendants knew or ought to have known that the asbestos fibres contained in the Products could cause diseases, including cancer and asbestosis, in those who worked with or were otherwise exposed to those fibres.
> 18. After about 1934, some or all of the defendants conspired with each other with the predominant purpose of injuring the plantiff [sic] and others who would be exposed to the asbestos fibres in the Products, by preventing this knowledge becoming public knowledge and, in particular, by preventing it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products.
> 19. Alternatively, after about 1934, some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff and

others who would be exposed to the asbestos fibres in the Products would result from the defendants' acts.

20. The defendants' acts in furtherance of the conspiracy referred to in paragraphs 18 and 19 include:

(a) fraudulently, deceitfully or negligently suppressing, distorting and misrepresenting the results of medical and scientific research on the disease-causing effects of asbestos;
(b) fraudulently, deceitfully or negligently misrepresenting the disease-causing effects of asbestos by disseminating incorrect, incomplete, outdated, misleading and distorted information about those effects;
(c) fraudulently, deceitfully or negligently attempting to discredit doctors and scientists who claimed that asbestos caused disease;

[page965]

(d) fraudulently, deceitfully or negligently marketing and promoting the Products without any or adequate warning of the dangers they posed to those exposed to them; and
(e) fraudulently, deceitfully or negligently attempting to influence to their benefit government regulation of the use of asbestos and the Products.

¶ 5 Carey Canada Inc. brought an application before the Supreme Court of British Columbia under Rule 19(24)(a) of the British Columbia Rules of Court seeking to have the action against it, which was based solely on the allegations of conspiracy, dismissed on the basis that it disclosed no reasonable claim. Rule 19(24) provides:

> 19(24) At any stage of a proceeding the court may order to be struck out or amended the whole or any part of an endorsement, pleading, petition or other document on the ground that
>
> (a) it discloses no reasonable claim or defence as the case may be, or
> (b) it is unnecessary, scandalous, frivolous, or vexatious, or
> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
> (d) it is otherwise an abuse of the process of the court,
>
> and may grant judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as between solicitor and client.

2. The Courts Below

(a) Supreme Court of British Columbia

¶ 6 Hollinrake J. accepted Carey Canada's submission that the only damage that could be the subject of a conspiracy action was "direct damage". Although counsels' memorandum summarizing Hollinrake J.'s oral reasons for judgment does not explain precisely what he understood the term "direct damage" to mean, it would appear that he meant damage suffered by a plaintiff that flows directly from acts aimed specifically at that plaintiff. Hollinrake J. stated:

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> Dealing with the issue of direct or indirect damage, in the first kind of conspiracy Estey, J. refers to the "predominant purpose" of the defendants' conduct [see: Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452, at p. 471]. I think this does import direct damage. The second type of conspiracy refers to conduct "directed towards the plaintiff". I think this imports direct damage. I think these conclusions are justified by what happened in Canada Cement LaFarge Ltd.

Hollinrake J. therefore allowed the motion and dismissed the action against Carey Canada as disclosing no reasonable claim.

(b) British Columbia Court of Appeal

¶ 7 By order of the British Columbia Court of Appeal (dated March 30, 1989), Flintkote Mines Limited and T & N, P.L.C. were named as respondents to the appeal in the Court of Appeal.

¶ 8 Anderson J.A. (Macfarlane and Esson JJ.A. concurring) allowed the appeal and set aside Hollinrake J.'s order. Anderson J.A. explained his reasons:

> (1) The cases relied upon by counsel for the respondent Carey Canada Inc. and the learned trial judge to the effect that there is no such tort as a conspiracy to injure by unlawful means where the damage is indirect, all relate to the area of competition in the marketplace and to labour-management disputes. They may not be applicable to the very different circumstances alleged in this case and to very different social considerations.
> (2) The arguments as to law and fact are intricate and complex and should be dealt with at trial after all the evidence is adduced. At this stage of the proceedings it is impossible to reach the conclusion that there is no cause of action in fact or law. (See Minnes v. Minnes (1962), 39 W.W.R. 112 at 122).

¶ 9 Esson J.A. (Anderson and MacFarlane JJ.A. agreeing) gave additional reasons stressing that the "language of predominant purpose and direct damage" in Canada Cement LaFarge Ltd. had arisen in cases that involved competition and pure economic loss. In Mr. Hunt's case, however, the context was very different. Mr. Hunt had suffered [page967] personal injury and claimed that by conspiring to suppress information the defendants had created a foreseeable risk of causing him the harm which he in fact suffered. It was not possible at this stage in the proceedings to determine that the damage was not sufficiently direct to be able to support an action rooted in the tort of conspiracy. Esson J.A. specifically declined to embark upon a detailed consideration of the law of conspiracy, noting:

> It has not generally been part of our tradition and, given the complexity and novelty of some of the issues raised in this case, it would I think be particularly undesirable to render a such decisions [sic], as it were, in a vacuum. For those reasons, as well as the reasons given by Mr. Justice Anderson, I agree in allowing the appeal.

3. The Issues

¶ 10 The issues that arise in this appeal are:

1. In what circumstances may a statement of claim (or portions of it) be struck out?
2. Should Mr. Hunt's allegations based on the tort of conspiracy be struck out?

4. Analysis

(1) In What Circumstances May a Statement of Claim be Struck Out?

¶ 11 Carey Canada's motion to have the action dismissed was made pursuant to Rule 19(24)(a) of the British Columbia Rules of Court. This rule stipulates that a court may strike out any part of a statement of claim that "discloses no reasonable claim". The rules of practice with respect to striking out a statement of claim are similar in other provinces. In Ontario, for example, Rule 21.01 of the Rules of Civil Procedure, O. Reg. 560/84, states:

> 21.01 (1) A party may move before a judge,
>
> [page968]
>
> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
> (b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,
>
> and the judge may make an order or grant judgment accordingly.
>
> (2) No evidence is admissible on a motion,
>
> (a) under clause (1)(a), except with leave of a judge or on consent of the parties;
>
> (b) under clause (1)(b). [Emphasis added.]

¶ 12 Rule 19(24) of the British Columbia Rules of Court and analogous provisions in other provinces are the result of a "codification" of the court's power under its inherent jurisdiction to stay actions that are an abuse of process or that disclose no reasonable cause of action: see McLachlin and Taylor, British Columbia Practice (2nd. ed. 1979), vol. 1, pp. 19-71. This process of codification first took place in England shortly after the Supreme Court of Judicature Act, 1873, (Eng.) 36 & 37 Vict., c. 66, was enacted. It is therefore of some interest to review the interpretation the courts in England have given to their rules relating to the striking out of a statement of claim.

(a) England:

¶ 13 In Metropolitan Bank, Ltd. v. Pooley, [1881-85] All E.R. 949 (H.L.), the Lord Chancellor explained at p. 951 that before the Supreme Court of Judicature Act, 1873, courts were prepared to stay a "manifestly vexatious suit which was plainly an abuse of the authority of the court" even although there was no written rule stating that courts could do so. The Lord Chancellor noted, at p. 951, that "The power seemed to be inherent in the jurisdiction of every court of justice to protect itself from the abuse of its procedure". That is, it was open to courts to ensure that their process was [page969] not used simply to harass parties through the initiation of actions that were obviously without merit.

¶ 14 Before the advent of the Supreme Court of Judicature Act, 1873 and the new Rules of the

Supreme Court (enacted in 1883) it had been open to parties to use a "demurrer" to challenge a statement of claim. That is, it had been open to a defendant to admit all the facts that the plaintiff's pleadings alleged and to assert that these facts were not sufficient in law to sustain the plaintiff's case. When a demurrer was pleaded the question of law that was thereby raised was immediately set down for argument and decision: see Halsbury's Laws of England (4th ed. 1981), vol. 36, para. 2, n. 7 and para. 35, n. 5; Milsom, Historical Foundations of the Common Law (2nd ed. 1981), at p. 72; and Baker, An Introduction to English Legal History (2nd ed. 1979), at p. 69. But a formal and technical practice eventually grew up around demurrer and judges were notoriously reluctant to provide definitive answers to the points of law that were thereby raised. As the Lord Chancellor explained in Pooley, it was eventually thought best to replace demurrers with an easier summary process for getting rid of an action that was on its face manifestly groundless. It was with this objective in mind that O. 25, r. 4 of the 1883 Rules of the Supreme Court came into force:

> 4. The court or a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just.

Commenting on the relative merits of demurrers and the new rule, Chitty J. observed in Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489, at p. 496:

[page970]

> Having regard to the terms of rule 4, and to the decisions on it, I think that this rule is more favourable to the pleading objected to than the old procedure by demurrer. Under the new rule the pleading will not be struck out unless it is demurrable and something worse than demurrable. If, notwithstanding defects in the pleading, which would have been fatal on a demurrer, the Court sees that a substantial case is presented the Court should, I think, decline to strike out that pleading; but when the pleading discloses a case which the Court is satisfied will not succeed, then it should strike it out and put a summary end to the litigation.

¶ 15 One of the most important points advanced in the early decisions dealing with O. 25, r. 4 was the proposition that the rule was derived from the courts' power to ensure both that they remained a forum in which genuine legal issues were addressed and that they did not become a vehicle for "vexatious" actions without legal merit designed solely to harass another party. In Pooley, supra, at p. 954, Lord Blackburn asserted that the new rule "considerably extends the power of the court to act in such a manner as I have stated, and enables it to stay an action on further grounds than those on which it could have been stayed at common law." Nonetheless, as Chitty J. subsequently observed in Peruvian Guano Co., the rule was not intended to prevent a "substantial case" from coming forward. Its summary procedures were only to be used where it was apparent that allowing the case to go forward would amount to an abuse of the court's process.

¶ 16 In one of the better-known decisions concerning the circumstances in which resort should be had to the rule Lindley M.R. stated:

> The second and more summary procedure is only appropriate to cases which are plain and obvious, so that any master or judge can say at once that the statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to what he asks. The use of the expression "reasonable cause of action" in rule 4 shews that the summary procedure

there introduced is only intended to [page971] be had recourse to in plain and obvious cases. [Emphasis added.]

[See: Hubbuck & Sons, Ltd. v. Wilkinson, Heywood & Clark, Ltd., [1899] 1 Q.B. 86 (C.A), at p. 91.]

Lindley M.R.'s observations made clear that even if the rule expanded the court's power to stay actions, courts were to use the rule only in those exceptional instances where it was "plain and obvious" that, even if one accepted the version of the facts put forward in the statement of claim, the plaintiff's case did not disclose a reasonable cause of action. The question was not whether the plaintiff could succeed since this was a matter properly left for determination at trial. The question was simply whether the plaintiff was advancing a "reasonable" argument that could properly form the subject matter of a trial.

¶ 17 The Master of the Rolls had made this very point some six years earlier:

> Then the Vice-Chancellor says: "The questions raised upon this application are of such importance and such difficulty that I cannot say that this pleading discloses no reasonable cause of action, or that there is anything frivolous or vexatious; therefore, I should let the parties plead in the usual way". It appears to me that this is perfectly right. To what extent is the Court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched -- cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the Court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether. [Emphasis added.]

[See: Attorney-General of the Duchy of Lancaster v. London and North Western Railway Co., [1892] 3 Ch. 274 (C.A.), at pp. 276-77.]

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Thus, the fact that the plaintiff's case was a complicated one could not justify striking out the statement of claim. Complex matters that disclosed substantive questions of law were most appropriately addressed at trial where evidence concerning the facts could be led and where arguments about the merits of a plaintiff's case could be made.

¶ 18 The requirement that it be "plain and obvious" that some or all of the statement of claim discloses no reasonable cause of action before it can be struck out, as well as the proposition that it is singularly inappropriate to use the rule's summary procedure to prevent a party from proceeding to trial on the grounds that the action raises difficult questions, has been affirmed repeatedly in the last century: see Dyson v. Attorney-General, [1911] 1 K.B. 410 (C.A.); Evans v. Barclays Bank and Galloway, [1924] W.N. 97 (C.A.); Kemsley v. Foot, [1951] 1 T.L.R. 197 (C.A.); and Nagle v. Feilden, [1966] 2 Q.B. 633 (C.A.). Lord Justice Fletcher Moulton's observations in Dyson, supra, at pp. 418-19, are particularly instructive:

> Now it is unquestionable that, both under the inherent power of the Court and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse,

so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the Courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claim as a matter of law. Differences of law, just as differences of fact, are normally to be decided by trial after hearing in Court, and not to be refused a hearing in Court by an order of the judge in chambers. Nothing more clearly indicates this to be the intention of the rule than the fact that the plaintiff has no appeal as of right from the decision of the judge at chambers in the case of [page973] such an order as this. So far as the rules are concerned an action may be stopped by this procedure without the question of its justifiability ever being brought before a Court. To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad. [Emphasis added.]

¶ 19 A more recent and no less instructive discussion of these principles may be found in Lord Pearson's reasons in Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094 (C.A.). I note that in Drummond-Jackson the Court of Appeal dealt with Rules of the Supreme Court, O. 18, r. 19 (the provision that replaced R.S.C. O. 25, r. 4 in 1962), a provision very similar to the rules that now govern the striking out of pleadings in Canada:

19. -- (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that --

(a) it discloses no reasonable cause of action or defence, as the case may be; or
(b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or
(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under paragraph (1)(a).

¶ 20 Responding to Lord Denning's suggestion that the potential length and complexity of a trial should be taken into account when considering whether to strike out a statement of claim, Lord Pearson (with whom Sir Gordon Willmer concurred in separate reasons) reaffirmed the proposition that Lord Justice Lindley had advanced some [page974] eighty years earlier in Attorney-General of the Duchy of Lancaster: length and complexity were not appropriate factors to consider when deciding whether a statement of claim should be struck out. Lord Pearson said at pp. 1101-02:

Over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases.

...

In my opinion the traditional and hitherto accepted view -- that the power should only be used in plain and obvious cases -- is correct according to the evident intention of the rule for several reasons. First, there is in r 19 (1) (a) the expression 'reasonable cause of action' to which Sir Nathaniel Lindley MR called attention in Hubbuck & Sons Ltd v. Wilkinson, Heywood and Clark Ltd. No exact paraphrase can be given, but I think 'reasonable cause of action' means a cause of action with some chance of success, when (as required by r 19 (2)) only the allegations in the pleading are considered. If when those allegations are examined it is found that the alleged cause of action is certain to fail, the statement of claim should be struck out. In Nagle v Feilden Danckwerts LJ said:

> 'The summary remedy which has been applied to this action is one which is only to be applied in plain and obvious cases, when the action is one which cannot succeed or is in some way an abuse of the process of the court'.

Salmon LJ said:

> 'It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable'.

Secondly, r 19 (1) (a) takes some colour from its context in r 19 (1) (b) -- 'scandalous, frivolous and vexatious' -- r 19 (1) (c) -- 'prejudice, embarrass or delay the fair trial of the action' -- and r. 19 (1) (d) -- otherwise an abuse of the process of the court'. The defect referred to in r 19 (1) (a) is a radical defect ranking with those referred to in the other paragraphs. Thirdly, an application for the statement of claim to be struck out under this rule is made at a very early stage of the action when there is only the statement of claim without any other pleadings and without any evidence at all. The plaintiff should not [page975] be 'driven from the judgment seat' at this very early stage unless it is quite plain that his alleged cause of action has no chance of success. [Emphasis added.]

Lord Pearson concluded at p. 1102:

> That is the basis of the rule and practice on which one has to approach the question whether the plaintiff's statement of claim in the present case discloses any reasonable cause of action. It is not permissible to anticipate the defence or defences -- possibly some very strong ones -- which the defendants may plead and be able to prove at the trial, nor anything which the plaintiff may plead in reply and seek to rely on at the trial. [Emphasis added.]

¶ 21 In England, then, the test that governs an application under R.S.C. O. 18, r. 19 has always been and remains a simple one: assuming 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? Is there a defect in the statement of claim that can properly be characterized as a "radical defect" ranking with the others listed in O. 18, r. 19? If it is plain and obvious that the action is certain to fail because it contains some such radical defect, then the relevant portions of the statement of claim may properly be struck out. To allow such an action to proceed, even although it was certain to fail, would be to permit the defendant to be "vexed" and would therefore amount to the very kind of abuse of the court's process

that the rule was meant to prevent. But if there is a chance that the plaintiff might succeed, then that plaintiff should not be "driven from the judgment seat". Neither the length and complexity of the issues of law and fact that might have to be addressed nor the potential for the defendant to present a strong defence should prevent a plaintiff from proceeding with his or her case. Provided that the plaintiff can present a "substantive" case, that case should be heard.

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(b) Canada
(i) Ontario and British Columbia Courts of Appeal

¶ 22 In Canada, provincial courts of appeal have long had to grapple with the very same issues concerning the rules with respect to statements of claim that courts in England have dealt with for over a century. As noted earlier, the rules of practice in this country are to a large extent modelled on England's rules of practice. It comes as no surprise, therefore, that the test Canadian courts of appeal have adopted is in essence the same one that the courts in England favour.

Ontario

¶ 23 In Ontario, for example, the Court of Appeal dealt with Rule 124 (the predecessor to Rule 21.01) in Ross v. Scottish Union and National Insurance Co. (1920), 47 O.L.R. 308 (C.A.). The rule followed closely the wording of England's R.S.C. 1883, O. 25, r. 4 and read as follows:

> 124. A judge may order any pleading to be struck out on the ground that it discloses no reasonable cause of action or answer, and in any such case, or in case of the action or defence being shown to be frivolous or vexatious, may order the action to be stayed or dismissed, or judgment to be entered accordingly.

¶ 24 In Ross, Magee J.A. embraced the "plain and obvious" test developed in England, stating at p. 316:

> That inherent jurisdiction is partly embodied in our Rule 124, which allows pleadings to be struck out if disclosing no reasonable cause of action or defence, and thereby, in such case, or if the action or defence is shewn to be vexatious or frivolous, the action may be stayed or dismissed or judgment be entered accordingly. The Rule has only been acted upon in plain and obvious cases, and it should only be so when the Court is satisfied that the case is one beyond doubt, and that there is no reasonable cause of action or defence. [Emphasis added.]

Magee J.A. went on to note at p. 317:

> To justify the use of Rule 124, a statement of claim should not be merely demurrable, but it should be [page977] manifest that it is something worse, so that it will not be curable by amendment: Dadswell v. Jacobs (1887), 34 Ch. D. 278, 281; Republic of Peru v. Peruvian Guano Co. (1887), 36 Ch. D. 489; and it is not sufficient that the plaintiff is not likely to succeed at the trial: Boaler v. Holder (1886), 54 L.T.R. 298.

¶ 25 At an early date, then, the Ontario Court of Appeal had modelled its approach to Rule 124 on the approach that had been consistently favoured in England. And over time the Ontario Court of Appeal has gone on to show the same concern that statements of claim not be struck out in anything

other than the clearest of cases. As Laidlaw J.A. put it in Rex ex rel. Tolfree v. Clark, [1943] O.R. 501 (C.A.), at p. 515:

> The power to strike out proceedings should be exercised with great care and reluctance. Proceedings should not be arrested and a claim for relief determined without trial, except in cases where the Court is well satisfied that a continuation of them would be an abuse of procedure: Evans v. Barclay's Bank et al., [1924] W.N. 97. But if it be made clear to the Court that an action is frivolous or vexatious, or that no reasonable cause of action is disclosed, it would be improper to permit the proceedings to be maintained.

¶ 26 More recently, in Gilbert Surgical Supply Co. v. F. W. Horner Ltd., [1960] O.W.N. 289 (C.A.), at pp. 289-90, Aylesworth J.A. observed that the fact that an action might be novel was no justification for striking out a statement of claim. The court would still have to conclude that "the plaintiff's action could not possibly succeed or that clearly and beyond all doubt, no reasonable cause of action had been shown".

¶ 27 Thus, the Ontario Court of Appeal has firmly embraced the "plain and obvious" test and has made clear that it too is of the view that the test is rooted in the need for courts to ensure that their process is not abused. The fact that the case the plaintiff wishes to present may involve complex issues of fact and law or may raise a novel legal proposition should not prevent a plaintiff from proceeding with his action.

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British Columbia

¶ 28 In British Columbia the Court of Appeal has approached the matter in a similar way. The predecessor to the rule that Carey Canada invokes in this appeal was worded in exactly the same way as England's R.S.C. 1883, O. 25, r. 4. Not surprisingly the British Columbia Court of Appeal's treatment of that rule has been similar to that taken in England and Ontario. For example, in Minnes v. Minnes (1962), 39 W.W.R. 112 (B.C.C.A.), Tysoe J.A. observed at p. 122:

> In my respectful view it is only in plain and obvious cases that recourse should be had to the summary process under O. 25, R. 4, and the power given by the Rule should be exercised only where the case is absolutely beyond doubt. So long as the statement of claim, as it stands or as it may be amended, discloses some question fit to be tried by a judge or jury, the mere fact that the case is weak or not likely to succeed is no ground for striking it out. If the action involves investigation of serious questions of law or questions of general importance, or if facts are to be known before rights are definitely decided, the Rule ought not to be applied. [Emphasis added.]

For his part Norris J.A. noted at p. 116 (agreeing with Tysoe J.A.):

> I might add that upon the motion, with respect, it was not for the learned trial judge as it is not for this court to consider the issues between the parties as they would be considered on trial. All that was required of the plaintiff on the motion was that she should show that on the statement of claim, accepting the allegations therein made as true, there was disclosed from that pleading with such amendments as might reasonably be made, a proper case to be tried. [Emphasis added.]

The law as stated in Minnes v. Minnes was recently reaffirmed in McNaughton and McNaughton v. Baker (1988), 25 B.C.L.R. (2d) 17 (C.A.), at p. 23, per McLachlin J.A. Similarly, Anderson and Esson JJ.A. relied on Minnes v. Minnes in this appeal.

¶ 29 Once again then the "plain and obvious" test has been firmly embraced. The British Columbia [page979] Court of Appeal has confirmed that the summary proceedings available under the rule in question do not afford an appropriate forum in which to engage in a detailed examination of the strengths and weaknesses of the plaintiff's case. The sole question is whether, assuming that all the facts the plaintiff alleges are true, the plaintiff can present a question "fit to be tried". The complexity or novelty of the question that the plaintiff wishes to bring to trial should not act as a bar to that trial taking place.

(ii) Supreme Court of Canada

¶ 30 While this Court has had a somewhat limited opportunity to consider how the rules regarding the striking out of a statement of claim are to be applied, it has nonetheless consistently upheld the "plain and obvious" test. Justice Estey, speaking for the Court in Attorney General of Canada v. Inuit Tapirisat of Canada, [1980] 2 S.C.R. 735, stated at p. 740:

> As I have said, all the facts pleaded in the statement of claim must be deemed to have been proven. On a motion such as this a court should, of course, dismiss the action or strike out any claim made by the plaintiff only in plain and obvious cases and where the court is satisfied that "the case is beyond doubt": Ross v. Scottish Union and National Insurance Co.

¶ 31 I had occasion to affirm this proposition in Operation Dismantle Inc. v. The Queen, [1985] 1 S.C.R. 441. At pages 486-87 I provided the following summary of the law in this area (with which the rest of the Court concurred):

> The law then would appear to be clear. The facts pleaded are to be taken as proved. When so taken, the question is do they disclose a reasonable cause of action, i.e. a cause of action "with some chance of success" (Drummond-Jackson v. British Medical Association, [1970] 1 All E.R. 1094) or, as Le Dain J. put it in Dowson v. Government of Canada (1981), 37 N.R. 127 (F.C.A.), at p. 138, is it "plain and obvious that the action cannot succeed?"

And at p. 477 I observed:

> It would seem then that as a general principle the Courts will be hesitant to strike out a statement of claim as disclosing no reasonable cause of action. The fact that [page980] reaching a conclusion on this preliminary issue requires lengthy argument will not be determinative of the matter nor will the novelty of the cause of action militate against the plaintiffs. [Emphasis added.]

¶ 32 Most recently, in Dumont v. Canada (Attorney General), [1990] 1 S.C.R. 279, I made clear at p. 280 that it was my view that the test set out in Inuit Tapirisat was the correct test. The test remained whether the outcome of the case was "plain and obvious" or "beyond reasonable doubt".

¶ 33 Thus, the test in Canada governing the application of provisions like Rule 19(24)(a) of the British Columbia Rules of Court is the same as the one that governs an application under R.S.C. O. 18,

r. 19: assuming 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. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia Rules of Court should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a).

¶ 34 The question therefore to which we must now turn in this appeal is whether it is "plain and obvious" that the plaintiff's claims in the tort of conspiracy disclose no reasonable cause of action or whether the plaintiff has presented a case that is "fit to be tried", even although it may call for a complex or novel application of the tort of conspiracy.

(2) Should Mr. Hunt's Allegations Based on the Tort of Conspiracy Be Struck from his Statement of Claim?

¶ 35 In the last decade the tort of conspiracy has received a considerable amount of attention. In [page981] England, for example, both the House of Lords and the Court of Appeal have recently had occasion to review the tort in some detail. These decisions have made clear that the tort of conspiracy may apply in at least two situations: (i) where the defendants agree to use lawful means to harm the plaintiff and (ii) where the defendants use unlawful means to harm the plaintiff. The law with respect to the first situation is not in doubt:

> If A and B agree to commit acts which would be lawful if done by either of them alone but which are done in combination and cause damage to C, no tortious conspiracy actionable at the suit of C exists unless the predominant purpose of A and B in making the agreement and carrying out the acts which cause the damage is to injure C and not to protect the lawful commercial interests of A and B. This proposition is established by five decisions at the highest level: Mogul Steamship Co. Ltd. v. McGregor, Gow & Co. [1892] A.C. 25; Quinn v. Leathem, [1901] A.C. 495; Sorrell v. Smith, [1925] A.C. 700; Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435 and Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2), [1982] A.C. 173. [See: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., [1989] 3 W.L.R. 563, at p. 593, per Slade L.J.] [Emphasis added.]

Courts in England have, however, encountered greater difficulty in stating with precision the applicable principles governing situations in which unlawful means are employed. In particular, they have struggled to decide whether the plaintiff must establish, not just that the defendants used means that were unlawful and resulted in harm to the plaintiff, but also that the defendants actually intended to harm the plaintiff.

¶ 36 In Lonrho Ltd. v. Shell Petroleum Co. (No. 2), [1982] A.C. 173, the House of Lords dealt with a consultative case stated by arbitrators in which it was asked to consider whether the tort of conspiracy could be extended to embrace a situation where the agreement in question resulted in a contravention of penal law (unlawful means) but did not include an intention to injure the plaintiff. [page982] In the process of deciding whether the tort should be so extended Lord Diplock noted at pp. 188-89:

> My Lords, conspiracy as a criminal offence has a long history. It consists of "the agreement of two or more persons to effect any unlawful purpose, whether as their

ultimate aim, or only as a means to it, and the crime is complete if there is such agreement, even though nothing is done in pursuance of it." I cite from Viscount Simon L.C.'s now classic speech in Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch, [1942] A.C. 435, 439. Regarded as a civil tort, however, conspiracy is a highly anomalous cause of action. The gist of the cause of action is damage to [page983] the plaintiff; so long as it remains unexecuted the agreement which alone constitutes the crime of conspiracy, causes no damage; it is only acts done in execution of the agreement that are capable of doing that. So the tort, unlike the crime, consists not of agreement but of concerted action taken pursuant to agreement.

¶ 37 Lord Diplock went on to observe that he was of the view that the rationale that had apparently fuelled the development of the tort in the late-nineteenth and early-twentieth centuries, namely that "a combination may make oppressive or dangerous that which if proceeded only from a single person would be otherwise" (see: Mogul Steamship Co. v. McGregor, Gow & Co. (1889), 23 Q.B.D. 598, at p. 616, per Bowen L.J.) was somewhat anachronistic in light of modern commercial developments. Nevertheless he did not feel that this meant that the tort could now be dispensed with. He said at p. 189:

> But to suggest today that acts done by one street-corner grocer in concert with a second are more oppressive and dangerous to a competitor than the same acts done by a string of supermarkets under a single ownership or that a multinational conglomerate such as Lonrho or oil company such as Shell or B.P. does not exercise greater economic power than any combination of small businesses, is to shut one's eyes to what has been happening in the business and industrial world since the turn of the century and, in particular, since the end of World War II. The civil tort of conspiracy to injure the plaintiff's commercial interests where that is the predominant purpose of the agreement between the defendants and of the acts done in execution of it which caused damage to the plaintiff, must I think be accepted by this House as too well-established to be discarded however anomalous it may seem today. It was applied by this House 80 years ago in Quinn v. Leathem, [1901] A.C. 495, and accepted as good law in the Crofter case [1942] A.C. 435, where it was made clear that injury to the plaintiff and not the self-interest of the defendants must be the predominant purpose of the agreement in execution of which the damage-causing acts were done.

¶ 38 Having set out this groundwork and having thereby confirmed that the tort of conspiracy was applicable in circumstances where the defendants entered into an agreement the predominant purpose of which was to injure the plaintiff, Lord Diplock turned to the question whether the tort should be extended beyond these confines. He concluded at p. 189:

> This House, in my view, has an unfettered choice whether to confine the civil action of conspiracy to the narrow field to which alone it has an established claim or whether to extend this already anomalous tort beyond those narrow limits that are all that common sense and the application of the legal logic of the decided cases require.
>
> My Lords, my choice is unhesitatingly the same as that of Parker J. and all three members of the Court of Appeal. I am against extending the scope of the civil tort of conspiracy beyond acts done in execution of an agreement entered into by two or more persons for the purpose not of protecting their own interests but of injuring the interests of the plaintiff.

¶ 39 Lord Diplock's observations made clear that in order to succeed with the tort of conspiracy in England a plaintiff would have to demonstrate that the purpose for which parties acted in accordance

with their agreement was to harm the plaintiff. The English Court of Appeal has recently had an opportunity to consider Lord Diplock's judgment in Lonrho (see: Metall und Rohstoff A.G. v. Donaldson, Lufkin & Jenrette Inc., supra) and has confirmed at p. 604 that "the House plainly intended the presence of a predominant intention to injure to be the touchstone of an actionable conspiracy". The Court of Appeal continued:

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> Where the predominant intention to injure is absent but the defendants pursuant to agreement commit torts against the plaintiff, the House held, we conclude, that common sense and the legal logic of the decided cases are satisfied if the plaintiff is denied a remedy in conspiracy and left to sue on the substantive torts.

Thus, regardless of whether the alleged conspirators used lawful or unlawful means, the law in England required the plaintiff to establish that the defendants entered into the agreement with the predominant purpose of injuring the plaintiff.

¶ 40 Although Canadian jurisprudence has taken note of the developments in England, the law governing the tort of conspiracy in Canada is not in all respects the same as the law set out in Lonrho. Indeed, this Court had occasion to consider both the tort of conspiracy and Lord Diplock's observations in Lonrho in Canada Cement LaFarge Ltd. v. British Columbia Lightweight Aggregate Ltd., [1983] 1 S.C.R. 452. Justice Estey stated at p. 468:

> The question which must now be considered is whether the scope of the tort of conspiracy in this country extends beyond situations in which the defendants' predominant purpose is to cause injury to the plaintiff, and includes cases in which this intention to injure is absent but the conduct of the defendants is by itself unlawful, and in fact causes damage to the plaintiff.

¶ 41 This passage made clear that this Court agreed with the House of Lords that where a plaintiff alleges that the defendants entered into an agreement whose predominant purpose was to injure the plaintiff and where the plaintiff alleges that he or she has in fact suffered damage as a result of the agreement, then regardless of the lawfulness of the means that the defendants are alleged to have used to implement the agreement the plaintiff will have made out a cognizable claim in the tort of conspiracy.

¶ 42 But what of situations in which the plaintiff alleges that there was an agreement that involved the use of unlawful means and that resulted in the plaintiff's suffering damage? Must the plaintiff also establish that the predominant purpose of the [page985] agreement was to injure him or her? It is in answering this question that Estey J. chose to follow a somewhat different path from Lord Diplock. Estey J. was of the view that it was not appropriate to go as far as the House of Lords had gone in precluding the action. He said at pp. 471-72:

> Although the law concerning the scope of the tort of conspiracy is far from clear, I am of the opinion that whereas the law of tort does not permit an action against an individual defendant who has caused injury to the plaintiff, the law of torts does recognize a claim against them in combination as the tort of conspiracy if:
>
> (1) whether the means used by the defendants are lawful or unlawful, the predominant purpose of the defendants' conduct is to cause injury to the plaintiff; or,

(2) where the conduct of the defendants is unlawful, the conduct is directed towards the plaintiff (alone or together with others), and the defendants should know in the circumstances that injury to the plaintiff is likely to and does result.

In situation (2) it is not necessary that the predominant purpose of the defendants' conduct be to cause injury to the plaintiff but, in the prevailing circumstances, it must be a constructive intent derived from the fact that the defendants should have known that injury to the plaintiff would ensue. In both situations, however, there must be actual damage suffered by the plaintiff. [Emphasis added.]

¶ 43 Estey J.'s summary of the law in Canada suggests that in cases falling into the second category it may not be necessary to prove actual intent. As Fridman has noted in The Law of Torts in Canada, vol. 2, at p. 265:

The difference between the English and Canadian formulations of the tort of conspiracy lies in the way the intent of the defendants is expressed. The language of Lord Diplock seems to indicate that the necessary intent should be actual. That of Estey J. suggests that it may be possible for a court to infer an intent to injure from the circumstances even if the defendants deny they acted with any such intent.

Fridman goes on to observe at pp. 265-66

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In modern Canada, therefore, conspiracy as a tort comprehends three distinct situations. In the first place there will be an actionable conspiracy if two or more persons agree and combine to act unlawfully with the predominating purpose of injuring the plaintiff. Second, there will be an actionable conspiracy if the defendants combine to act lawfully with the predominating purpose of injuring the plaintiff. Third, an actionable conspiracy will exist if defendants combine to act unlawfully, their conduct is directed towards the plaintiff (or the plaintiff and others), and the likelihood of injury to the plaintiff is known to the defendants or should have been known to them in the circumstances.

In my view, this passage provides a useful summary of the current state of the law in Canada with respect to the tort of conspiracy. Whether it is "good law", it seems to me, it is not for the Court to consider in this proceeding where the issue is simply whether the plaintiff's pleadings disclose a reasonable cause of action. I agree completely with Esson J.A. that it is not appropriate at this stage to engage in a detailed analysis of the strengths and weaknesses of Canadian law on the tort of conspiracy.

¶ 44 I note that in this appeal Mr. Hunt was clearly fully aware of Estey J.'s observation in Canada Cement LaFarge Ltd. when he prepared paragraphs 18 and 19 of his statement of claim. Paragraph 18 of his statement of claim follows faithfully the first proposition that Estey J. put forward at p. 471, alleging that some or all of the defendants "conspired with each other with the predominant purpose of injuring" Mr. Hunt. Paragraph 19 of the statement of claim presents an alternative argument that is faithful to the wording of Estey J.'s second proposition, alleging that "some or all of the defendants conspired with each other to prevent by unlawful means this knowledge becoming public knowledge and, in particular, to prevent it reaching the plaintiff and others who would be exposed to the asbestos fibres in the Products, in circumstances where the defendants knew or ought to have known that injury to the plaintiff" would result. If there is a defect in Mr. Hunt's statement of claim, it is certainly not that

paragraphs 18 or 19 fail to follow the language of this Court's most [page987] recent pronouncement on the conditions that must be met in order to ground a claim in the tort of conspiracy. In other words, given this Court's most recent pronouncement on the circumstances in which the law of torts will recognize such a claim, it is not "plain and obvious" that the plaintiff's statement of claim fails to disclose a reasonable claim.

¶ 45 The defendants contend, however, that this Court's recent pronouncements, as well as those of courts in England, make clear that the tort of conspiracy cannot be invoked outside a commercial law context and that it certainly cannot be invoked in personal injury litigation. They point out that in Lonrho, supra, at p. 189, Lord Diplock was not prepared to extend the tort to cover the facts of the case before him. They emphasize that Estey J. displayed a measure of sympathy for Lord Diplock's reluctance to extend the scope of the tort when he stated at p. 473 of Canada Cement LaFarge Ltd.:

> The tort of conspiracy to injure, even without the extension to include a conspiracy to perform unlawful acts where there is a constructive intent to injure, has been the target of much criticism throughout the common law world. It is indeed a commercial anachronism as so aptly illustrated by Lord Diplock in Lonrho, supra, at pp. 188-89. In fact, the action may have lost much of its usefulness in our commercial world, and survives in our law as an anomaly. Whether that be so or not, it is now too late in the day to uproot the tort of conspiracy to injure from the common law world. No doubt the reaction of the courts in the future will be to restrict its application for the very reasons that some now advocate its demise.

¶ 46 Finally, the defendants point to my observations in Frame v. Smith, [1987] 2 S.C.R. 99, where I had occasion to consider whether the tort of conspiracy might be extended to cover a case in which [page988] a father was suing his former wife for denying him access to his children. Although I was in dissent in the final result, the Court agreed with my observations about the tort of conspiracy (see La Forest J. at p. 109). The defendants place a good deal of weight on my suggestion, at p. 124, that "the criticisms which have been levelled at the tort give good reason to pause before extending it beyond the commercial context". I concluded that even although the tort could in theory be extended to the facts of Frame, it was not desirable to extend the tort to the custody and access context.

¶ 47 Not surprisingly, the defendants contend that it would be equally inappropriate to extend the tort of conspiracy to cover the facts of this case. The difficulty I have, however, is that in this appeal we are asked to consider whether the allegations of conspiracy should be struck from the plaintiff's statement of claim, not whether the plaintiff will be successful in convincing a court that the tort of conspiracy should extend to cover the facts of this case. In other words, the question before us is simply whether it is "plain and obvious" that the statement of claim contains a radical defect.

¶ 48 Is it plain and obvious that allowing this action to proceed amounts to an abuse of process? I do not think so. While there has clearly been judicial reluctance to extend the scope of the tort beyond the commercial context, I do not think this Court has ever suggested that the tort could not have application in other contexts. While Estey J. expressed the view in Canada Cement LaFarge Ltd., supra, at p. 473, that the action had lost much of its usefulness, and while I noted in Frame v. Smith, supra, at pp. 124-25, that some have even suggested that consideration should be given to abolishing the tort entirely (see: Burns, "Civil Conspiracy: An Unwieldy Vessel Rides a Judicial Tempest" (1982), 16 U.B.C. L. Rev. 229, at p. 254), we both affirmed the ongoing existence of the tort at the date of these judgments. In my view, it would be highly inappropriate for this Court to deny a litigant who is capable of fitting his allegations into Estey J.'s two-pronged summary of the law on civil conspiracy the opportunity [page989] to persuade a court that the facts are as alleged and that the tort of conspiracy should be held to apply on these facts. While courts should pause before extending the tort beyond its existing

confines, careful consideration might conceivably lead to the conclusion that the tort has a useful role to play in new contexts.

¶ 49 I note that in Frame v. Smith, supra, at p. 125, I was not prepared to extend the tort of conspiracy to the custody and access context both because such an extension was not in the best interests of children and because such an extension would not have been consistent with the rationale that underlies the tort of conspiracy: "namely that the tort be available where the fact of combination creates an evil which does not exist in the absence of combination". But in the appeal now before us it seems to me much less obvious that a similar conclusion would necessarily be reached. If the facts as alleged by the plaintiff are true, and for the purposes of this appeal we must assume that they are, then it may well be that an agreement between corporations to withhold information about a toxic product might give rise to harm of a magnitude that could not have arisen from the decision of just one company to withhold such information. There may, accordingly, be good reason to extend the tort to this context. However, this is precisely the kind of question that it is for the trial judge to consider in light of the evidence. It is not for this Court on a motion to strike out portions of a statement of claim to reach a decision one way or the other as to the plaintiff's chances of success. As the law that spawned the "plain and obvious" test makes clear, it is enough that the plaintiff has some chance of success.

¶ 50 The issues that will arise at the trial of the plaintiff's action in conspiracy will unquestionably be difficult. The plaintiff may have to make complex submissions about whether the evidence [page990] establishes that the defendants conspired either with a view to causing him harm or in circumstances where they should have known that their actions would cause him harm. He may well have to make novel arguments concerning whether it is enough that the defendants knew or ought to have known that a class of which the plaintiff was a member would suffer harm. The trial judge might conclude, as some of the defendants have submitted, that the plaintiff should have sued the defendants as joint tortfeasors rather than alleging the tort of conspiracy. But this Court's statements in Inuit Tapirisat of Canada and Operation Dismantle Inc., as well as decisions such as Dyson and Drummond-Jackson, make clear that none of these considerations may be taken into account on an application brought under Rule 19(24) of the British Columbia Rules of Court.

¶ 51 In my view, Anderson and Esson JJ.A. were entirely correct in suggesting that it should be left to the trial judge to ascertain whether the plaintiff can establish that the predominant purpose of the alleged conspiracy was to injure the plaintiff. It seems to me that they were also correct in suggesting that it should be left to the trial judge to consider the merits of any arguments that may be advanced to the effect that the "predominant purpose" test should be modified in the context of this case. Similarly, it seems to me that the argument that some of the defendants advanced, to the effect that Quebec's Business Concerns Records Act, R.S.Q. 1977, c. D-12, might limit the range of information that the defendants could produce at trial, is a matter that is not relevant to the question whether the plaintiff's statement of claim discloses a reasonable claim.

¶ 52 The fact that a pleading reveals "an arguable, difficult or important point of law" cannot justify striking out part of the statement of claim. Indeed, I would go so far as to suggest that where 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 [page991] 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.

¶ 53 Finally, the defendants also submit that a cause of action in conspiracy is not available when a plaintiff has available another cause of action. Since the plaintiff has alleged in paragraph 20 of his statement of claim that the defendants engaged in various tortious acts, the defendants contend that it is not open to the plaintiff to proceed with his claim in conspiracy.

¶ 54 In my view, there are at least two problems with this submission. First, while it may be arguable that if one succeeds under a distinct nominate tort against an individual defendant, then an action in conspiracy should not be available against that defendant, it is far from clear that the mere fact that a plaintiff alleges that a defendant committed other torts is a bar to pleading the tort of conspiracy. It seems to me that one can only determine whether the plaintiff should be barred from recovery under the tort of conspiracy once one ascertains whether he has established that the defendant did in fact commit the other alleged torts. And while on a motion to strike we are required to assume that the facts as pleaded are true, I do not think that it is open to us to assume that the plaintiff will necessarily succeed in persuading the court that these facts establish the commission of the other alleged nominate torts. Thus, even if one were to accept the appellants' (defendants) submission that "upon proof of the commission of the tortious acts alleged" in paragraph 20 of the plaintiff's statement of claim "the conspiracy merges with the tort", one simply could not decide whether this "merger" had taken place without first deciding whether the plaintiff had proved that the other tortious acts had been committed.

¶ 55 This brings me to the second difficulty I have with the defendants' submission. It seems to me totally inappropriate on a motion to strike out a [page992] statement of claim to get into the question whether the plaintiff's allegations concerning other nominate torts will be successful. This a matter that should be considered at trial where evidence with respect to the other torts can be led and where a fully informed decision about the applicability of the tort of conspiracy can be made in light of that evidence and the submissions of counsel. If the plaintiff is successful with respect to the other nominate torts, then the trial judge can consider the defendants' arguments about the unavailability of the tort of conspiracy. If the plaintiff is unsuccessful with respect to the other nominate torts, then the trial judge can consider whether he might still succeed in conspiracy. Regardless of the outcome, it seems to me inappropriate at this stage in the proceedings to reach a conclusion about the validity of the defendants' claims about merger. I believe that this matter is also properly left for the consideration of the trial judge.

¶ 56 In the result the appellants have not demonstrated that those portions of the respondent's statement of claim which allege the tort of conspiracy fail to disclose a reasonable claim. They should not therefore be struck out under Rule 19(24)(a) of the British Columbia Rules of Court.

5. Disposition

¶ 57 The appeal should be dismissed with costs.

Solicitors for Carey Canada Inc.: Farris, Vaughan, Wills & Murphy, Vancouver.
Solicitors for Lac d'amiante du Québec Ltée: Davis & Co., Vancouver.
Solicitors for National Gypsum Co.: Koenigsberg & Russell, Vancouver.
Solicitors for Atlas Turner Inc., Asbestos Corporation Limited and Bell Asbestos Mines Limited: Douglas, Symes & Brissenden, Vancouver.

[page993]

Solicitors for T & N, P.L.C.: Macaulay & Company, Vancouver.
Solicitors for Flintkote Mines Limited: Edwards, Kenny & Bray, Vancouver.
Solicitors for George Ernest Hunt: Ladner Downs, Vancouver.

QL Update: 20010102
qp/i/qlplh

Case Name:

Jameson Livestock Ltd. v. Toms Grain & Cattle Co.

Between
Jameson Livestock Ltd., Gilroy Cattle Company Inc.
and Sinclair Holdings Corp., appellants, and
Toms Grain & Cattle Co. Ltd. and Mark E. Szakacs,
respondents

[2006] S.J. No. 93
2006 SKCA 20
Docket: 1054

Saskatchewan Court of Appeal
Bayda C.J.S., Lane and Smith JJ.A.

Heard: November 21, 2005.
Judgment: February 15, 2006.
Reasons: February 15, 2006.
(38 paras.)

Civil procedure — Class or representative actions — Certification — Common interests — Members of class — A common issue is one the answer to which is common to all members of the class — It must be capable of determination on a class-wide basis — If it is impossible to know whether the answer to a question of whether sales were consignment sales was the same for all members of the proposed class, it follows that this cannot be a common issue.

Appeal from a certification order that certified the action against Jameson Livestock, Gilroy Cattle, and Sinclair Holdings, carrying on business in partnership as Prairie Livestock, as part of a class action also involving seven other defendants. The claim was brought by the respondents, Toms Grain & Cattle Co. and Mark Szakacs, as proposed representative plaintiffs on behalf of approximately one hundred cattle producers whose cattle were sold, allegedly on consignment, by one of the other defendants, Arcola, at an auction, and who did not receive the full net proceeds of the sale. The claim against Prairie Livestock was that it purchased some of the cattle of some of the members of the proposed class and, instead of remitting the full purchase price to Arcola, purported to set off a portion of the price against a debt owed to it by a company related to one of the directors of Arcola (also named as a defendant). The statement of claim alleged that the sale to Prairie Livestock was a sale by consignment whereby Arcola sold the cattle for and on behalf of the cattle producers. Prairie Livestock took the position that they purchased the cattle from Arcola as a licensed livestock dealer, under a contract of sale with that company, and that it was not a sale by consignment or that they owed a duty to pay the purchase price directly to the cattle producers. Prairie Livestock claimed that the chambers judge erred in concluding that a class action against them would be preferable procedure for the resolution of the common issues identified in the certification order, and, more generally, that she failed to determine whether the matter ought to be certified as a class action appropriately, reasonably, or fairly in accordance with the circumstances, facts and evidence before her. They argued that the effect of the order was to embroil Prairie Livestock in an action involving multiple diverse claims, including fraud and corporate oppression, that had nothing to do with them.

HELD: Appeal allowed. The certification order was set aside as it affected Prairie Livestock. There was no evidence on the application for certification to justify a conclusion that the answer to the question of whether the sales were consignment sales was the same for all members of the proposed class. If it was impossible to know whether the answer to this question was necessarily the same for all members of the class, it follows that this cannot be a common issue, for, by definition, a common issue was one the answer to which is common to all members of the class. It must be capable of determination on a class-wide basis. Therefore, the chambers judge erred in certifying the claim against Prairie Livestock as a class action.

Statutes, Regulations and Rules Cited:

Animal Products Act, R.S.S. 1978 (Supp), c. A-20.2

Business Corporations Act, R.S.S. 1978, c. B-10, s. 234

Class Actions Act, S.S. 2001, c. C-12.01, ss. 4(1), 4(2), 4(2)(a), 6, 6(a), 6(b), 10(1), 10(2), 10(c)

Fraudulent Preferences Act, R.S.S. 1978, c. F-21

Livestock Dealer Regulations, R.R.S., c. A-20.2, Reg. 9, s. 10

Appeal From:

On appeal from Q.B.G. No. 2746 of 2003, J.C. Regina

Counsel:

Kevin Mellor for Jameson Livestock Ltd., Gilroy Cattle Company Inc. and Sinclair Holdings Corp.

Peter Bergbusch for Toms Grain & Cattle Co. Ltd. and Mark E. Szakacs

¶ 1 **THE COURT**:— The within action was certified as a class action pursuant to s. 6 of The Class Actions Act, S.S. 2001, c. C-12.01, by a judge of the Court of Queen's Bench assigned in accordance with s. 4(2)(a) of the Act to hear and determine the certification application. Three of the 10 proposed defendants, Jameson Livestock Ltd., Gilroy Cattle Company Inc. and Sinclair Holdings Corp., carrying on business in partnership as "Prairie Livestock," have appealed that decision insofar as it applies to the claim against themselves. We will refer to the appellants jointly as "Prairie Livestock." The appeal raises questions as to the application of the statutory criteria for certification pursuant to s. 6 of the Act.

I. Background

¶ 2 The claim was brought by the proposed representative plaintiffs on behalf of approximately 100 cattle producers whose cattle were sold, allegedly on consignment, by the defendant Arcola Livestock Sales Ltd. ("ALS") at an auction on February 11, 2003 and who did not receive the full net proceeds of the sale. The plaintiffs allege that ALS committed a breach of contract and breach of trust in failing to remit the net proceeds of the sale to the producers. In addition to ALS, the claim named as defendants, among others, the four individual directors of ALS, alleging actions that were oppressive, unfairly prejudicial or unfairly disregarded their interests as creditors contrary to s. 234 of The Business

Corporations Act, R.S.S. 1978, c. B-10, breach of trust and breach of fiduciary duty. These claims are based upon the allegation that the directors authorized the auction sale knowing that the company was on the brink of insolvency and likely would not be able to pay the cattle producers for their cattle. Fraud and dishonesty are also alleged against ALS and against the four directors. Another defendant, Playtyme Holdings Ltd., was named as defendant in relation to an alleged fraudulent preference contrary to The Fraudulent Preferences Act, R.S.S. 1978, c. F-21, arising from a transfer of land from ALS to Anderson Livestock Ltd., a predecessor to the defendant, Playtyme Holdings Ltd., the consideration being outstanding indebtedness of ALS to Anderson Livestock, at a time when ALS was unable to pay the cattle producers.

¶ 3 None of the defendants, other than the three appellants operating as Prairie Livestock, is party to the within appeal.

¶ 4 The claim against Prairie Livestock is that it purchased some of the cattle of some members of the proposed class, including the proposed representative plaintiffs, and, instead of remitting the full purchase price to ALS (approximately $875,000), purported to set off a portion of the price (a sum claimed to be $368,024.24) against a debt owed to it by Frank Eaton Livestock Ltd., a company related to one of the directors of ALS and also named as a defendant, but not party to this appeal. The statement of claim alleges that the February 11, 2003 sale was a sale by consignment whereby ALS sold the cattle for and on behalf of the cattle producers.

¶ 5 The claim against the appellants is set out in para. 4(c) of the certification order as follows:

> 4. The nature of the claims asserted on behalf of the class are as follows:
>
> ...
>
> (c) As against [Prairie Livestock] that Prairie Livestock:
>
> (i) wrongfully purported to set off a debt owed to it by Frank Eaton Livestock Ltd. against the purchase proceeds Prairie Livestock owed to the class members as consideration for the purchase of their cattle at the ALS auction sale;
> (ii) wrongfully converted the class members' cattle and/or the sale proceeds for the said cattle, breached its obligation to pay under purchase contracts for the class members' cattle, and committed a breach of trust in respect of the purchase proceeds of the class members' cattle.

¶ 6 The plaintiffs claim judgment against Prairie Livestock for $368,024.24 plus punitive or aggravated damages, pre-judgment interest and costs on a solicitor-client basis.

¶ 7 In their statement of defence, the corporate partners of Prairie Livestock take the position that they purchased the cattle from ALS, as a licensed livestock dealer, under a contract of sale with that company. They deny that the sale was a sale by consignment or that they owed a duty to pay the purchase price directly to the cattle producers.

¶ 8 The certification order certified the action as a class action as against all 10 of the named defendants. The proposed representative plaintiffs were certified as representative plaintiffs for a class defined as all "cattle producers whose cattle were sold by Arcola Livestock Sales Ltd. ("ALS") at an auction sale on February 11, 2003, and who have not received the full net proceeds of such sales." In

para. 4 the certification order quoted the nature of the claims against the respective defendants as set out in the statement of claim. It then identified the common issues for the class simply as "the liability of the Defendants to them for the matters alleged in paragraph 4 above, as more particularly described in the Statement of Claim herein."

¶ 9 In the notice of appeal, the appellants claim that the certification judge erred in concluding that a class action as against the appellants would be the preferable procedure for the resolution of the common issues identified in the certification order and, more generally, that she failed to exercise her discretion to determine whether the matter ought to be certified as a class action "appropriately, reasonably or fairly in accordance with the circumstances, facts and evidence before her."

¶ 10 In their factum, the appellants argue that the learned certification judge failed to assess properly the considerations of judicial economy, access to justice and behaviour modification, identified in Hollick v. Toronto (City), [2001] 3 S.C.R. 158 as the relevant considerations, to the determination that a class action would be the preferable procedure for resolving the common issues raised by the claim against the appellants. The gist of the argument is that the effect of the certification order is to embroil Prairie Livestock in an action involving multiple diverse claims, including fraud and corporate oppression, that have nothing to do with them. It is also argued that the certification judge failed to consider whether the statement of claim disclosed a cause of action as against the appellants, and, if so, the nature of that claim.

¶ 11 The relevant provisions of The Class Actions Act are as follows:

> Plaintiff's class action
>
> 4(1) One member of a class who resides in Saskatchewan may commence an action in the court on behalf of the members of that class.
>
> (2) The member who commences an action pursuant to subsection (1) shall:
>
> (a) apply to the chief justice of the court for the designation of a judge to consider an application mentioned in clause (b); and
>
> (b) apply to the judge designated pursuant to clause (a) for an order:
>
> (i) certifying the action as a class action; and
>
> (ii) subject to subsection (4), appointing the member as the representative plaintiff for the class action.
>
> ...
>
> Class certification
>
> 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.

...

Contents of certification order

10 (1) A certification order must:

(a) describe the class with respect to which the order was made by setting out the class's identifying characteristics;
(b) appoint the representative plaintiff for the class;
(c) state the nature of the claims asserted on behalf of the class;
(d) state the relief claimed by the class;
(e) set out the common issues for the class;
(f) state the manner in which, and the time within which, a class member may opt out of the class action;
(g) state the manner in which, and the time within which, a person who is not a resident of Saskatchewan may opt into the class action; and
(h) include any other provisions the court considers appropriate.

(2) If a class includes a subclass whose members have claims that raise common issues not shared by all the class members and, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the certification order must include the same information in relation to the subclass that, pursuant to subsection (1), is required in relation to the class.

(3) The court may, at any time, amend a certification order on the application of a party or class member or on its own motion.

II. Standard of Review

¶ 12 Section 6 of the Act requires the court to certify an action as a class action "if the court is satisfied that" five listed criteria are met, namely: (a) the existence of a cause of action; (b) the existence of an identifiable class; (c) that the claims of the class members raise common issues; (d) that a class action would be the preferable procedure for the resolution of the common issues; and (e) that the proposed representative plaintiffs were willing to be appointed as representative plaintiffs, would fairly and adequately represent the interests of the class, had produced a workable plan for the class action, and did not have, on the common issues, an interest that is in conflict with the interests of the other class members.

¶ 13 Section 6 of the Saskatchewan Act reflects virtually identical provisions in other Canadian provinces and similar provisions in American jurisdictions. The substance of this provision has therefore been the subject of extensive judicial commentary in other jurisdictions, including consideration by

appellate courts, and the criteria equivalent to those set out in ss. 6 (a), (b), (c) and (d) have been the subject of adjudication in the Supreme Court of Canada. It is therefore clear that the application of these criteria engages questions of law and that the decision to grant or refuse certification may in some circumstances be challenged on the basis that the chambers judge has erred in law in determining that one or more of the criteria has or has not been satisfied.

¶ 14 Thus, while the terminology used in s. 6 seems to suggest that the certification decision is a discretionary one, a review of the case law confirms that the extent of appellate deference in relation to a decision to grant or to refuse certification of an action is limited. It seems clear, for example, that the decision as to whether the pleadings disclose a cause of action is a question of law, reviewable on a standard of correctness by an appellate court. See, for example, the decisions of the Supreme Court of Canada in Cooper v. Hobart, [2001] 3 S.C.R. 537 and Edwards v. Law Society of Upper Canada, [2001] 3 S.C.R. 562 where this issue is clearly treated as a question of law, subject to full appellate review on the standard of correctness.

¶ 15 Similarly, in Hollick, supra, the Supreme Court reviewed the lower courts' decisions determining whether the applicants had satisfied the criteria of an identifiable class, common issues, and preferability of procedure apparently on the standard of correctness, for no mention is made in that decision of a requirement for deference to the decision of the certification judge, who had certified the action in that case.

¶ 16 In some cases, some degree of deference in relation to the criterion of preferability of procedure has been recognized, for the legislation requires the certification judge to determine the overall fairness of the class action as a method for determining the common issues identified. See: Ward Branch, Class Actions in Canada, looseleaf (Aurora, Ont.: Canada Law Book, 2005) at para. 4.1850, citing authorities. At the same time, as we have indicated, the Supreme Court of Canada overturned a finding of preferable procedure by the certification judge in Hollick, with no reference to a requirement for deference to the lower court's determination.

¶ 17 In the instant case, the reasons given for the decision to grant the certification order focused almost exclusively on the positions of other defendants to the action, and did not address at all the circumstances that would distinguish the claim against the appellants from the other claims certified to proceed as a class action.

¶ 18 In our view, taking all these circumstances into account, it is open to this Court to review the certification order from which the appeal is taken on the basis of whether the learned chambers judge correctly apprehended and applied the criteria set out in s. 6 of the Act to the claim against the appellants as proposed defendants.

III. Analysis

¶ 19 We begin with the observation that, although the focus of the appeal is on the question of whether the chambers judge correctly decided that a class action would be the preferable procedure for deciding the common issues relating to the claim against Prairie Livestock, this question is necessarily related to the determinations in the certification order regarding other criteria for certification. In particular, the determination of the preferable procedure for deciding the common issues in relation to these defendants cannot be decided without consideration of what those common issues are. That determination, in turn, depends upon the determination of the nature of the cause of action as against the defendants in question (for the common issues must relate to the cause or causes of action identified), as well as upon the class definition (for the common issues must be "common" to all members of the

putative class).

¶ 20 Further, the decision of the Supreme Court in Hollick, supra, makes it clear that, although determination of whether there is a cause of action is to be determined solely on the basis of the pleadings, the application for certification must provide a minimum evidentiary basis for the remaining criteria. Thus, for example, in order to establish an identifiable class, it is necessary for the applicants to file evidence to show that members of the proposed class have, in common, the claim asserted against the defendants, (that they have, for example, all suffered the loss claimed to be the responsibility of the defendants) and that the claim or claims against the defendants in question raise "common issues" in the sense that the resolution of the issue proposed will be the same for all members of the class.

¶ 21 It is our respectful view, on a review of the first three requirements for certification in the instant case, insofar as that certification relates to the claim against the appellants, that the applicants failed to establish an evidentiary basis for determining an identifiable class with common issues necessary for certification of that portion of the action as a class action.

¶ 22 We turn first to the requirement set out in s. 6 (a) that the pleadings disclose a cause of action. As has already been noted, the reasons of the chambers judge did not address at all whether there was a cause of action set out in the pleadings as against the appellants, and, if so, the nature of the claim. This question required at least some comment, for it is not at all clear, for example, how the pleadings could support a claim in conversion as against Prairie Livestock, which is alleged to have purchased the cattle in question. In effect, Prairie Livestock is alleged to have bought livestock, including the representative plaintiffs' livestock, at the auction held on February 11, 2003, and to have failed to remit to ALS the full purchase price, having instead claimed a set off for a portion of the price. The facts alleged to support the claim are set out in paras. 25 and 26 of the statement of claim as follows:

> 25. At the February 11, 2003 auction sale held by ALS, Prairie Livestock agreed to purchase cattle having a total purchase price of $875,089.68, including the Plaintiffs' livestock, and the said cattle were released by ALS to Prairie Livestock. In addition, Prairie Livestock owed to ALS $23,544.51 for cattle purchased at a sale held by ALS on January 28, 2003. However, on about February 18, 2003, Prairie Livestock provided only part payment for the said cattle to ALS, in the amount of $530,609.95. The difference, of $368,024.24, remains unpaid by Prairie Livestock to ALS.
>
> 26. Prairie Livestock has purported to withhold the sum of $368,024.24 from ALS on the basis that it is owed this amount by FEL [Frank Eaton Livestock Ltd.]. The Plaintiffs say that Prairie Livestock has no right in law or equity to claim such setoff. In addition, the Plaintiffs say that at all times:
>
> (a) Prairie Livestock knew that ALS was selling the said livestock on consignment and that the livestock belonged to the Plaintiffs and other cattle producers;
> (b) Prairie Livestock knew or ought to have known that the purchase price for the cattle was payable in trust to ALS as agent for the Plaintiffs and other cattle producers; and
> (c) Prairie Livestock further understood that the Plaintiffs and other cattle producers, not ALS, were entitled to receive the proceeds of sale, less a commission and other deductions payable to ALS.

¶ 23 Thus, in order to support a claim that the sum of $368,024.24 is owed, not to ALS, but to the representative plaintiffs and other members of the proposed class, the statement of claim alleges that the

livestock was sold by consignment. On this basis, the claim would seem to be simply one of debt for the price owing to the plaintiffs for the cattle purchased. In our respectful view, it is doubtful that a basis for the claim in conversion or breach of trust has been pled. Even if, as the respondents argue, proceeds of a consignment sale in the hands of a consignee are impressed with a trust in favour of the consignors, it does not follow that the purchaser's obligation to pay the price for the goods received is a fiduciary, or trust, obligation.

¶ 24 Nonetheless, in the circumstances of this appeal, it is not necessary to determine whether an action in trust or conversion would lie against the defendants for non-payment of the purchase price in relation to a consignment sale. What is clear is that to establish any liability on the part of Prairie Livestock toward any member of the putative class, whether in debt, trust or conversion, it would be necessary for the plaintiffs to establish at least the following: (1) that Prairie Livestock bought cattle delivered to the auction by the member in question; (2) that the member did not receive the full purchase price less commission and fees owed to ALS in relation to the cattle purchased by Prairie Livestock; and, (3) that the sale of cattle by that member was a consignment sale.

¶ 25 This brings us to the requirement of s. 6(b), that there be an identifiable class. The certification order identified the class as all "cattle producers whose cattle were sold by Arcola Livestock Sales Ltd. ("ALS") at an auction sale on February 11, 2003, and who have not received the full net proceeds of such sales."

¶ 26 There was evidence before the chambers judge that this definition would provide objective criteria for determining class membership. The affidavit of Shannon Eaton, a shareholder and director of ALS and one of the individually-named defendants deposed that, with respect to the sale of February 11, 2003, there were approximately 200 producers who provided livestock for sale. Gross receipts for the sale were in excess of $2 million and cheques were prepared for all producers the following day. Of the approximately 200 cheques issued, approximately 100 cleared the ALS bank account, but another 125 producers received cheques that were not honored due to insufficient funds in the account. Of these, approximately 20 were producers from a previous sale who had not yet deposited their cheques. ALS has invited all the unpaid producers to obtain a consent judgment against the company for the amount of the unpaid cheques. The sum owing to Toms Grain & Cattle Co. Ltd. is $107,113.50. The debt owing to Mark E. Szakacs is $31,558.17. A list of all other unpaid producers is attached to the affidavit of Ms Eaton. The amounts owing range from a low of $32.10 to a high of approximately $100,000, for a total in excess of $1.1 million.

¶ 27 Thus, apart from the largely overlooked glitch that a portion of the money owed by the appellants related to an earlier sale, and approximately 20 of ALS's unpaid producers were owed money in relation to an earlier sale (and these producers therefore have been arbitrarily excluded from the class definition even in relation to the claim as against ALS), it is clear that members of the certified class can be objectively identified.

¶ 28 However, the mere fact that a group of people is identifiable is not sufficient to render them a class for the purpose of a class action. In addition, there must be a rational connection between the proposed class definition, the proposed causes of action and the proposed common issues. In effect, the class description must describe persons who in fact have a claim asserted in the statement of claim. This has often been interpreted to mean that all members of the proposed class must have at least a colourable claim and that the class definition should not be over-inclusive or under-inclusive, sweeping in those who do not have a claim against the proposed defendants or arbitrarily excluding others who share the same cause of action. See, for example, Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.), Lau v. Bayview Landmark Inc. (1999), 40 C.P.C. (4th) 301 (Ont. S.C.J.). In addition, the application for certification must provide a minimum evidentiary basis for the court to be satisfied that

there is a class of more than one person who share the common claim. Both requirements, that the class definition must bear a rational relationship to the causes of action certified and the proposed common issues (and therefore must not be unreasonably over-inclusive or under-inclusive), and that there be an evidentiary basis supporting the factual conclusion that such a class exists (i.e., that all the members of the class have suffered the loss claimed), were upheld by the Supreme Court of Canada in Hollick, supra.

¶ 29 In this case, and in relation to the claim against the appellants, it is clear that the class as certified is at least over-inclusive, for there is no evidence that all or even most of the unpaid producers who supplied cattle for the sale in question provided the cattle that were purchased by the appellants. Indeed, the evidence above referred to would make this unlikely since the total proceeds for the sale in question was over $2 million, approximately one-half of the producers who supplied cattle for the sale were in fact paid, and the total price for all the cattle purchased at that sale by the appellants was only a little over $850,000. Clearly much of the money owing to the unpaid producers, as a class, related to sales of cattle to other purchasers. There is no other evidence as to whether the debt owing to individual producers related to the sale of cattle to Prairie Livestock except for the allegations in the statement of claim that cattle of the two representative plaintiffs were among those sold to these appellants, combined with the affidavits of Franklin Toms and Mark E. Szakacs, respectively, that, to the best of their knowledge, the facts alleged in the statement of claim concerning Toms Grain & Cattle Co. Ltd. and Mark E. Szakacs (the two representative plaintiffs) are true.

¶ 30 This problem with class definition might be solved with an amendment to the certification order certifying a sub-class in relation to the claim against the appellants, defined, perhaps, as all "cattle producers whose cattle were sold by Arcola Livestock Sales Ltd. ("ALS") at an auction sale on February 11, 2003, to Prairie Livestock, and who have not received the full net proceeds of such sales," although even this definition would leave unresolved the problem that a class so defined would arbitrarily exclude those unpaid producers whose cattle were sold at an earlier sale.

¶ 31 This, however, leads to the next problem, the identification of common issues. The common issues in relation to the appellants must arise from the alleged liability of the appellants to members of the class for the purchase price of the cattle purchased by the appellants at the auction sale of February 11, 2003. The certification order in this case simply identified the common issues as the liability of the defendants to the class members for matters alleged in the statement of claim. More analysis is required in order to determine whether the question of liability raises issues that are in fact common across the class.

¶ 32 As we have indicated above, a principal issue in relation to the alleged liability of the appellants to the cattle producers is whether the sales in question were or were not consignment sales. This is clearly a contested issue, for the statement of defence filed by the appellants, and the affidavits filed on their behalf on the certification application, deny that the sales were consignment sales, claiming that they entered into a contract of purchase and sale with ALS, as principal, to purchase the cattle in question. There was virtually no other evidence on this point apart from the allegation in the statement of claim that cattle of the two proposed representative plaintiffs were sold to these defendants on consignment, and the above noted affidavits of Franklin Toms and Mark E. Szakacs deposing that, to the best of their knowledge, the facts alleged in the statement of claim concerning the two proposed representative plaintiffs were true. There is no other factual evidence in relation to the sales of cattle producers other than the representative plaintiffs.

¶ 33 Significantly, it cannot be assumed that the answer to this question would be the same for all unpaid cattle producers. Although it might be thought that the sale in question was governed by the general law governing auction sales, both parties acknowledged that in Saskatchewan cattle auctions are

a special case, not subject to the general law relating to auction sales, but, rather, regulated by The Livestock Dealer Regulations, 1995, R.R.S., c. A-20.2, Reg 9. These regulations are promulgated pursuant to The Animal Products Act, R.S.S. 1978 (Supp.), c. A-20.2. They regulate all dealings between "livestock dealers" (i.e., in this case, ALS) and "contributors of livestock" (i.e., in this case, the cattle producers), whether the livestock dealers purchase on their own behalf, or sell livestock on behalf of the producers. For example, s. 10 of the Regulations provides as follows:

> Conditions for payment by a livestock dealer
>
> 10(1) Subject to subsection (1.1), a livestock dealer shall ensure that the contributor of livestock is paid for all livestock purchased or sold by the livestock dealer within three days, excluding weekends and statutory holidays, from the date:
>
> (a) the livestock dealer purchases or takes possession of the livestock; or
> (b) the price is calculated in railgrade settlement or price pooling.
>
> (1.1) Subsection (1) does not apply where the livestock dealer and the contributor have entered into a written agreement to extend the date for payment with respect to the contributor's livestock being purchased or sold by the livestock dealer.
>
> (2) Cheques in payment for livestock purchased by a livestock dealer or a livestock agent must bear the same name as that indicated on the livestock dealer's licence and all cheques must bear the livestock dealer's licence number.
>
> (3) Where a livestock dealer fails to make payment for livestock purchased or sold in accordance with subsection (1) the contributor may, at any time within 30 days of the purchase or sale, or any further period that may be authorized by the minister, provide a statutory declaration to the minister declaring:
>
> (a) the value and description of the original loss;
> (b) the amount recovered by any other action; and
> (c) the action taken to recover the portion of his or her original loss still unpaid.
>
> (4) All moneys received by a livestock dealer on account of the sale of livestock that are in the hands of the livestock dealer are to be held for the benefit of the contributor of the livestock, and the livestock dealer shall not appropriate the money or convert it to his or her own use or to any use not authorized by the contributor until the livestock dealer has:
>
> (a) set aside the inspection fees, less any commission, for payment to the minister in accordance with section 11.1; and
> (b) paid the contributor any amounts owing to the contributor for that livestock.
>
> (5) Notwithstanding any other provision of these regulations, where a livestock dealer and a contributor have entered into a written agreement in accordance with subsection (1.1), the livestock dealer's surety bond provided pursuant to section 7 is not subject to any claims related to the livestock dealer's failure to make payment for the livestock under the agreement.

¶ 34 It is clear that these regulations anticipate that livestock dealers such as ALS may either purchase livestock on their own account, for resale or not, or may sell livestock on consignment.

Paragraph 3 of the statement of claim confirms this understanding, alleging that the defendant, ALS, is "engaged in the business of purchase and sale of livestock." The ALS statement of defence, at para. 4, alleges that ALS "carries on the business of a public cattle auction and was licensed as a livestock dealer pursuant to the provisions of The Livestock Dealer Regulations 1995," but denies "that at any time did they hold a consignment of livestock sale as alleged by the Plaintiffs, but rather the Plaintiffs provided livestock as a contributor." In para. 5 they say, more clearly, "that at no time did the Defendants accept the Plaintiffs' cattle on consignment for sale." Further, as we have indicated, ALS has acknowledged its indebtedness to all of the producers who delivered cattle for the sale in question, (and a previous sale) regardless of whether ALS itself has received payment from the ultimate purchasers.

¶ 35 Accordingly, it would appear that the question of whether a particular sale was or was not a consignment sale may well be a question of fact, depending on the particular arrangement between ALS and a particular cattle producer. Indeed, the respondents argue, in their factum on this appeal, that whether the sales were consignment sales is a question of fact. In any case, there was no evidence on the application for certification to justify a conclusion that the answer to this question is necessarily the same for all members of the proposed class. If it is impossible to know whether the answer to the question is the same for all members of the class, it follows that this cannot be a "common issue," for, by definition, a common issue is one the answer to which is common to all members of the class. It must be capable of determination on a class-wide basis. An issue that can be resolved only by inquiry into the circumstances of each individual claim is not a "common issue," even though the same question must be posed in each case. See Bittner v. Louisiana-Pacific Corp. (1997), 43 B.C.L.R. (3d) 324 (B.C.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.); Chadha et al. v. Bayer Inc. et al., (2001), 200 D.L.R. (4th) 309 (Ont. S.C.J., Div. Ct.).

¶ 36 It follows, in our respectful view, that there was no evidence to support the conclusion of the learned chambers judge that the liability of the appellants in this case could be determined in a class action as a common issue.

¶ 37 An alternative way to look at this, of course, is to say that a class action is not the preferable procedure for determining the liability of the appellants to the members of the proposed class of cattle producers for the purchase price of cattle purchased at the sale in question, for the question of liability must be answered on the basis of an inquiry into the individual circumstances of each sale, which circumstances may vary from case to case. The learned chambers judge gave no reasons for her conclusion that a class action was the preferable procedure, either in relation to the appellants or in relation to any of the other proposed defendants. However, since the question of whether the sale at issue was a consignment sale is the principal and, indeed, the sole outstanding issue pertinent to the resolution of the issue of liability of the appellants to the class members, it follows that that question of liability cannot be resolved on a class-wide basis. There was, for this reason, no basis upon which the learned chambers judge could have concluded that the interests of judicial economy or access to justice are served by proceeding, as against the appellants as defendants, as a class action. The principle of behavior modification does not seem to be relevant in these circumstances.

IV. Conclusion

¶ 38 It is our conclusion that the learned chambers judge erred in certifying the claim against the appellants as a class action on the basis of the material before her on the certification application, for that material did not support the conclusion that the claim involved common issues for which a class action was the preferable procedure. Nor was the class definition set out in the certification order a proper description of the class of persons who had at least a colourable claim against the appellants. For these reasons, the appeal should be allowed and the certification order set aside insofar as it affects the

appellants. The appellants shall have their costs of this appeal in the usual way.

SMITH J.A.

BAYDA C.J.S.:— I concur.

LANE J.A.:— I concur.

QL UPDATE: 20060222
cp/e/qw/qlrds/qltxp

Case Name:

Killough v. Canadian Red Cross Society

Between
Edward Killough, Patricia Nicholson, Irene Fead,
Daphne Martin, Deborah Lutz and Melanie Creehan,
plaintiffs, and
The Canadian Red Cross Society, Her Majesty the
Queen in Right of British Columbia and the
Attorney General of Canada, defendants

[2001] B.C.J. No. 2631
2001 BCSC 1745
Vancouver Registry No. C976208

British Columbia Supreme Court
Vancouver, British Columbia
Pitfield J.

Heard: November 26, 2001.
Judgment: December 13, 2001.
(39 paras.)

Barristers and solicitors — Compensation — Measure of compensation — Class actions.

Application by counsel for the plaintiff Killough for fee approval in a class proceeding. The action was one of many in several provinces arising from the contamination of the Canadian blood supply. The class members claimed damages for negligence in the testing of blood, allegedly resulting in infection with the hepatitis C virus. The defendant Red Cross sought protection under the Companies' Creditors Arrangement Act, as a result of which a fund was created to settle the claims. Red Cross assets were paid to certain trust accounts for the benefit of various claimants, and the applicant's firm was paid $191,978 in respect of the proceedings. The applicant and counsel from Ontario and Quebec concluded an agreement with respect to their aggregate fees. The applicant sought approval of a fee in respect of the national settlement fund, comprising a base fee, a proportionate share of investment income earned from the trust accounts, and a share of any amounts accruing to the hepatitis C virus fund in the future. He also sought a fee of 15 per cent of the recovered amount in respect of the provincial settlement fund.

HELD: Application allowed in part. A fee of $2,100,000 was approved in respect of the national settlement fund. Any fee above that would have been unreasonable in light of the agreement with counsel from Ontario and Quebec. The fees for the Companies' Creditors Arrangement Act proceedings paid from the Red Cross estate to the solicitor were to be deducted from the fee otherwise payable. The proposed fee of 15 per cent in relation to the provincial settlement fund was approved.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 38(2).

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

David M. Rosenberg, for the applicant.

¶ 1 **PITFIELD J.**:— Mr. David A. Klein, counsel in this class proceeding, applies for fee approval as contemplated by s. 38(2) of the Class Proceedings Act, R.S.B.C. 1996, c. 50. There are two aspects to the application. The first relates to the approval of fees in relation to what is called the "national settlement fund". The second relates to approval of the fees in respect of a settlement that is unique to the province of British Columbia.

¶ 2 In addition to reasonableness, other issues of consequence arise in relation to the national fee. The first is the determination of the amount of the "national settlement fund" within the meaning of an agreement concluded by counsel. The second is whether provision should be made to increase the fee in the event the national settlement fund increases in the future. The third is whether the approved fee should be increased by any portion of the investment income earned on the national settlement fund since October 16, 2001. The fourth is whether the amount of the fee that is approved should be reduced by the amount of fees received by Mr. Klein's firm in respect of the Red Cross Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, proceedings.

¶ 3 The relevant facts for present purposes are these. This action is one of many that arose as a consequence of the contamination of the Canadian blood supply. The action was commenced in the name of representative plaintiffs against The Canadian Red Cross Society, The Queen in Right of British Columbia, and the Attorney General of Canada. The plaintiffs claimed damages resulting from the defendants' alleged negligence in the testing of blood. The alleged negligence was said to have caused the plaintiffs and members of the class to be infected with the Hepatitis C Virus ("HCV"). The action was brought on behalf of those who were infected with the virus prior to January 1, 1986 and after July 1, 1990. Others infected by HCV between January 1, 1986 and July 1, 1990 were plaintiffs in separate legal proceedings: 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.

¶ 4 Actions similar to the Killough action were commenced in Ontario (see McCarthy v. Canadian Red Cross Society, [2001] O.J. No. 2474 (S.C.J.) and Quebec (see Surprenant v. Société Canadienne de la Croix-Rouge & al (October 19, 2001), No. 500-06-000120-002, (S.C. Qué)).

¶ 5 The essence of the litigation pertaining to the pre-1986/ post-1990 claim was summarized by K. Smith, J. as he then was, in reasons certifying the class action and approving the settlement (see [2001] B.C.J. No. 1481) at paras. 9, 10 and 11:

> [9] In the 1970's and 1980's, American scientists developed surrogate, or indirect, tests for Hepatitis C virus in the American blood supply. Studies done in the early 1980's concluded that these tests were effective in identifying the presence of the virus in donated blood. As a result, American blood banks began to employ these tests as early as 1982 and, by about August 1, 1986, they were routinely used by the American Association of Blood Banks and the American Red Cross. However, they were never

implemented in the Canadian blood system.

[10] In the late 1980's, scientists developed a specific test for Hepatitis C that was put into use in the United States, in conjunction with the surrogate tests, to good effect. However, while the Red Cross implemented the specific test in Canada on July 1, 1990, it continued to ignore the surrogate tests. Finally, with the implementation by the Red Cross of a second, more-sensitive specific test in 1992, the Canadian blood system came into harmony with the testing regime in the United States.

[11] The essence of the plaintiffs' case is that they became infected with the Hepatitis C virus as a result of the failure of the three defendants to implement the surrogate tests and to seasonably introduce the more effective testing regime.

¶ 6 Faced with the many actions against it, the Red Cross sought the protection of the CCAA by court proceedings in Ontario. As a consequence of the CCAA proceeding, a plan of compromise and arrangement (the "Plan") emerged that provided a fund estimated to approximate $63 million in settlement of the claims of the pre-1986/post-1990 claimants as against the Red Cross.

¶ 7 The Plan provided that the assets of the Red Cross should be paid to certain trust accounts for the benefit of various claimants as follows:

(a) $600,000 for Creutzfeld-Jacob blood disease claimants;
(b) $1.0 million for Prison Blood HCV claimants;
(c) 14/79ths of the remainder of the Trust after deducting the amounts in (a) and (b) above for HIV claimants;
(d) $500,000 for other transfusion claimants as defined by the Plan; and
(e) the remainder, less a reserve for costs of the Trustee and the Trust Counsel, for the pre-1986/post-1990 HCV claimants.

¶ 8 By October 16, 2001 the sum of $83,152,316.48 had been paid to the Trustee under the Plan. After setting aside the trust funds stipulated in paras. (a) through (d) above, the remainder of $66,600,007.23 was set aside as the HCV fund. The Trustee has determined that the sum of $600,007.23 should be reserved for Trust Counsel and Trustee fees authorized by the Plan such that, as at October 16, 2001, the capital sum in the HCV fund amounted to $66 million. The fund has likely been enhanced by investment income earned by the Trustee since October 16, 2001.

¶ 9 There is a possibility that the HCV fund will be further augmented in the future. The settlement agreement provides that any portion of the Creutzfeld-Jacob, Prison Blood, HIV and other transfusion claimant funds remaining after specified periods of time will be transferred to the HCV fund for distribution to the claimants of that fund. On the other hand, the HCV fund may be diminished in the event that Trust Counsel and Trustee fees exceed the amount that has been reserved.

¶ 10 In February 1999, Mr. Klein and the representative plaintiffs in the British Columbia action signed an agreement with respect to fees providing as follows:

> The legal fee paid to Klein, Lyons for its work as class counsel will be fifteen percent (15%) of all amounts members of the class recover for damages and interest. Taxes, including P.S.T. and G.S.T. will be paid from any funds recovered over and above the fees charged.
>
> Klein, Lyons will be reimbursed for all disbursements plus interest incurred in work for the common benefit of members of the class. Interest on disbursements will be calculated at the rate of 10% per annum, not compounded. The payment of legal fees,

> disbursements and taxes to Klein, Lyons shall be a first charge on proceeds and shall be made by lump sum at the conclusion of this matter, or in any manner that the Court shall direct. In the event the suit is unsuccessful, I will have no liability for legal fees, disbursements or taxes.

¶ 11 On July 18, 2000, counsel in the British Columbia, Ontario and Quebec pre-1986/post-1990 actions concluded an agreement with respect to their aggregate fees. The agreement is reflected in a letter of that date written by Mr. Klein to counsel in Ontario and Quebec as follows:

> As the final amendments to the Plan are now being put into place, it seems an appropriate time to record the agreement we have reached regarding class counsel fees. We have agreed that each of us will seek class counsel fees such that the aggregate of our class counsel fees in respect of the Red Cross CCAA settlement will be no more than 10% of the settlement fund plus disbursements and applicable sales taxes. Each of us will seek no more than one third of 10% of the Red Cross fund. Should a fee of less than this one third share be approved by any of the class action judges, then the balance of that third remains in the settlement for distribution to the victims. In the event that a fee is approved that is larger than the one third cap, counsel will limit themselves to the one third and forego the additional amount awarded.

¶ 12 When the agreement among counsel was concluded in July 2000, it was anticipated the national settlement fund would total $63 million.

¶ 13 Relevant to the consideration of these applications is the fact that counsel for the HCV litigants in British Columbia, Ontario and Quebec were paid fees from the Red Cross estate as a consequence of their involvement in the CCAA proceeding. Mr. Klein's firm received $191,978.20, and Quebec counsel was paid $195,075. The amount paid to Ontario counsel does not appear in the evidence before me on this application.

¶ 14 Applications for fee approval have been finalized in Ontario and Quebec. On June 21, 2001 Winkler J. approved the application of Ontario Counsel for a lump sum fee of $2.1 million: see McCarthy, supra. The reasons for judgment do not make reference to the payment of G.S.T. or disbursements. The evidence on the application before me is that on October 12, 2001 the Trustee paid Ontario counsel the sum of $2.1 million inclusive of fees, disbursements and all applicable taxes. No amount was deducted in respect of the CCAA fees.

¶ 15 On October 19, 2001 the Quebec Superior Court approved a fee of $2.1 million to Quebec counsel increased by expenses of $72,623 but reduced by the $195,075 paid to counsel in respect of the CCAA proceeding. In addition to the net fee of $1,977,548, the fund administrator was directed to pay G.S.T. of $138,428.36 and Quebec tax of $158,698.23 for a total of fees, expenses and taxes of $2,274,674.59.

¶ 16 There are obvious differences between the Ontario and Quebec orders with respect to disbursements and taxes and the treatment of the CCAA fees in the context of fees payable in relation to the Red Cross settlement.

¶ 17 The relevant facts with respect to the settlement of the British Columbia class action against the Attorney General are the following.

¶ 18 Counsel endeavoured to persuade the Province to contribute an amount to a settlement fund for

the benefit of British Columbia residents. The Province declined.

¶ 19 In the course of his work on behalf of the class, Mr. Klein learned that the Province had lent funds to the Red Cross. He was able to persuade the presiding judge in the CCAA proceeding in Ontario that the Crown in Right of British Columbia had a lien over the Red Cross premises in Vancouver that should be paid in preference to general creditors. As a result, the amount of $6,531,382 was received by The Attorney General of British Columbia on September 29, 2000. The full amount is being held in an account bearing interest at the CIBC prime rate.

¶ 20 Mr. Klein succeeded in persuading the Province to contribute the full amount to a settlement fund for the residents of British Columbia. The Province's obligation to make the contribution is conditional upon the Province being satisfied that a sufficient proportion of the class has opted to accept the benefit of the settlement rather than electing to pursue individual remedies.

¶ 21 Against this factual background, Mr. Klein seeks approval of a fee in respect of the national settlement fund comprised of a base of $2.2 million, a proportionate share of investment income earned by the Trustee from October 16, 2001 to the date his fee is paid, and one-third of 10% of amounts that may accrue to the HCV fund in the future. He seeks a fee of 15% in respect of the provincial settlement fund. The Attorney General of British Columbia, the Public Guardian and Trustee for British Columbia and the representative plaintiffs have indicated they do not oppose the amount of the fees sought by Mr. Klein in respect of the national and provincial settlement funds.

¶ 22 The factors that the Court should take into account in deciding upon an appropriate fee on a class action were fully discussed by K. Smith, J. in Endean v. Canadian Red Cross Society (2000), 78 B.C.L.R. (3d) 28. I am particularly mindful of three observations made by K. Smith J. in his reasons. The first was that the reasonableness of the fee was to be determined in the British Columbia context but gross inconsistencies with awards made in other provinces should be avoided if possible.

¶ 23 The second was that the fee agreement must be found to have been fair in the sense that the client understood and appreciated the contents of the agreement, and reasonable having regard for all of the factors that enter into the determination of a lawyer's account. Those factors include 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: see Yule v. Saskatoon (1955), 1 D.L.R. (2d) 540 (Sask. C.A.).

¶ 24 The third was that because of the unique nature of class actions, all members of the class should share in the payment of a fair fee for the result achieved when viewed from the perspective of the member, and an effort should be made to identify the causal relationship between the efforts of counsel and the benefits conferred on the class claimants.

¶ 25 In this case, there is no suggestion that either the agreement signed with the representative plaintiff or the agreement concluded among counsel was unfair. The time value of the work done by the Klein Lyons firm approximates $900,000.

¶ 26 The litigation was very risky because of the difficulty in establishing negligence on the part of the Red Cross or other defendants in the period before July 1986 and in the period from August 1990 through to 1998. There is no doubt the outcome of the litigation was important from the point of view of the claimants.

¶ 27 Counsel in the British Columbia, Ontario and Quebec actions were all involved in the CCAA proceeding against the Red Cross. That proceeding was complicated. In his reasons on certification and settlement approval, K. Smith, J. stated the following in respect of the conclusion of the plan:

> [13] The Red Cross ultimately filed a plan of compromise and arrangement in the CCAA proceeding that described four classes of creditors, all of whom voted in favour of accepting the plan. On September 14, 2000, Mr. Justice Blair, the judge presiding in the CCAA proceeding, endorsed the plan, describing it as "fair and reasonable" in the context of the Companies' Creditors Arrangement Act. He observed that the plan was the culmination of "two years of intense and complex negotiations", and he commended counsel for their efforts in what he characterized as a "difficult and sensitive case".

¶ 28 Mr. Klein is experienced and able in relation to class proceedings. Over time he has acquired expertise that permits him to make a valuable contribution to the advancement and resolution of class actions. While the precise causal relationship between the efforts of Mr. Klein and the national settlement is difficult to define with any precision, I am satisfied that his involvement, along with that of Ontario and Quebec counsel on behalf of the HCV litigants, was valuable and a significant factor in the attainment of the settlement that was ultimately concluded.

¶ 29 In so far as the settlement with the Province of British Columbia is concerned, I am satisfied that Mr. Klein's tenacity resulted in the discovery of the fact that funds had been advanced by the Province to the Red Cross and assisted in the attainment of the order in the CCAA proceeding resulting in the payment of $6,531,382 to the Province. The Province had stoutly resisted any settlement with the class but that position changed when funds were paid to the Province out of the Red Cross estate in the course of the CCAA proceeding.

¶ 30 The demographics of the pre-1986/post-1990 class are such that approximately 22% of all claimants eligible for the national settlement reside in British Columbia. That being the case, the amount to be paid to British Columbia counsel computed as 3.33% of the national settlement fund, yields an amount that is not in excess of the 15% which the representative class plaintiff agreed would be payable as a fee. The fee proposed in relation to the provincial settlement is 15% of the amount recovered by the Province from the Red Cross estate.

¶ 31 The reasonable fee cannot be determined without respect for the agreement among counsel. The wording in their agreement is ambiguous in that the term "national settlement fund" is not defined. I find that counsel in British Columbia, Ontario and Quebec intended to regard the sum of $63 million as the national settlement fund as that was the estimated amount of the settlement at the time of the letter agreement. That was the position adopted by counsel in Quebec and Ontario in respect of their fee approval applications. Those applications were brought some time ago. I am not aware that Mr. Klein suggested to his fellow counsel that their applications had not been made in conformity with the agreement among them. Consistency of treatment as between counsel in the three provinces is to be encouraged in this respect.

¶ 32 Because the amount of the fund was agreed at $63 million for purposes of computing the fees that would be payable, I cannot accede to the suggestion that the agreement among counsel permits an increased payment because of the fact that investment income has been earned by the Trustee after October 16, 2001.

¶ 33 Similarly, by agreeing on a fund of $63 million for fee purposes, counsel in British Columbia, Ontario and Quebec obviated the need to make any calculations based on increases or decreases to the

fund associated with variables such as residuals that might be received from other funds or Trustee and Trust Counsel fees that exceeded the estimate.

¶ 34 Given the nature and result of the litigation and the understanding among counsel in British Columbia, Ontario and Quebec, as well as the applications made and orders obtained in those provinces, it is my opinion that any fee in excess of $2.1 million occasioned by the fact that more than $63 million was received by the Trustee, the fact that the amount of the HCV fund may be increased by future receipts, or the fact that investment income has been earned by the Trustee, would be unreasonable in the circumstances. Details of that nature, if counsel intends to press them to advantage, should be specified with precision in the fee agreements, particularly those with co-counsel.

¶ 35 I am satisfied that the CCAA fees paid from the Red Cross estate to Mr. Klein should be deducted from the fee otherwise payable. In the course of submissions, counsel for Mr. Klein stressed that Mr. Klein's contribution to the settlement for the class lay principally in the force with which he assisted in representing the class interests in the CCAA proceeding. That being the case, the CCAA fees must be regarded as payment for work on behalf of the class. Anything else would result in excessive compensation.

¶ 36 Accordingly, I approve a fee in respect of the national settlement fund of $2.1 million. I direct the Trustee to pay that amount less $191,978.20, or the sum of $1,908,021.80, together with provincial sales tax and G.S.T. to Klein Lyons. The firm is also entitled to recover disbursements as they may be taxed, to the extent such disbursements have not been paid out of the Red Cross estate in the CCAA proceeding. No interest will be payable on any portion of the fee or disbursements amount due Klein Lyons.

¶ 37 In so far as the settlement with the Province is concerned, I am satisfied that the proposed fee amounting to 15% of the amount to be recovered by class members resident in British Columbia is reasonable in the circumstances. The right to this fee has not yet accrued. The right will only accrue in the event the number of class members, if any, who opt out of the settlement is acceptable to the Province.

¶ 38 The latest of the dates specified for confirmation that there is a provincial settlement fund is defined by agreement with the Province. The confirmation may be provided at an earlier date. In the meantime, the amount to be recovered by class members will increase because of investment income. Because of the terms of the fee agreement signed by the representative plaintiff that based fees on the amount recovered, and because recovery is not yet assured, I approve a fee of 15% of the provincial fund balance calculated at the date any amount is first paid from the provincial settlement fund to a member of the class resident in British Columbia as by that date, the right of recovery will have been confirmed.

¶ 39 The applicant is not entitled to the costs of this application.

PITFIELD J.

QL Update: 20020107
cp/i/qldrk/qlsng/qlbrl

Case Name:

Knudsen v. Consolidated Food Brands Inc. (c.o.b. Fleetwood Sausage)

Between
Thomas Holst Knudsen by his Guardian ad litem Palle Knudsen as representative plaintiff, plaintiff, and
Consolidated Food Brands Inc. carrying on business as Fleetwood Sausage, defendant

[2001] B.C.J. No. 2902
2001 BCSC 1837
Vancouver Registry No. L000093

British Columbia Supreme Court
Vancouver, British Columbia
Wong J.

Oral judgment: January 4, 2001.
(49 paras.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class actions, certification, considerations — Settlements — Judgment based on — Costs — Considerations.

Application by Knudsen to certify a class proceeding and to obtain approval of a settlement agreement. Knudsen purchased meat that was produced by the defendant Consolidated. He was affected with E. coli bacteria because of his consumption. There were 143 similar cases that were reported to the authorities. Knudsen commenced an action for damages in negligence. He was the representative plaintiff. It was anticipated that the class would consist of 80 members. An agreement was reached between the claimants and Consolidated. There were three classes of claimants who qualified for payments. Claimants who were not admitted to hospital would receive a lump sum payment of $4,000 plus reimbursement of reasonable and documented special damages. Claimants who were admitted to hospital for less than 30 days would receive $7,500, $700 for each day in the hospital and reimbursement of special damages. The third class consisted of claimants who had continued symptoms or were in hospital for longer than 30 days. Compensation would be in an agreed-upon amount between the claimant and Consolidated. Class members were entitled to opt out of the settlement and pursue individual actions against Consolidated. The settlement was negotiated by counsel who had extensive experience in personal injury law. It compared favourably with Consolidated's initial settlement offer. Counsel for Knudsen sought a class counsel fee of 20 per cent of each class member's recovery under the settlement agreement plus one per cent of each member's recovery as reimbursement of disbursements.

HELD: Application allowed. The action was certified as a class proceeding. The pleadings disclosed a cause of action. There was an identifiable class of two or more persons. A class proceeding was the preferable procedure to fairly and efficiently resolve the common issues. The representative plaintiff fairly and adequately represented the interests of the class. He produced a workable plan to advance the proceedings. He was not in a conflict of interest position. The settlement agreement and the

requested fees were approved. The agreement was fair and reasonable for all the class members. It provided a mechanism to resolve each member's claim in a simple manner. It also minimized and controlled administrative, legal and medical costs. It provided an administrative process that would not burden the court system. The agreement was in the best interests of the class members since they would not receive more compensation if they pursued litigation. The requested fees and disbursements were modest. They only covered the certification of the action, its negotiation and the implementation of the settlement. It did not cover administration plus administration of the claims.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 2, 2(2), 4(1), 8, 35, 35(1), 35(3), 38(1), 38(2)
Court Order Interest Act, R.S.B.C. 1996, c. 79.

Sale of Goods Act, R.S.B.C. 1996, c. 410.

Counsel:

D.A. Klein and J.G. Pearce, for the plaintiff.
J.D. Morin, for the defendant.
C. Cunningham, for the Public Guardian and Trustee.

WONG J. (orally):—

INTRODUCTION:

¶ 1 This is a threefold application brought by the plaintiff under the Class Proceedings Act, R.S.B.C. 1996, c. 50. The first two applications are under Sections 2(2), 8, and 35 of the Act for an order:

1. Certifying this proceeding as a class proceeding pursuant to Section 2 of the Class Proceedings Act;
2. Declaring that the class be comprised of all residents of British Columbia who suffered personal injuries and tested positive for E. coli 0157:H7 during the period between September the 23, 1999, and January the 31, 2000, after consuming a Fleetwood Sausage product. Persons of legal capacity who have accepted a settlement offer and have signed a release in favour of the defendant in respect of this matter are excluded from the class;
3. Appointing Tom Holst Knudsen by his Guardian Ad Litem, Palle Knudsen, as the representative plaintiff of the class;
4. Declaring that the claims of the class are for damages arising from personal injuries suffered as a result of consuming meat products which were tainted with E. coli bacteria and which were manufactured and distributed by the defendant;
5. Declaring that the relief sought by the plaintiff class is judgment against the defendant for negligence and breach of the Sale and Goods Act, R.S.B.C. 1996, c. 410, and if granted:

    a) General damages;
    b) Special damages;
    c) Interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79; and

d) costs of this action pursuant to the Class Proceedings Act, R.S.B.C. 1996, c. 50.

6. Declaring that the following question is certified as a common issue in the class proceeding. Does the defendant have liability and damages to the class;
7. Declaring that notice of the certification of this class proceeding and the settlement of this class proceeding be given to class members in a form and manner to be determined on further application to the court;
8. Declaring that members of the class may opt out of this action by notifying Klein Lyons in a form and manner to be determined upon further application to the court;
9. Declaring that any member of the class who does not opt out of this action will be bound by the settlement agreement once approved;
10. Approving the settlement agreement substantially in the form attached as Exhibit D to the affidavit of Mark L. Lyons, sworn December 29, 2000;
11. Declaring that the settlement agreement is fair, reasonable, and in the best interests of the class members;
12. Such further and other relief as this Honourable Court may deem just.

¶ 2 The third application is for an order pursuant to Section 38(2) of the Act approving a class counsel fee to counsel for the representative plaintiff. I have concluded the requested applications are appropriate. These are my reasons.

THE BACKGROUND:

¶ 3 This action arises out of the allegation of negligence against Consolidated Food Brands Inc. carrying on business as Fleetwood Sausage in connection with an outbreak of illness caused by the E. coli bacterium in meat products that were manufactured and distributed by Fleetwood in October 1999.

¶ 4 Consolidated Food Brands Inc. is the sole proprietor of Fleetwood. Fleetwood specializes in the manufacturing of ready-to-eat meat products.

¶ 5 The E. coli bacterium known scientifically as Escherichia coli 0157:H7 produces high levels of toxins that have a toxic effect on cells in the intestines and, if absorbed, exert toxic effects on the kidneys. Food contaminated with E. coli looks and smells normal.

¶ 6 On October the 25, 1999, the plaintiff's mother purchased some tainted meat from a grocery store located in Langley, British Columbia. The plaintiff ate the tainted meat on October the 28, 1999. The plaintiff was affected with E. coli bacteria as a result of consuming that tainted meat and suffered from severe abdominal pain and vomiting. He passed frank blood from his bowels. He was admitted to Langley Memorial Hospital on or about November the 1, 1999, and he remained there for treatment for approximately five days.

¶ 7 Laboratory tests requisitioned by the hospital and conducted by the B.C. Centre for Disease Control isolated E. coli 0157:H7 from a stool sample collected from the plaintiff on November the 1, 1999.

¶ 8 The writ of summons was filed in these proceedings on January the 14, 2000. The statement of claim was filed on April the 11, 2000. The amended writ and the amended statement of claim were filed on June 26, 2000. The statement of defence was filed on June 13, 2000.

¶ 9 The amended statement of claim alleges that Fleetwood was negligent in the manufacture and distribution of the tainted meat and that it failed to take any steps or any adequate steps to warn or adequately warn the public of the danger of the consumption of tainted meat or recall the tainted meat in a timely manner or at all.

¶ 10 The defendant denies any wrongdoing or liability to class members. Further, in the defendant's initial submissions, opposing certification, the defendant expressed an intention to vigorously defend the allegations of negligence that have been brought against it.

¶ 11 143 cases of E. coli related to tainted sausages were reported to the B.C. Centre for Disease Control (CDC). E. coli causes severe abdominal pain, vomiting, and diarrhoea, often bloody. It can be especially severe in the elderly and in children, with up to 10 percent of young people developing haemolytic uremic syndrome, HUS, which causes kidney failure and internal bleeding. About one-third of persons with HUS have abnormal kidney function many years later, and a few require long-term dialysis. Another 8 percent of persons with HUS have life long complications such as high blood pressure, seizures, blindness, paralysis and the effects of having part of their bowel removed.

¶ 12 Out of the CDC recorded 143 cases, 42 people required hospitalization and 101 did not. Approximately two-fifths of the 143 known victims are minors. Medical literature suggests that likely the most severely affected victims may be minors. Six cases of HUS were reported.

¶ 13 Defence counsel has advised that 80 cases have already been settled. Of those 80, 70 were adults and 10 minors.

¶ 14 On the eve of the initial certification hearing on November the 27 last the parties effected a settlement now before the court for approval.

THE CERTIFICATION NOTICE MOTION:

¶ 15 This motion is now unopposed by the defendant. I am satisfied and find that the statutory requirements under Section 4(1) of the Act for certification as a class proceeding are satisfied, namely:

1. the pleadings disclose a cause of action;
2. there is an identifiable class of two or more persons;
3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
5. there is a representative plaintiff who:

    a) would fairly and adequately represent the interests of the class;
    b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding; and
    c) does not have on the common issues an interest that is in conflict with the interests of other class members,

    and therefore would certify this action as a class proceeding.

THE SETTLEMENT:

¶ 16 The settlement negotiations with the defendant began in May 2000. Negotiations were strongly adversarial with the defendant denying negligence. Terms of settlement, however, were agreed to at the end of November 2000. The settlement agreement appears to ensure that compensation varies between claimants according to established tort principles. Class members qualify for payment in the following categories:

> Class I - claimants who were not admitted to hospital: lump-sum payment of $4,000 plus reimbursement of all reasonable and documented special damages suffered by them or the family members as a direct result of the claimant's infection;
> Class II - claimants who were admitted to hospital for less than 30 days and whose symptoms have now resolved: lump-sum payment of $7,500 plus $700 for each day or part thereof spent in hospital, plus reimbursement of all reasonable and documented special damages suffered by them or the family members as a direct result of the claimant's infection;
> Class III - claimants not falling within Class I or II and who provide medically supported evidence of continuing symptoms or who were admitted to hospital for 30 days or longer: compensation in an amount agreed by the claimant and Fleetwood.

¶ 17 If the parties are unable to agree, the dispute will be mediated. If the mediation is unsuccessful, the claim will go to binding arbitration. Fleetwood will pay the costs of the mediation and arbitration.

¶ 18 Class members who opt out of the class proceeding are free to pursue individual actions against the defendant and retain all the rights they would have had in the absence of the settlement. I agree with Mr. Klein's submissions that the settlement agreement is more advantageous to class members than continuing with litigation, as it is evident that:

1. class members will receive compensation without the burden of proving liability or, in the main, causation;
2. class members will not have to appear in court;
3. class members will have their confidentiality protected;
4. class members will likely receive compensation more quickly than if they were to pursue litigation.

¶ 19 The settlement agreement also provides a mechanism for resolving class member's claims that is simple and easy to access, but also minimizes and controls administrative, legal, and medical costs. The settlement agreement also provides an administration process that will not burden the court system. The settlement agreement is supported by Palle Knudsen, the Guardian Ad Litem for the representative plaintiff. He has received and reviewed the terms of the settlement with Mr. David Klein and finds that it is fair and in the best interests of the class.

¶ 20 The settlement was negotiated by senior counsel who have extensive experience in personal injury law and class actions. Plaintiff's counsel consider the settlement agreement to be fair and in the best interests of the class. The settlement agreement compares favourably with the defendant's initial settlement offer.

THE APPLICABLE LAW:

¶ 21 Under the Class Proceedings Act, Sections 35(1) and (3), the settlement of a class proceeding must be approved by the court. For a settlement in the class proceeding to be approved, it must be fair, reasonable, and in the best interests of those affected by it. The court is concerned with the interests of

the class as a whole rather than the demands of the particular class member. See Endean v. Canadian Red Cross Society, [1999] B.C.J. No. 2180, (October 1, 1999, Vancouver, C965349, (B.C.S.C.), paragraph 13); Sawatzky v. Societe Chirurgicale Instrumentarium, [1999] B.C.J. No. 1814, (August 4, 1999), Vancouver, C954740, (B.C.S.C.), paragraph 19; Haney Iron Works Ltd. v. ManuLife Financial, [1998] B.C.J. No. 2936 (December 16, 1998), Vancouver, C954749, (B.C.S.C.), paragraph 27; and Dabbs v. Sun Life, (February 24, 1998), Ontario Court of Justice 96-CT-O22862, (General Division) paragraph 14.

¶ 22 There is no overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial and reduces the strain upon the court system. See Dabbs v. Sun Life (supra).

¶ 23 The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. It may only approve or disapprove the settlement. See Sawatzky v. The Societe Chirurgicale Instrumentarium (supra), Harrington v. Dow Corning Corporation, [1999] B.C.J. No. 320 (February 16, 1999), Vancouver, C954330 (B.C.S.C.), paragraph 7, Haney Iron Works Ltd. v. ManuLife Financial (supra) paragraph 22; and Dabbs v. Sun Life (supra) paragraph 10.

¶ 24 The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every respect. Settlements must fall within a zone or range of reasonableness. See Endean v. Canadian Red Cross Society, October 1, 1999, Vancouver, C965349, (B.C.S.C.), paragraph 14.

¶ 25 Settlements must fall within a zone, or range of reasonableness. The range of reasonableness has been described as follows:

> 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.
> See Dabbs v. Sun Life (1998), 40 O.R. (3d) 429 at 4440 (Gen. Div.).

¶ 26 This Court has also acknowledged the significance of a recommendation made by experienced counsel:

> The recommendation of class counsel is clearly not depositive 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, the reputation for integrity and diligent effort on behalf of their clients is also on the line.
> See Dabbs v. Sun Life (supra) at page 440.

¶ 27 The Public Guardian and Trustee has filed a report to the court and was represented by counsel at this application. There was a concern by the Public Guardian and Trustee whether the proposed Class II claimants' benefits criteria can be adequately assessed according to unliquidated damage principles and whether those Class II claimants whose medical symptoms from ingesting tainted meat have continued, can access Class III benefits of provided mediation and arbitration.

¶ 28 It must be remembered, as mentioned earlier, that the exercise of settlement approval does not

lead the court to a dissection of this settlement with an eye to perfection in every respect, provided it follows within the zone or range of reasonableness. I think the proposed Class II claimant compensation for those claimants whose symptoms have resolved is reasonable and fair. In any event, individual claimants who qualify as Class II, who believe that Class II compensation is not in their best interests, have the option to opt out of the class.

¶ 29 In reviewing the final and executed draft of the terms of settlement, I think the initial concern by the Public Guardian and Trustee of the need for clarification as to whether potential Class II claimants whose hospitalization was less than 30 days but with continuing medical symptoms fall into Class III can be allayed by the stipulation provided, that the real distinction between Class II and Class III claimants is that in Class II, the medical symptoms at the time of claim is resolved, whereas in Class III there is evidence of continuing medical symptoms.

¶ 30 There was an additional concern by the Public Guardian and Trustee whether earlier monies paid out by the defendant in individual private settlements on behalf of minors and not yet approved by the Public Guardian and Trustee, as required by Section 40(5) of the Infants Act, have been adequately safeguarded or retained by the minors' guardians. The Public Guardian and Trustee has indicated that there will be opposition to any attempt by the defendant claiming a set-off from monies payable in the class action for monies they advanced contrary to the provisions of the Infants Act and the special protections built into the law for minors. Mr. Morin, counsel for the defendant, indicated to the court that there would be no attempt to set-off monies paid out earlier on behalf of minors which are no longer preserved for their benefit.

¶ 31 On the matter of notice, the Public Guardian and Trustee wrote:

> The defendant has stated that a condition of settlement is that notification of the class proceeding and settlement agreement will be by direct mail to all potential class members and not by advertising. Since it cannot be assumed that minors and people under mental disability are able to organize their legal affairs in response to letters addressed to them, I recommend that letters to children be addressed to their guardians and that all letters sent out be monitored for a response. If a response is not forthcoming, I recommend telephone or other follow-up to make sure entitlements for persons under disability are pursued.

¶ 32 On the matter of opting out, the Public Guardian and Trustee also wrote:

> The notice of motion dated December 29, 2000, seeks a declaration that members of a class may opt out of this action by notifying Klein Lyons in a form and manner to be determined upon further application to the court. Since many of the class members are minors, the decision regarding whether or not to opt out will have to be made on their behalf. And I submit such a decision should be reviewed by the Public Guardian and Trustee and/or the court. If I were persuaded that the Class II compensation is favourable, I would recommend that only decisions to opt the child out of the class be superintended by the Public Guardian and Trustee and/or the court.

¶ 33 I think the notice and opting out procedures for minors and persons with mental disabilities recommended by the Public Guardian and Trustee are reasonable and can be addressed by counsel in later applications. Similarly, the Public Guardian and Trustee's suggestion that since minors and mentally incapable adults do not have legal capacity to swear a statutory declaration in support of the claim, an alternative method for adducing evidence for persons under legal disability be allowed, such as

a capable adult who would have knowledge of the facts could swear a statutory declaration on behalf of a person under legal disability is also one that I would commend for inclusion in the notice and information package contemplated in the direct mailing to potential claimants.

¶ 34 The terms of the proposed settlement agreement appear to be fair and reasonable to all members of the class. It has been approved by the representative plaintiff and senior counsel. As class members are unlikely to receive more compensation if they pursue litigation, the settlement is clearly in the best interests of the class and I would therefore approve it pursuant to Section 35 of the Act.

APPLICATION TO APPROVE CLASS COUNSEL FEES:

¶ 35 The Class Proceedings Act requires that the fee agreement between the representative plaintiff and his or her counsel be approved by the court. Section 38(2) of the Class Proceedings Act states:

> 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.

¶ 36 Counsel for the representative plaintiff is seeking a class counsel fee of 20 percent of each class member's recovery under the settlement agreement, plus 1 percent of each class member's recovery as reimbursement of disbursements incurred on behalf of the class. Section 38(1) of the Class Proceedings Act requires that a fee agreement state the terms under which fees and disbursements are to be paid, give an estimate of the expected fee, and state the method of payment.

¶ 37 The fee agreement with the representative plaintiff appears to comply with those requirements. The estimate of the expected fee is expressed as a percentage of any settlement or judgment. As the fee is contingent on the amount of a settlement or judgment, it was submitted that no more specific amount can be provided until a settlement is reached or a judgment is pronounced.

¶ 38 The Class Proceedings Act does not stipulate the factors to be considered when approving class counsel's fee. However, on such applications British Columbia courts have considered 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 claimant's contribution to the fee as a portion of their recoveries, and the fee expectation of the representative plaintiff and other claimants. See Harrington v. Dow Corning Corporation, et al., (February 16, 1999), Vancouver C9544330, (B.C.S.C.), paragraph 18; Sawatzky v. The Societe Chirurgicale Instrumentarium Inc., (September 8, 1999), Vancouver C9544740, (B.C.S.C.) at paragraph 8; Fischer v. Delgratia Mining Corporation, [1999] B.C.J. No. 3149 (December 7, 1999), Vancouver C974521, (B.C.S.C.) at paragraph 22; and in Endean v. Canadian Red Cross Society et al., (June 22, 2000), Vancouver, C965349, (B.C.S.C.).

¶ 39 According to American texts and authorities cited by counsel, class counsel fees in the United States range from 15 percent to 50 percent with a presumptively reasonable rate of 30 percent being adjusted according to special circumstances. The requested 20 percent class counsel fee is consistent with several British Columbia decisions:

1. in Campbell v. Flexwatt, (February 26, 1996), Victoria 95/2895 (B.C.S.C)., the court approved a graduated contingency fee agreement which stipulated a fee ranging from 10 percent to 33 percent of the recovery, depending on the time of settlement or judgment;

2. in Harrington v. Dow Corning Corporation, et al., (February 16, 1999), Vancouver, C954330, (B.C.S.C.), a fee of 15 percent was approved on a $40 million settlement;
3. Mr. Justice Brenner (as he then was) approved a 20 percent fee in Sawatzky v. Societe Chirurgical Instrumentarium Inc., (September 8, 1999), Vancouver C954740, (B.C.S.C.);
4. a 30 percent fee was approved by Mr. Justice Williamson in Fisher v. Delgratia Mining Corporation, (December 7, 1999), Vancouver C974521, (B.C.S.C.).

¶ 40 Plaintiff's counsel are senior members of the bar who have extensive experience in personal injury litigation and class actions. The writ of summons was filed in January 2000. Plaintiff's counsel were aggressive in the prosecution of the action. Negotiations apparently commenced in earnest after the first case management conference in May 2000. A tentative agreement was reached on the eve of the certification hearing, which was scheduled to commence on November 27, 2000. I agree with Mr. Klein that this represents a very timely resolution of the litigation.

¶ 41 The level of compensation that was achieved for class members appears also to be excellent. The amount represents litigation based recoveries without the expense and risk inherent in litigating the issues. The compensation levels are substantially higher than the defendant's initial settlement offer.

¶ 42 The degree of skill and effort of counsel for the representative plaintiff is evidenced by the result obtained for class members and the timeliness of the resolution. Most, if not all class members could not retain counsel to pursue these claims even on a contingency basis. The claims are relatively modest and would not have been economic to litigate individually.

¶ 43 The retainer agreement signed by the representative plaintiff provides for a contingency fee of 33 1/3 percent. The requested class counsel fee is lower than this amount. Palle Knudsen, the Guardian Ad Litem for the representative plaintiff has sworn an affidavit confirming that he considers the request of class counsel fee to be fair and reasonable.

¶ 44 The requested levy of 1 percent for common benefit disbursements appears to be modest. Unlike the vast majority of class action settlements, the claims process is being handled entirely by class counsel and counsel for the defendant without the use of an outside claims administrator. Thus, no administration expenses will be deducted from class members' compensation.

¶ 45 The cost of mediation and arbitration for category 3 and exceptional category 1 claims is being borne by the defendant.

¶ 46 To date, Mr. Klein's firm has been retained by 52 claimants and received enquiries from another 12 persons. Mr. Klein estimates that he may ultimately represent 80 class members. If the average individual claim recovered is $5,000, $400,000 would be recovered and his fee at 20 percent would be $80,000, and 1 percent for disbursements would be $4,000. If the average claim is at $10,000, the total recovery would be $800,000, counsel's fees would be $160,000 and $8,000 for disbursements. Counsel's estimate of future actual disbursements would be close to the $8,000 mark.

¶ 47 The proposed 21 percent fee will not cover future legal work plus the administration of the claims; it covers the certification of this class action, negotiation, and effecting of settlement, the notice of class action benefits to potential claimants, and handling inquiries from them thereafter. Implementation of their respective claims would be subject to individual retainers at a discounted rate of 16 1/2 percent on the remaining 79 percent of their recovery.

¶ 48 It is expected that most claimants in Class I and Class II whose symptoms have resolved at the time of claim would be processing their own claims. Those who choose to retain Mr. Klein 's firm would ultimately pay 33.2 percent of their recovery in fees, in contrast to the "do-it-yourselfers" who would be required to pay 21 percent in class counsel fees in any event.

¶ 49 Viewed in this overall percentage perspective, I think the proposed class counsel fee is fair and reasonable and I would approve it.

WONG J.

QL Update: 20020610
cp/i/np/qldrk/qlebh/qlbrl

Kumar v. Mutual Life Assurance Co. of Canada

Kumar v. Mutual Life Assurance Company of Canada et al.

226 D.L.R. (4th) 112

Ontario Court of Appeal
Court File No. C37858
McMurtry C.J.O., Catzman and Rosenberg JJ.A.

November 5, 2002 ; November 6, 2002;
APRIL 8, 2003

Civil procedure — Class actions — Certification — Plaintiff seeking to certify class of individuals who purchased life insurance policies with premium offset feature — Alleging insurance companies negligently misrepresented that future dividends would eventually offset premiums — Companies not engaging in any organized or systemic marketing of policies — Claims of class members did not raise common issues — Class proceeding not preferable procedure based on judicial economy and access to justice — Motion to certify dismissed — Class Proceeding Act, 1992, S.O. 1992, c. 6.

The plaintiff brought an action against two insurance companies for negligent misrepresentation because the companies had allegedly been deceptive in selling him life insurance policies with a premium offset feature. Under the policy, the plaintiff was entitled to any dividends the company paid, and the theory was that at ***[page113]*** a certain point in time the accumulated dividends would be sufficient to offset future premiums. The plaintiff claimed that he had been advised that he would no longer have to pay premiums after a specified number of years, but that because interest rates declined, this never occurred. The plaintiff brought a motion for certification on behalf of a class of persons who had been treated in a common manner. The motions judge found that the insurance companies had not engaged in any organized or systemic marketing of the policies, that it did not train its agents to use the concept in any common way, and that it had provided cautions about premium offsets. The motions judge dismissed the motion on the basis that the claims of the class members did not raise common issues, and that a class proceeding was not the preferable procedure under the Class Proceedings Act, 1992, S.O. 1992, c. 6. The plaintiff appealed to the Ontario Divisional Court, which dismissed the appeal. The plaintiff appealed to the Ontario Court of Appeal.

Held, the appeal should be dismissed.

The motions judge was correct in refusing to certify this class action. He made findings of fact based on uncontradicted evidence that the agents gave unique and individually targeted presentations to different prospective policyholders. It was inevitable that the action would ultimately break down into individual proceedings. A class proceeding would not be the preferable means of resolving the common issues, based on considerations of judicial economy and access to justice. That it might serve the interests of behaviour modification was insufficient to outweigh the other considerations.

Cases referred to

Anderson v. Wilson (1997), 32 O.R. (3d) 400, 69 A.C.W.S. (3d) 29; affd 156 D.L.R. (4th) 735, 18 C.P.C. (4th) 208, 37 O.R. (3d) 235, 107 O.A.C. 274, 77 A.C.W.S. (3d) 1142; vard 175 D.L.R. (4th) 409, 36 C.P.C. (4th) 17, 44 O.R. (3d) 673, 122 O.A.C. 69, 89 A.C.W.S. (3d) 441; leave to appeal to S.C.C. refused 185 D.L.R. (4th) vii, 138 O.A.C. 200n, 258 N.R. 194n -- refd to

Carom v. Bre-X Minerals Ltd. (1999), 6 B.L.R. (3d) 82, 1 C.P.C. (5th) 82, 46 O.R. (3d) 315; revd 196 D.L.R. (4th) 344, 11 B.L.R. (3d) 1, 1 C.P.C. (5th) 62, 51 O.R. (3d) 236, 138 O.A.C. 55, 103 A.C.W.S. (3d) 17; leave to appeal to S.C.C. refused 157 O.A.C. 399n, 283 N.R. 399n, [2000] S.C.C.A. No. 660 (QL) -- distd

Dabbs v. Sun Life Assurance Co. of Canada (1998), 5 C.C.L.I. (3d) 18, 22 C.P.C. (4th) 381, [1998] I.L.R. 1-3575, 40 O.R. (3d) 429, 80 A.C.W.S. (3d) 956 -- refd to

Gariepy v. Shell Oil Co. (2002), 23 C.P.C. (5th) 360, 115 A.C.W.S. (3d) 19, [2002] O.J. No. 2766 (QL); supplementary reasons 23 C.P.C. (5th) 393, 116 A.C.W.S. (3d) 495 -- refd to

Hollick v. Toronto (City) (2001), 205 D.L.R. (4th) 19, [2001] 3 S.C.R. 158, 42 C.E.L.R. (N.S.) 26, 13 C.P.C. (5th) 1, 24 M.P.L.R. (3d) 9, 153 O.A.C. 279, 277 N.R. 51, 56 O.R. (3d) 214n, 108 A.C.W.S. (3d) 774, sub nom. Hollick v. Metropolitan Toronto (Municipality), 2001 SCC 68 -- apld

Mouhteros v. DeVry Canada Inc. (1998), 22 C.P.C. (4th) 198, 41 O.R. (3d) 63, 80 A.C.W.S. (3d) 1148 - - apld ***[page114]*** Queen v. Cognos Inc. (1993), 99 D.L.R. (4th) 626, [1993] 1 S.C.R. 87, 45 C.C.E.L. 153, 14 C.C.L.T. (2d) 113, 93 C.L.L.C. 14,019, 60 O.A.C. 1, 147 N.R. 169, 37 A.C.W.S. (3d) 1304 -- refd to Rumley v. British Columbia (2001), 205 D.L.R. (4th) 39, [2001] 3 S.C.R. 184, 10 C.C.L.T. (3d) 1, 9 C.P.C. (5th) 1, [2001] 11 W.W.R. 207, 256 W.A.C. 1, 95 B.C.L.R. (3d) 1, 108 A.C.W.S. (3d) 775, 2001 SCC 69 -- refd to Western Canadian Shopping Centres Inc. v. Dutton (2001), 201 D.L.R. (4th) 385, [2001] 2 S.C.R. 534, 8 C.P.C. (5th) 1, [2002] 1 W.W.R. 1, 253 W.A.C. 201, 94 Alta. L.R. (3d) 1, 286 A.R. 201, 272 N.R. 135, 106 A.C.W.S. (3d) 397, sub nom. Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere, 2001 SCC 46 - - refd to Zicherman v. Equitable Life Insurance Co. of Canada (2003), 226 D.L.R. (4th) 131, [2003] I.L.R. 1-4182, 121 A.C.W.S. (3d) 1002 -- refd to

Statutes referred to Class Proceeding Act, 1992, S.O. 1992, c. 6 ss. 5, 6 Competition Act, R.S.C. 1985, c. C-34 s. 52(1) [rep. & sub. 1999, c. 2, s. 12(1)]

APPEAL from an order of the Ontario Divisional Court, 34 C.C.L.I. (3d) 316, 17 C.P.C. (5th) 103, [2002] I.L.R. 1-4052, 152 O.A.C. 344, 110 A.C.W.S. (3d) 427, dismissing an appeal from an order of Cumming J., 24 C.C.L.I. (3d) 298, [2001] I.L.R. 1-3896, 51 O.R. (3d) 54, 100 A.C.W.S. (3d) 387, refusing to certify a class action.

Paul J. Pape, for appellant.

F. Paul Morrison and Dana M. Peebles, for respondents.

The judgment of the court was delivered by

ROSENBERG J.A.

¶ 1 **ROSENBERG J.A.**:—This is one of two appeals heard together by this court concerning the Class Proceedings Act, 1992, S.O. 1992, c. 6. Both are appeals from refusals by motions judges to certify, as class actions under the CPA, claims originating from the sale of so-called "premium offset" or

"vanishing premiums" participating whole life insurance policies.

¶ 2 The appellant and another person brought a motion for certification on behalf of a proposed class of persons who had allegedly received premium offset representations from the respondent in a "common manner". Cumming J. dismissed the motion and the Divisional Court dismissed the appellant's appeal from the order of Cumming J. as well as the companion appeal, Zicherman v. The Equitable Life Insurance Company of Canada [reported post, p. 131]. ***[page115]***

¶ 3 In my view, the motions judge and the Divisional Court were correct in denying certification. For the following reasons, I would dismiss the appeal.

The Facts

¶ 4 The appellant Sehdev Kumar and the other proposed representative plaintiff Rosel Williams brought actions against Mutual Life Assurance Company of Canada and Prudential Assurance Company Limited for having deceptively sold them life insurance policies with a premium offset feature. The Canadian business of Prudential was acquired by Mutual on March 1, 1995. Mutual's name has since been changed to Clarica Life Insurance Company.

¶ 5 The appellant is a semi-retired university professor. He is married and has two children. In 1991, when he was 49 years old, he purchased a $ 500,000 whole life insurance policy from the Prudential. When Ms. Williams purchased her policy in 1989, she was a 23-year-old single mother living with her parents. She purchased a Prudential whole life policy with $ 100,000 coverage. She has since settled with the respondents. I will, however, make brief reference to the facts of her case since they demonstrate some of the problems with the proposed class action.

¶ 6 The appellant's policy was a participating permanent whole life policy. As a participating policyholder the appellant was entitled to dividends in any year in which the company declared them. The size of the dividends depended upon the performance of the company's investments. The theory behind a premium offset or vanishing premium policy is that at a certain point in time the accumulated dividends would be sufficient to pay or "offset" future premiums as they came due. Whole life policies with vanishing premiums pay dividends to policyholders that purportedly cover the cost of premiums within a number of years, upon a specified "cross-over" date. These policies apparently accomplish their objectives so long as interest rates are high. If rates decline, the dividends fail to produce sufficient income to pay the remaining premiums, and insurers move back the "cross-over" dates by several years. Using the premiums to offset future premiums was not the only way that participating policies were sold. For example, the policyholder could use the dividends to buy additional term insurance. ***[page116]***

¶ 7 The appellant claims that before he bought the policy in 1991 he was told that after nine years he would no longer have to pay premiums. As a university professor, this representation was important to him because he knew that he would be required to retire at age 65 and live on a reduced income.

¶ 8 The appellant claims that the two Prudential agents with whom he dealt, the third party defendants Chagger and Piruchta, showed him a computer generated illustration for a Life 2,000-PEP Series A insurance policy. The appellant wrote across the top of this illustration, "In this you pay premiums for nine years until age 58". The illustration itself included a disclaimer:

The Paid-up additions and their Cash Values are based on the Company's current dividend scale and ARE NOT GUARANTEED. In our present environment, current dividend scales are expected to change more frequently, thus long term projections should be viewed with caution.

¶ 9 The policy itselfalso stipulated that the annual premiums are payable for the duration of the contract, that is until death or the surrender of the policy. The appellant claims that in 1995, Piruchta told him he would have to pay premiums for a total of twelve years, not nine years and for the first time explained to him that the duration of premium payments was dependent upon the dividends declared by the company. The appellant accordingly cancelled the policy and complained to Mutual and expressed his intent to make a complaint to the Life Insurance Commission of Ontario.

¶ 10 He then commenced a class action for damages for, inter alia, negligent misrepresentation. He also brought claims for breach of contract, failure to warn, breach of fiduciary duty, unjust enrichment, tort of deceit and breach of s. 52(1) of the Competition Act, R.S.C. 1985, c. C-34. On behalf of the class, he sought damages equivalent to (a) the premiums payable after the specified "vanishing premium" dates and to (b) the reduced amount of the policies' cash surrender value.

¶ 11 Ms. Williams met once with the agent that sold her the policy. The agent proposed a particular type of policy and she agreed. She did not receive any illustration when she purchased the policy in 1989. She was subsequently sent two illustrations from a rival company and later two further illustrations from her agent. Ms. Williams alleged that she was told that she would only have to pay premiums for ten years. She was subsequently told that the ***[page117]*** premiums would not "vanish" after ten years and she stopped paying the monthly premiums as of January 1997.

Prudential's use of vanishing premium policies

¶ 12 In response to demands from its agents and to remain competitive in the market place where the premium offset feature had become popular, Prudential made this feature available in 1982. Between 1982 and 1986, premium offset was not actively promoted by Prudential. It was however, available at the request of its agents. Prudential began actively marketing this feature of its policies from July 1986 to March 1995. Over 120,000 whole life policies were sold during this period. There is apparently no way to tell how many whole life policyholders were told about the premium offset feature, were shown illustrations, or chose to use this feature to reduce their annual premiums.

¶ 13 Prior to 1988, there was no formal training structure in place for Prudential sales agents. Rather, the managers of each office trained agents. In 1988, Prudential developed a training program for new agents to educate them about specific insurance products. As early as July 1982, Prudential had developed software for generating computer illustrations of premium offsets. These illustrations came with pre-printed warnings. In 1986, Prudential began disseminating sales bulletins to its sales agents promoting the premium offset concept.

¶ 14 In 1990, Prudential produced a Life 2000 Series Marketing Guide. The Guide illustrated premium offset as an available feature for several policies. However, it did not explicitly direct sales agents to warn prospective customers of the contingency that premium offset is dependent on dividend performance.

¶ 15 Prudential's first dividend scale decrease occurred in 1992 as a result of declining interest rates. In 1993, Prudential began advising its agents to present multiple scale illustrations to customers showing future values based on three projections: dividends higher than, equal to and lower than the current rate. Prudential maintains that these were not a guarantee or a prediction byPrudential of future developments regarding dividend scales or interest rates. Rather, the illustrations merely set out the current dividend scales and interest rates.

¶ 16 The motions judge described some of the potential problems with the premium offset feature

[reported 24 C.C.L.I. (3d) 298]: ***[page118]*** [7] In theory, if not always in practice, the client's choice of policy would depend upon the individual's needs and ability to pay. It is apparent that there were problems throughout the life insurance industry with the so-called "premium offset" feature to some whole life policies. Perhaps it is not too cynical to imagine that many agents might over-emphasize and over-simplify this optional feature given the attractive dividends being paid. Perhaps many people tended to expect that the then-prevailing economic conditions would persist into the future. The certainties of the present are more apparent than the uncertainties of the future. The "premium offset" feature is dependent, of course, upon the payment of dividends and the quantity thereof. Thus, the superficial appeal of a projected future "premium offset" date is fraught with all the uncertainties attendant upon the political economy and the reality that unfolds when the future becomes the present.

¶ 17 After this action was commenced Clarica established an ADR program to resolve complaints such as the appellant's. The respondents received 239 complaints over the years about premium offset policies. About half of the complaints were received after the ADR program was established.

The Definition of the Class and Common Issues Before the Motions Judge

¶ 18 The appellant proposed that the class be defined as follows:

All owners of Class Policies purchased from Prudential. Class Policies being defined as

Any participating whole life policy issued by Prudential between January 1, 1980 and December 31, 1995 which is in force as of August 31, 1998 (or "Current Class Policy") or which has become a Lapsed Policy between January 1, 1990 and August 13, 1998 (a "Lapsed Class Policy") except those policies in respect of which the owners have released Prudential from claims related to premium offset or to the sale of the policies.

¶ 19 The appellant proposed the following common question:

Did the use of illustrations and/or representations, in writing or verbal, create an obligation on the part of Prudential with respect to a specified offset date despite the terms of the policy and the terms of any illustration?

The Reasons of Cumming J.

¶ 20 The motions judge found that there was no evidence to support "the plaintiffs' bald allegation of uniformity in Prudential's sales techniques and materials over the 1980-1995 period". Rather, the "particular circumstances of the individual client and the oral statements and explanations of the particular agent were of fundamental importance" [at para. 19]. This would involve examination of the unique sales experience of each policyholder. The ***[page119]*** motions judge then examined the elements of negligent misrepresentation as set out in Queen v. Cognos Inc., [1993] 1 S.C.R. 87 at 110, 99 D.L.R. (4th) 626. Those elements are:

(1) there must be a duty of care based on a "special relationship" between the representor and the representee; (2) the representation in question must be untrue, inaccurate, or misleading; (3) the representor must have acted negligently in making said misrepresentation; (4) the representee must have relied, in a reasonable manner, on said negligent misrepresentation; and (5) the reliance must have been detrimental to the representee in the sense that damages resulted.

¶ 21 The motions judge had the greatest concern with elements (2) to (5). In summary, he found that an

individual determination would have to be made with respect to each policyholder for each of those elements. For example, as to element (2) there would have to be evidence as to whether any representation as to premium offset was made and then, if so, whether or not it was accurate. In summary, he concluded that, "While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy" [at para. 39]. Accordingly, he found that the claims of the class members do not raise common issues.

¶ 22 Even if there was a common issue, the motions judge found that a class proceeding would not be the preferable procedure as required by s. 5(1)(d) of the Act. He reviewed the three policy objectives underlying the Act of access to justice; judicial economy; and behaviour modification. He was also of the view that the court must consider whether certification would be a "fair, efficient and manageable way of advancing the claims" referring to the decision of the Divisional Court in Carom v. Bre-X Minerals Ltd. (1999), 46 O.R. (3d) 315. (That decision was reversed in part by this court in reasons reported at (2000), 51 O.R. (3d) 236. Leave to appeal to the Supreme Court of Canada was denied, [2000] S.C.C.A. No. 660 (QL).)

¶ 23 The motions judge considered that the necessary inquiry into individual issues "would significantly increase the time, cost and complexity of the proceedings such that the CPA's objective of access to justice and judicial efficiency would be impeded if not frustrated". He therefore found that a class proceeding was not the preferable procedure. ***[page120]***

The Reasons of the Divisional Court

¶ 24 The Divisional Court dealt with the appeal from the judgment of Cumming J. and the appeal from the decision of Ferrier J. in the matter of Zicherman v. The Equitable Life Insurance Company of Canada. By the time the cases came before the Divisional Court, this court's decision in Bre-X had been released. Writing for the Divisional Court, McRae J. held that the Bre-X decision merely stood for the proposition that "[W]here there is certification for a number of common issues, judicial expediency is best served if all issues are canvassed in the same action" (at para. 23) [reported 34 C.C.L.I. (3d) 316].

¶ 25 Before the Divisional Court, Mr. Pape, who had not appeared before the motions judge, argued that if the motions judge was not satisfied with the common issue proposed by the plaintiff, he should have reformulated the issue. Mr. Pape suggested that the issue might be defined as, "[W]as there an organized and systematic marketing of premium offset policies by the insurance company which was misleading?" The Divisional Court held that there was no such obligation on the motions judge and, in any event, even if the common issue was reformulated as suggested, there was no evidence of common complaint with respect to this issue:

[11] The issue is not with respect to the use of illustrations or the systematic marketing of "premium offset" policies by the insurance companies, but rather, some individual complaints by some clients about the sales approaches of some agents. Many tens of thousands of policies were sold by hundreds of agents, but a relatively small number of purchasers complained about representations allegedly made to them by agents at the time of sale. These transactions do not present common issues but, rather, individual representations.

¶ 26 The Divisional Court also held that the motions judge made proper use of the evidentiary record. He recognized that he should not examine the facts with a view to determining the strength of the allegation. Rather, his responsibility was to "look to the allegation to determine if there was an identifiable class and common issues which would merit certification" (at para. 10). The Court agreed

with the motions judge's decision and dismissed the appeal.

The Issues

¶ 27 The appellant raises three issues:

(1) Did the Divisional Court err in principle in finding that the appeal must be approached solely on the basis of the issues as presented to the motions judge? ***[page121]***

(2) Did the courts err in principle in their use of the evidentiary record to determine there were no common issues?

(3) Did the motions judge and the Divisional Court err in principle in finding there were no common issues to be certified?

¶ 28 It seems to me that the appellant cannot succeed without also showing that the motions judge erred in finding that a class proceeding was not the preferable procedure for the resolution of the common issues.

The Legislation

¶ 29 The relevant parts of the CPA are ss. 5 and 6, which provide 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.

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences 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 shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

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

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members.

. . . . .

6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds: ***[page122]*** 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.

Analysis

(1) The role of the motions judge and the Divisional Court

¶ 30 If the reasons of the Divisional Court stand for the proposition that the motions judges should not modify the definition of the class or the common issues as presented by the plaintiff then, in my view, this was an error. I can see no reason in principle why the motions judge cannot modify the definition of the class or the common issues if the judge is of the view that such modification is required to accord with the Act. Further, in my view, it was open to the Divisional Court, in this case, to modify the definition of the class or the common issue. In Anderson v. Wilson (1998), 37 O.R. (3d) 235, 156 D.L.R. (4th) 735, the Divisional Court amended both the class and the common issues as certified by the motions judge (1997), 32 O.R. (3d) 400. On further appeal, (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409,this court again varied both the class and the common issues. Similarly, in Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 205 D.L.R. (4th) 19 at para. 21, McLachlin C.J.C., speaking for the court, held that where the class proposed by the plaintiff could be defined more narrowly, "the court should either disallow certification or allow certification on condition that the definition of the class be amended . . .".

¶ 31 While I would not go so far as to suggest that there is a duty on the motions judge to modify the definitions, the class or the common issue, it is certainly open to the judge to do so. It should be borne in mind that the judges hearing these motions are experienced with managing CPA cases. They are entitled to bring their experience to bear in formulating the class and the common issue, provided, of course, that the parties are not unfairly prejudiced.

¶ 32 That said, in this case the issue is of no real consequence in this appeal. As I have pointed out, the Divisional Court did consider ***[page123]*** the reformulation of the common issue suggested by counsel for the appellant. The court held that even as reformulated, the proceeding should not be certified as a class action.

¶ 33 In this case, I can see no prejudice to the respondents in considering the reformulated question. In fairness to the appellant, the class and common issue as initially proposed were drawn from the decision in Dabbs v. Sun Life Assurance Co. of Canada (1998), 40 O.R. (3d) 429 (Gen. Div.)). Dabbs was a motion for certification and approval of a settlement in a vanishing premium case. Thus, the defendant was consenting to the certification, provided the motion judge also approved the settlement. The motions judge in Dabbs found that the proposed class represented an identifiable class within the meaning of s. 5(1)(b) of the Act and that the statement of claim raised a common issue.

¶ 34 Further, when the instant matter was before the motions judge in September 2000, neither he nor the parties had the benefit of the decisions of the Supreme Court of Canada in Hollick and Rumley v. British Columbia, [2001] 3 S.C.R. 184, 205 D.L.R. (4th) 39. It is apparent that in reformulating the common issue the appellant is attempting to bring his case within Rumley. In this case, in view of the extensive record before the motions judge, I can see no unfairness to the respondents in considering the reformulated common issue.

(2) Use of the evidentiary record

¶ 35 The appellant submits that the motions judge erred in using the evidentiary record provided by the respondents to determine the merits of the proposed claim. In Hollick, the court dealt with the use of evidence on the certification motion. The court held at para. 16 that "the certification stage is decidedly not meant to be a test of the merits of the action". Thus, the "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".

¶ 36 The Supreme Court then considered the proper use of the evidentiary record. McLachlin C.J.C. held at para. 25 that 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 ***[page124]*** the requirement that the pleadings disclose a cause of action". Section 5(1)(a) requires that the pleadings disclose a cause of action. This requirement is governed by the rule that pleadings should not be struck for failure to disclose a cause of action unless it is "plain and obvious" that no claim exists.

¶ 37 The motions judge made a number of findings of fact based upon the material submitted by the respondents. For example, he stated that the "documentation produced does not support the plaintiffs' allegation that Prudential engaged in any organized and systemic marketing of premium offset insurance policies" (at para. 17). He also stated that the "evidentiary record establishes that Prudential . . . did not require or encourage its agents to use the concept, did not train its agents to use the concept in any specific or common way and provided cautions and warnings about premium offsets in its directions to its agents and in the illustrations they employed" (at para. 18). Further, he stated that the "evidence establishes that agents gave unique and individually targeted presentations to each different prospective policy purchaser" (at para. 19).

¶ 38 As I understand it, the respondents' evidence was adduced to support its position that there was no common issue of fact raised by the pleadings. The evidence was also relevant to the proposed class definition. As held in Hollick at para. 20, there must "be some rational relationship between the class and common issues". The respondents' evidence was relevant to this issue as well. The appellant proposed a class comprising over 100,000 policyholders. The respondents were entitled to show that many of those potential class members never received any illustrations and thus that there was no relationship between the class and the proposed common issue. Indeed, the other original plaintiff, Ms. Williams, did not receive any written illustration before buying her policy.

¶ 39 In my view, the motions judge did not err. He accurately summarized the respondents' evidence

and the appellant did not contradict that evidence. The legal consequences flowing from that evidence are another matter and involves consideration of the finding by the motions judge that there was no common issue and that, in any event, the class proceeding would not be the preferable procedure for the resolution of the common issue. ***[page125]***

(3) The common issues

¶ 40 Relying on Dabbs, the appellant proposed the following common issue before the motions judge:

Did the use of illustrations and/or any representations, in writing or verbal, create an obligation on the part of Prudential with respect to a specified offset date despite the terms of the policy and the terms of any illustration? (at p. 433)

¶ 41 In light of Rumley, the appellant refined the common issue and framed it as follows:

Was there an organized and systematic marketing of premium offset policies by Prudential which was misleading?

I do not see a radical difference between these two proposals.

¶ 42 In the course of oral argument in this court, Mr. Pape seemed to suggest a different common issue:

Was Prudential negligent in failing to properly train its agents in the use of the premium offset feature?

¶ 43 In my view, however the proposed common issue is framed, the motions judge and the Divisional Court were correct in refusing to certify this class action. For the purposes of this discussion I will assume in the appellant's favour that there is an identifiable class of two or more persons within the meaning of s. 5(1)(b). The respondents' evidence shows that Clarica has received several hundred complaints about premium offset policies. This evidence is similar to the evidence relied upon in Hollick showing that of the potential class of 30,000 persons who lived in the vicinity of the Keele Valley landfill, there had only been between 150 and 500 complaints. The Supreme Court nevertheless held that the plaintiff had shown a sufficient basis in fact to satisfy the commonality requirement.

¶ 44 The Supreme Court of Canada has recently looked at the question of common issues in three cases, Hollick, Rumley and Western Canadian Shopping Centres Inc. v. Bennett Jones Verchere (2001), 201 D.L.R. (4th) 385, under three different statutory regimes. Those cases suggest a number of principles that the court must apply in determining whether there are one or more common issues. It is not necessary that the common issues predominate over individual issues or that the resolution of the common issues be determinative of each class member's claim (Western Canadian at para. 39). The underlying question is a practical one based on issues ***[page126]*** of 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" (Western Canadian at para. 39). While not stated exactly in those terms it seems to me that this is similar to Campbell J.'s statement in Anderson v. Wilson (1998), 37 O.R. (3d) 235 (Div. Ct.) at 243, that the "common issues need only be issues of fact or law that move the litigation forward".

¶ 45 The Supreme Court decisions do, however, show that the court is required to make a realistic appraisal of the place of the proposed common issue in the litigation. McLachlin C.J.C. expressed this requirement in different ways:

In Rumley at para. 29:

It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

And in Western Canadian at para. 39 (adopted in Hollick at para. 18):

[T]he 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.

¶ 46 In my view, the problem with the appellant's application is that any common issue, however phrased, cannot meet the requirements that the issue be necessary to the resolution of each class member's claim and a substantial ingredient of each of the class members' claims. A proposed common issue that does not meet these requirements is not a common issue for the purposes of s. 5 of the CPA.

¶ 47 In this case, establishing that Prudential was negligent in any of the ways suggested by the appellant would not represent a substantial ingredient in each of the class members' claims. It would not, to use Campbell J.'s phrase in Anderson, "move the litigation forward". As the motions judge pointed out, since Prudential had no direct dealings with any of the class members at the time the policies were sold, the class members would still at least have to show that the agents with whom they dealt made representations about premium offset, that those representations constituted negligent misrepresentations about the premium offset feature, and that the ***[page127]*** prospective policyholder reasonably relied upon the representation. As was stated in Rumley at para. 29: "Inevitably such an action would ultimately break down into individual proceedings."

¶ 48 I agree with the motion judge's conclusion on this issue:

[39] . . . While the theories of liability can be phrased commonly, the actual determination of liability for each class member can only be made upon an examination of the unique circumstances with respect to each class member's purchase of a policy.

¶ 49 The appellant points out that in finding that there were no common issues, the motions judge relied upon the decision of the Divisional Court in Bre-X, which decision was subsequently overturned by this court. In Bre-X, the motions judge identified some 15 common issues relating to the torts of conspiracy and fraudulent misrepresentation and breach of the Competition Act. He held that a class proceeding was the preferable procedure for the resolution of those common issues. However, he refused to certify the class action in negligent misrepresentation and the Divisional Court upheld this result. This court held that given the definitions of fraudulent and negligent misrepresentation, there was no logical or principled basis for treating them differently for the purposes of certification. Since the parties accepted that the action based on fraudulent misrepresentation was properly certified there was no reason not to certify the negligent misrepresentation claim. As MacPherson J.A., speaking for the court, said at para. 42:

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.

¶ 50 He went on to point out that several of the common issues related directly to the negligent misrepresentation claim and that the two core issues in the litigation -- whether there was gold in the Busang mine and, if not, what was the various defendants' knowledge of that fact -- were common to the

claims of misrepresentation whether made fraudulently or negligently. Moreover, Bre-X is factually a different case. The foundations of the plaintiffs' case are the public statements made by the Bre-X insiders to sell a single product, Bre-X shares, and the insiders' knowledge that those claims were untrue. This case, on the other hand, will always come down to individual representations made by hundreds of different agents selling a variety of whole life insurance products in widely ***[page128]*** different circumstances. It has not been suggested that the premium offset feature is per se illegal or misleading. Only if the feature is not properly used does it become misleading.

(4) Preferable procedure

¶ 51 Even if the appellant were able to get over the common issue problem, I agree with the motions judge that the class action would not be the preferable means of resolving the common issues. The question of preferability should be examined "through the lens of the three principal advantages of class actions - - judicial economy, access to justice, and behaviour modification" (Hollick at para. 27).

¶ 52 Many of the comments made by the court in Hollick are applicable to this case. Although class actions will be allowable even where there are substantial individual issues, preferability "must take into account the importance of the common issues in relation to the claims as a whole" (Hollick at para. 30). Resolution of the proposed common issues would, in my view, have almost no impact on the claims for the reasons set forth above. In terms of judicial economy, as was said in Hollick at para. 32 "any common issue here is negligible in relation to the individual issues". Thus, "[o]nce 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".

¶ 53 It seems to me that the comments of Winkler J. in Mouhteros v. DeVry Canada Inc. (1998), 41 O.R. (3d) 63 (Gen. Div.) at 73, apply to this case: "[C]ertification in this case will result in a multitude of individual trials, which will completely overwhelm any advantage to be derived from a trial of the few common issues."

¶ 54 I am not persuaded that the appellant has shown that allowing a class action would serve the interests of access to justice. In this respect, the fact that Clarica has established an ADR program to deal with policyholders' complaints about the premium offset is a relevant, although probably minor, consideration. See Hollick at paras. 33-5. More importantly, it seems to me that since resolution of the common issue would play such a minimal role in resolution of the individual claims, the potential members of the class would be faced with the same costs to litigate their claim as if they were bringing the claims as individuals and not members of the class.

¶ 55 I acknowledge that the class action could serve the interests of behaviour modification by exposing the vanishing premium/premium ***[page129]*** offset sales technique to public scrutiny through a class action, assuming that a court were to find that the technique amounted to negligent misrepresentation. However, the other considerations relating to judicial economy and access to justice so far outweigh this consideration that a class action should not be considered a preferable procedure.

¶ 56 It is apparent that the appellant has reformulated the common issue in an attempt to bring his case within the holding of the Supreme Court of Canada in Rumley. The Rumley plaintiffs brought an action against the Government of British Columbia for compensatory and punitive damages based upon abuse at a residential school for children with disabilities. The Supreme Court found that the commonality and preferability requirements under the British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50, were met. Fundamental issues in that case were the duty of care and whether the government's conduct fell below an acceptable standard. Resolving those issues was necessary to the resolution of each class

member's claim. As Nordheimer J. observed in Gariepy v. Shell Oil Co., [2002] O.J. No. 2766 (QL) (S.C.J.) [reported 23 C.P.C. (5th) 360] at para. 73:

In Rumley, the determination of systemic negligence would have left the members of the class only with the requirement of establishing the fact of the abuse and the injuries that flowed from it. In that sense, the members of the class in Rumley would be left, in essence, with only having to prove their damages.

¶ 57 As I have explained, in this case resolution of the proposed common issue in this case would contribute little, if anything, to the resolution of each class member's claim. McLachlin C.J.C. held in Rumley at para. 30 that plaintiffs are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings. Thus, it was open to the appellant in this case to attempt to establish liability based on the company's systemic negligence rather than vicarious liability for the actions of the agents. However, that does not advance the appellant's position in this case since whether the company is liable on a theory of systemic negligence or vicarious liability, the classmembers would still have to prove the elements of negligent misrepresentation as set out in Cognos.

¶ 58 It may be that a common issue could be framed to assist in litigation of the first element from Cognos, "a duty of care based on ***[page130]*** a 'special relationship' between the representor and the representee". In other words, a common issue might be framed to address the question of whether Prudential owed a duty of care to the individual policyholders. However, given that life insurance policies are sold by individual agents having regard to the particular circumstances of the client, resolving that issue would not sufficiently advance the policyholders' cases to make class proceeding the preferable procedure. The centrality of the relationship between the agent and the client dictates that there would have to be an individual inquiry as to whether the premium offset representation was made, how it was made and whether it had any impact in the particular case.

¶ 59 In Hollick at para. 19 the court found that "some aspect of the issue of liability is common within the meaning of s. 5(1) (c)" since "[f]or 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". The court went on to find that there was a rational connection between the class as defined and the asserted common issues. I have some concern that this element can be satisfied in this case since the class as defined embraces all persons who purchased participating whole life policies issued by Prudential during the specified time period. The difficulty with that definition is that it embraces many policyholders who would not have purchased policies with the premium offset option. Nevertheless, I will put that concern to one side since, as I have pointed out, McLachlin C.J.C. held in Hollick at para. 21 that courts can allow certification on condition that the definition of the class is amended.

¶ 60 In Hollick, the Supreme Court refused to certify the class action because it would not be the preferable procedure. The reasoning of the court in Hollick at para. 32, concerning judicial economy, applies in this case:

[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 ***[page131]*** other times. As the Divisional Court noted: "[E]ven 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. [Emphasis added.]

¶ 61 My earlier discussion concerning access to justice and behaviour modification applies to this theory as well.

Disposition

¶ 62 Accordingly, I would dismiss the appeal. The respondents shall have ten days from release of these reasons to provide the Senior Legal Officer with submissions on costs and their bill of costs. The appellant may file his submissions as to costs within seven days after receipt of the respondents' submissions. The respondents may respond within 7 days thereafter.

Appeal dismissed.

Maxwell v. MLG Ventures Limited et al.

[Indexed as: Maxwell v. MLG Ventures Ltd.]

30 O.R. (3d) 304
[1996] O.J. No. 2644
Court File No. 95-CQ-60022

Ontario Court (General Division),
Ground J.

July 24, 1996

Civil procedure — Costs — Class proceedings — Fees in class proceedings normally to be determined on solicitor and client basis — Action settled before discovery stage on basis of settlement arrived at in another action — Hours billed by solicitors for plaintiff reduced by half in calculating base fee — Solicitors for plaintiff playing very minimal role in achieving settlement — Multiplier of 1.5 applied to base fee — Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33(7), (8), (9).

A class action was settled before the discovery stage on the basis of a settlement reached in another action. A motion was brought under s. 33 of the Class Proceedings Act, 1992 to have the costs fixed.

Held, costs should be fixed accordingly.

The court had previously ordered that the defendants pay to the plaintiff's solicitors their fees and disbursements on a solicitor and client basis. The concept of the Act is that a solicitor who has been successful in a class action, either at trial or by virtue of negotiating a favourable settlement for the class, would be entitled to costs on a solicitor and client basis so that the solicitor would be fully compensated for the time spent. The Act does not specify a solicitor and client scale and there may be situations where a party and party scale would be appropriate, but those situations would be very rare.

The solicitors for the plaintiff retained two lawyers and a law student on a contract basis. Even though the amounts due to those persons were shown as disbursements in certain of the material filed with the court on the basis that the plaintiff's solicitors were obligated to pay these amounts regardless of the outcome of the costs motion, the amounts should be regarded as fees in determining the base fee for the purposes of s. 33 of the Act.

The total number of hours billed, 857.11, was excessive in light of the fact that the action did not proceed to the discovery stage and should be reduced by half.

The multiplier factor under s. 33 of the Act is applied in order to determine fair and reasonable compensation to solicitors for the risk incurred in accepting a retainer in a class action under an agreement for payment only in the event of success. A certain degree of risk was assumed by the solicitors for the plaintiff. When the action was commenced, it appeared that it would be vigorously defended and there were substantial issues involved. Besides risk, the other element to be considered in determining whether a multiplier ought to be applied and the amount of such multiplier is the degree of success achieved by the solicitors. In this case, the result of the settlement was that a substantial amount in excess of $4 million was to be paid to members of the class. However, the settlement was reached as a result of the settlement arrived at in another action. The solicitors for the plaintiff in this action played a

very minimal role in achieving the settlement. The success element should play a very small part in determining the multiplier in this action. The appropriate multiplier was 1.5.

Cases referred to

Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 33(7), (8), (9)

MOTION under s. 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6, to have costs fixed.

Harvey T. Strosberg, Q.C., for solicitors J. Perry Borden, Q.C., and James B. Stratton.
Jeffrey Leon, Brian Bellmore and Maureen Helt, for defendants.

GROUND J.: —

Background

A motion to certify this action as a class action was heard April 15, 1995 and pursuant to my reasons dated April 27, 1995, the action was certified as a class action.

On August 15, 1995 a motion was brought by the plaintiff for leave to amend the statement of claim and to have the notice of certification, the agreement and the plan approved. During the course of the hearing of that motion, a number of revisions to the notice of certification, the agreement and the plan were agreed to and the revised documents were approved by the court for circulation to the potential class members.

The action initiated by the Attorney General of Ontario and the Public Trustee against the defendants in this action and others after numerous court appearances, extensive productions and many weeks of discoveries, went to mediation in December 1995 and a settlement in that action was reached with the plaintiffs and the intervenors on April 4, 1996. The settlement was approved by Justice Blair on April 12, 1996 and at that time the court was advised that it was the intention of the defendant MLG Ventures Limited ("MLG") to pay an additional $10.60 per share to each former shareholder of Maple Leaf Gardens Limited, who had tendered shares pursuant to the offer to purchase made by MLG in April 1994. As a result of subsequent discussions between counsel in this action, a settlement of this action was negotiated on the basis of the payment of an additional payment of $10.60 per share and the payment by the defendants of the costs of the plaintiff in this action. Minutes of settlement were prepared and were proved by the court pursuant to my order dated May 24. 1996. At that time, as the earlier order certifying the class and approving the documentation to be circulated to the potential class members had not been completed, entered and circulated to the potential class members, the order of May 24, 1996 certified the action as a class proceeding, defined the class, appointed the plaintiff as representative plaintiff, declared the nature of the claims asserted, the relief sought and the common issues for the class, and also approved the settlement of the action and the notice of settlement to be forwarded by R-M Trust to each class member and published, and established procedures for potential class members to opt out of the class and the settlement. The order of May 24, 1996 also approved the agreement respecting fees and disbursements between J. Perry Borden, Q.C. and James B. Stratton and

the representative plaintiff. Paragraph 20 of such order provides as follows:

> 20. THIS COURT ORDERS that the defendants shall pay to J. Perry Borden, Q.C. and James B. Stratton their fees, disbursements and G.S.T. thereon, on a solicitor and client basis, including the account of Harvey T. Strosberg, Q.C., and including any multiplier which may be allowed by the Court pursuant to section 33 of the Class Proceedings Act, 1992, as if the costs were being fixed or assessed and paid by the Class members (the "Costs").

The order of May 24, 1996 further provided that the costs were to be fixed by me on motion brought pursuant to s. 33 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "C.P.A."). The provisions of s. 33 of the C.P.A. which are relevant to the motion now before me are s-ss. (7), (8) and (9) which read as follows:

> 33(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 solicitor's 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 clause (7)(b), the court may consider the manner in which the solicitor conducted the proceeding.

Reasons

I am not aware of, nor was I cited, any previous decisions of this court dealing with the process to be followed by the court and the matters to be considered by the court in fixing a fee, including the application of a multiplier, pursuant to s. 33 of the C.P.A. It appears to be clear that the consideration by the court involves a two-step process; firstly, the determination of the base fee and secondly, the consideration of whether a multiplier ought to be applied to the base fee and, if so, the amount of such multiplier. The court is also directed to determine the amount of disbursements.

In determining the base fee and the multiplier, the court must be concerned with the protection of the class members who, in the normal class action, may have very little contact with their solicitors. It seems to me that the same principle ought to be applied in this case where costs are being paid by defendants but where the court has ordered, in para. 20 of the order of May 24, 1996, that the costs shall be fixed or assessed as if they were being paid by the class members.

In this action, my earlier order provides that the fee will be determined on a solicitor and client basis and accordingly no submissions were made as to the appropriate scale. In any event, I would have thought that the concept of the C.P.A. is that a solicitor who has been successful in a class action, either at trial or by virtue of negotiating a favourable settlement for the class, would be entitled to costs on a solicitor and client basis so that the solicitor would be fully compensated for the time spent. I concede

that the C.P.A. does not specify a solicitor and client scale and there may be situations where a party and party scale would be appropriate but it seems to me that these would be very rare situations indeed. In addition, the fees agreement in this action provides that Messrs. Borden and Stratton will charge for their services based on their standard billing rates of $300 per hour and $200 per hour, respectively. The order of May 24, 1996 also provides that the account of Mr. Strosberg, as counsel to the plaintiffs, will be paid on a solicitor and client basis and in materials submitted to the court at that time, Mr. Strosberg indicated that his hourly charging rate would be $400 to $415 per hour. In my view, the hourly charging rates of Messrs. Strosberg, Borden and Stratton have therefore been previously approved by the court.

The bill of costs submitted by Messrs. Borden and Stratton to this court include time charges of Eve R. Wahn and James M. O'Connor, solicitors retained by Mr. Borden on a contract basis, and Peter J. Osborne, a law student retained by Mr. Borden on a contract basis. The affidavit filed by Mr. Borden indicates that the hourly charging rate of Ms. Wahn, who was called to the bar in 1987, was $195 per hour, the hourly charging rate of Mr. O'Connor, who was called to the bar in 1977, was $175 per hour, and the hourly charging rate of the law student, Mr. Osborne, was $95.00 per hour, and that they are all to be remunerated for their time regardless of the outcome of this motion for costs. In my view, even though the amounts due to Ms. Wahn and Messrs. O'Connor and Osborne are shown as disbursements in certain of the material filed with this court on the basis that Messrs. Borden and Stratton are obligated to pay these amounts regardless of the outcome of this costs motion, I think that they must be regarded as fees in determining the base fee for purposes of the C.P.A. Obviously, they are charges for solicitors' work done and must be looked at in the context of hourly charging rates and total number of hours in determining a reasonable base fee. In any event, even if one were to regard the payments to be made to these individuals as disbursements, the court is directed in cl. (c) of s. 33(7) of the C.P.A. to determine the amount of disbursements to which the solicitor is entitled.

The total hourly charges for these three individuals is $52,184.70 plus G.S.T. of $3,652.91 for a total of $55,837.61. It seems to me that the hourly charging rate of Ms. Wahn is somewhat out of proportion, particularly when compared with the hourly charging rates of Mr. Stratton and Mr. O'Connor, and I would fix fees for the time spent by Ms. Wahn on the basis of $150 an hour. It also occurs to me that an hourly charging rate of $95 for the law student, Mr. Osborne, is somewhat excessive and I would fix fees for the time spent by Mr. Osborne at $75 per hour.

Counsel for Messrs. Borden and Stratton has submitted that the base fee should be approximately $176,000 (taking the amounts payable to Ms. Wahn and Messrs. O'Connor and Osborne as fees rather than disbursements) whereas counsel for the defendants has submitted that the base fee should be somewhere in the neighbourhood of $35,000 to $40,000. It is interesting to note that the fees agreement estimated the total cost of the proceeding through to completion at $200,000. I appreciate that it is difficult to estimate the fees for an action such as this with any great degree of accuracy but the estimate appears to me to be significant when compared with the $176,000 base fee now claimed for the initial proceedings in fact taken by the solicitors for the plaintiff.

It then becomes necessary to determine whether the number of hours included in the bill of costs submitted by Mr. Borden and Mr. Stratton for the various individuals appear to be reasonable. Section 33(8) of the C.P.A. directs that in determining the amount of the solicitor's base fee, the court shall allow only a reasonable fee.

With respect to the total number of hours billed, the breakdown is as follows:

Mr. Stratton	--	258.65 hours
Mr. Borden	--	241.20 hours

Ms. Wahn	--	29.85 hours
Mr. O'Connor	--	190.75 hours
Mr. Osborne	--	136.66 hours
Total	--	857.11 hours

In considering whether the number of hours appears to be reasonable, one must look to the various steps in the proceeding. In this action, the solicitors were involved in the preparation of the statement of claim, in preparing the notice of motion and accompanying documentation for the original motion for certification, in preparing the amended statement of claim and revised documents on the motion to amend and to approve the notification, form of agreement and form of plan in negotiations with respect to the settlement of this action and the preparation of the order of May 24, 1996 and the notification and other documentation appended to such order.

The solicitors for the plaintiff had presumably determined not to proceed further with the action pending the outcome of the mediation and settlement discussions in the Public Trustee's action and accordingly the original order certifying the action as a class action and approving the notification, fees agreement and plan was never finalized, entered or circulated to the class members. In addition, the action did not proceed to the stage of productions, discoveries or other interlocutory proceedings. While one cannot argue with the decision of the solicitors for the plaintiff to hold this action in abeyance pending the outcome of the mediation and settlement negotiations in the Public Trustee's action, it is necessary to consider what steps were not taken by the solicitors for the plaintiffs in determining whether the number of hours billed appears to be reasonable. It seems to me, considering the stage of proceedings reached in this action, that a total of more than 800 hours billed by solicitors for the plaintiff is excessive. In reviewing the docket entries by the individual solicitors and student, it appears to me that an unreasonable amount of time was spent on many of the steps in this proceeding and that there was considerable duplication and many "in-house consultations" among the various solicitors. In fixing costs, a judge is not carrying out an assessment. The principle of fixing costs was stated by Justice Henry in Apotex Inc. v. Egis Pharmaceuticals (1991), 4 O.R. (3d) 321 at p. 326, 37 C.P.R. (3d) 335 (Gen. Div.), as follows:

> This brings me to a second guiding principle -- the judge in fixing costs of a proceeding is not assessing costs as if he were performing the functions of a master or officer to whom the court has referred costs to be assessed. Rule 57.01(3) expressly provides that:
>
> > In awarding costs, the court may fix all or part of the costs with or without reference to the Tariffs, instead of referring them for assessment . . .
>
> This I understand is what the judges are doing frequently in interlocutory proceedings currently, including myself: it is not an assessment item by item according to the Tariffs as would be done by an assessment officer; it is rather the judge's determination of what the services devoted to the motion or other proceeding are worth according to the submissions of counsel, his own experience and with some regard to what could be taxed on the party and party scale.

In my view, the same considerations apply to the court determining the solicitor's base fee under s. 33 of the C.P.A. Without going through an item by item analysis of the various hours charged, it seems to me that the total number of hours is at least double what would be reasonable in view of the stage which

the proceeding reached and, on that basis, and reducing the hourly rate of Ms. Wahn to $150 an hour and the hourly rate of Mr. Osborne to $75 an hour results in a base fee of $86,100 plus G.S.T.

It then becomes necessary to determine whether a multiplier ought to be applied to such base fee.

I accept the submission of counsel for Messrs. Borden and Stratton that the multiplier factor is applied in order to determine fair and reasonable compensation to solicitors for the risk incurred in accepting a retainer in a class action under an agreement for payment only in the event of success and that, absent the multiplier factor, solicitors would be loathe to accept the risks inherent in taking a retainer in a class action where they would be compensated only if successful. Submissions were made by counsel for Messrs. Borden and Stratton with respect to disbursements incurred by them which they would have to pay regardless of the outcome of the litigation or of this costs motion. As I indicated above, I believe that the disbursements which relate to payments to Miss Wahn and Messrs. O'Connor and Osborne for legal services performed must be taken into account in determining the base fee. The other disbursements claimed are, in my view, non-controversial and amount only to some $2,000. In any event, the original order made certifying the class permitted the solicitors for the plaintiff to solicit the class for contribution to be applied toward disbursements. This was not done because circulation to the potential class members was not carried out prior to the settlement of the action; however, the fact remains that the solicitors for the plaintiff were entitled to seek contribution from the class members toward the cost of disbursements and did not have to accept any substantial risk in that regard.

There is no doubt that a certain degree of risk was assumed by Messrs. Borden and Stratton in accepting the retainer and commencing this action and that that risk must be looked at at the time the action was commenced. At such time it appeared that the action would be vigorously defended and that there were clearly substantial issues in establishing that the misrepresentations alleged in the statement of claim had been made and in establishing the damages incurred by the members of the class.

The other element to be considered in determining whether a multiplier ought to be applied and the amount of such multiplier is the degree of success achieved by the solicitors. In the case at bar, the result of the settlement is that a substantial amount in excess of $4 million will be paid to members of the class and that no part of the proceeds will be applied toward solicitors' fees, the defendants having agreed to pay such fees. It would appear, however, that the settlement was reached as a result of the settlement arrived at in the Public Trustee's action and a concern of the lawyers for the defendants that securities laws required them to pay a similar amount to the minority shareholders who had tendered their shares pursuant to the offer made by MLG in April 1994. It is to be noted that, on the settlement of the Public Trustee's action, MLG advised the court that it intended to make an offer of an additional $10.60 per share to the minority shareholders and in fact issued a press release to that effect. It appears to me that the solicitors for the plaintiff in this action played a very minimal role in achieving the settlement and that the success element would play a very small part in determining the multiplier in this action.

Counsel for Messrs. Borden and Stratton has suggested that the multiplier should be three and counsel for the defendants has submitted that there should be no multiplier. On balance, in view of the fact that a certain degree of risk was assumed by Messrs. Borden and Stratton in accepting the retainer and commencing the action but that the action did not proceed very far before a settlement was achieved which was largely the result of the settlement in the Public Trustee action and was not achieved by virtue of the efforts of Messrs. Borden and Stratton, the appropriate multiplier would, in my view, be 1.5 resulting in a total fee of $129,150 plus G.S.T. of $9,040.50 and disbursements of $1,940.30.

I am also asked to fix the fee of Mr. Strosberg as counsel to Messrs. Borden and Stratton. As indicated above, the account of Mr. Strosberg is to be settled on a solicitor and client basis and Mr. Strosberg has advised the court that his regular charging rate is $400 to $415 an hour. I note that the billing report

submitted by Mr. Strosberg to this court does use a charging rate of $415. In view of Mr. Strosberg's considerable expertise in this area and the contribution made by him with respect to the settlement of the order of May 24, 1996 and the accompanying documentation, I have no difficulty with the 44.8 hours indicated in Mr. Strosberg's billing report and would fix Mr. Strosberg's fee at $16,000 plus G.S.T. and disbursements as indicated in the billing report submitted to this court in the amount of $319.60 plus applicable G.S.T.

Order accordingly.

Indexed as:

McCarthy v. Canadian Red Cross Society

PROCEEDING UNDER The Class Proceedings Act, 1992

Between
Michael McCarthy, Christine McCarthy and Derek Marchand,
plaintiffs, and
The Canadian Red Cross Society and The Attorney General of Canada, defendants

[2001] O.J. No. 2474
Court File No. 98-CV-143334

Ontario Superior Court of Justice
Winkler J.

Heard: January 29-30, 2001.
Judgment: June 21, 2001.
(29 paras.)

Practice — Settlements — Court approval, class actions — Approval of counsel fees.

Motion for approval of a class action settlement. A class action was commenced against the Canadian Red Cross Society and the government on behalf of victims who had contracted Hepatitis C from the Canadian blood supply and who were excluded from an earlier government settlement. A partial settlement was proposed between the victims and other parties, the Plan Participants, which included pharmaceutical companies, insurance companies, hospitals and individual physicians. The judge dismissed the parties' motion to approve the settlement because no compensation was payable to those with derivative claims, such as relatives of infected persons. The judge also found that there was insufficient evidence to enable him to determine whether the release sought by the Plan Participants was fair. Leave was granted to file further and better material addressing the deficiencies. The parties provided supplementary materials, and renewed their motion for approval of the settlement.

HELD: Motion allowed. Under the new proposal, the derivative claimants would receive payments in accordance with their relationship to the infected claimant. Spouses and minor children of a claimant or the parents of a minor infected child would receive $300, while all other close relatives, including siblings, would receive $100. The total amount payable in respect of any one infected class member would be capped at $800. The proposed distribution of the settlement fund was fair, reasonable and in the best interests of the class as a whole. There was a finite settlement fund available, as the Society was the subject of a proceeding under the Creditors Companies Arrangement Act. Litigation would be protracted and complex. Timely payment was in the interests of class members. The potential inequality between derivative claims was insignificant in light of the cap. The parties also provided additional evidence to establish that the release sought by the Plan Participants was a fair and reasonable compromise for the class. The proceeding was certified as a class proceeding, having satisfied the requirements for certification. A lump sum fee for counsel was approved.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5(1), 29(2), 32(2).

Companies Creditors Arrangements Act, R.S.C. 1985, c. C-36.

Counsel:

David Harvey, Lori Stoltz and Susan Vella, for the plaintiffs.
P.R. Boeckle, for The Canadian Red Cross Society.
W. Knights, for The Attorney General of Canada.
Laurie Redden, for The Public Guardian and Trustee.
Linda Waxman, for The Children's Lawyer.
Malcolm Ruby, M.M. Fox and Mary Thomson, for various Plan Participants.
William Dermody, Friend of the Court.

WINKLER J.:—

Nature of the Motion

¶ 1 The plaintiffs are the proposed representative plaintiffs in this intended class proceeding. On January 29, 2001 they brought a motion for approval of the partial settlement reached with the Canadian Red Cross Society ("CRCS") and certain other individuals and entities that are not currently parties to the action. These non-parties are identified collectively as the Plan Participants, a defined term in an on-going proceeding involving the CRCS under the Companies' Creditors Arrangements Act, R.S.C. 1985, c. C-36 ("CCAA"). The CRCS and the Plan Participants were consenting to the certification of this action for the purpose of effecting the partial settlement, if the settlement was approved by the Court as required under s. 29(2) of the Class Proceedings Act, S.O. 1992, c. 6. As part of the motion for approval of the settlement, the plaintiffs also sought ancillary relief in the form of an order barring the non-settling defendant from initiating or continuing any action against the settling parties for contribution or indemnity in respect of the claims asserted by the plaintiffs or the class members. In addition there was a companion motion seeking approval of the fees and disbursements of the class counsel.

¶ 2 In reasons released February 20, 2001, I refused to approve the proposed settlement advanced by the plaintiffs on two grounds:

(a) that the settlement was unfair to the derivative claimants intended to be included in the class; and
(b) the absence of evidence to support the granting of the release that would enure to the benefit of the Plan Participants.

The motion was dismissed with leave to file further and better material that would address these deficiencies. The parties have now provided the Court with supplementary materials and renew their motion for the relief set out above.

Background

¶ 3 The background facts were set out in my earlier reasons and I reiterate them here for clarity. This action is one of several that have arisen as a result of the contamination of the Canadian blood supply with infectious viruses during the 1970s and 1980s. The particular viral infection at issue in this action is Hepatitis C, a disease which attacks and debilitates the liver over a period of time. Although a small

percentage of those infected with Hepatitis C may actually clear the disease within a six month period, most infected individuals will remain so for the duration of their lives. The progression of the disease varies from person to person. In some people, the virus is latent even though it is present in the bloodstream. However, the debilitating effects of Hepatitis C are progressive in nature in some infected persons. In those most severely affected, the manifestation of the disease begins with mild fatigue and progresses over time to decompensation of the liver or hepatocellular cancer, both of which are terminal. Presently, there is no known cure for Hepatitis C.

¶ 4 The CRCS had control of the Canadian blood supply for a period spanning over 50 years and concluding in 1998. During the latter part of that term, the CRCS management of the blood supply was funded by the federal, provincial and territorial governments. The governments created an overseer committee to formulate policy directives relating to the blood supply. Those directives were implemented by the CRCS. The contamination of the blood supply occurred primarily during the 1970s and 1980s. The plaintiffs allege that the contamination of the blood supply and the subsequent infection of the class members partly resulted from the policies in force during that time.

¶ 5 In 1997, Mr. Justice Horace Krever released the report of the Commission of Inquiry on the Blood System in Canada. ("Krever Report"). The report detailed the problems that led to the contamination of the Canadian blood system and recommended the institution of a no-fault compensation plan for all victims of tainted blood. The recommendation was not adopted by the governments. According to the Affidavit of Michael McCarthy, currently Vice-President of the Canadian Hemophilia Society and a proposed representative plaintiff in this action, the failure of the governments to adopt the recommendation for a compensation plan resulted in the victims advancing legal and political strategies in an attempt to obtain redress for the injuries that they had suffered.

¶ 6 Mr. McCarthy deposes that this action was commenced on March 10, 1998 as a result of rumours that the federal, provincial and territorial governments were considering settling a class proceeding commenced on behalf of those persons who had contracted Hepatitis C from the blood supply between January 1, 1986 and July 1, 1990 without offering compensation to any other victims. On March 28, 1998, the governments did in fact make such an announcement which culminated in the pan-Canadian settlement approved by this Court and reported as Parsons v. The Canadian Red Cross Society (1999), 40 C.P.C. (4th) 151 (Ont. Sup. Ct.).

¶ 7 This action is brought on behalf of a class of persons described as:

> All persons who became infected with the Hepatitis C virus as a result of receiving blood or blood derivatives or blood products collected or supplied by the CRCS prior to January 1, 1986 or after July 1, 1990 but before September 28, 1998 in all provinces or territories of Canada except British Columbia and Quebec; and
> All persons who became infected with the Hepatitis C virus as a result of contact with a person described above; and
> All persons with claims derivative of the claims described above.

The class excludes those persons with claims arising as a result of an infection occurring between January 1, 1986 and July 1, 1990 as they are included in the class proceeding that has now been settled in Parsons and the related actions. September 28, 1998 has been selected as a termination date for class membership as the CRCS surrendered control of the Canadian blood supply to the Canadian Blood Services and Hema-Quebec organizations after that date.

¶ 8 As stated, the CRCS is currently subject to a Court supervised CCAA proceeding. The proposed

partial settlement and its funding is a product of that proceeding. Accordingly, the plaintiffs move for approval of the partial settlement, certification on consent and certain ancillary relief.

¶ 9 Section 29(2) of the Class Proceedings Act S.O. 1992, c. 6, mandates Court approval of settlements in class proceedings. Having reviewed the record and considered the submissions of class counsel and other interested parties, and the supplementary materials filed by the parties in response to my earlier ruling. I conclude that the concerns noted in my earlier reasons have been adequately addressed and that the motion ought to be granted. My reasons follow.

Settlement Approval

¶ 10 The partial settlement for which the plaintiffs sought approval on the earlier motion was described as follows at paragraph 19 of the plaintiffs' factum:

> The Plan represents the settlement reached among the CRCS and certain other parties referred to as "Plan Participants", which include such entities as pharmaceutical companies, insurance companies, hospitals and individual physicians. The CRCS settlement is a national settlement that covers the class actions in British Columbia, Ontario and Quebec and will only become effective if courts in all three jurisdictions approve it. The settlement creates a fund of approximately $63 million for people infected directly or indirectly with Hepatitis C as a result of blood received in Canada before 1986 or after July 1, 1990 ...

¶ 11 As stated above, I rejected the settlement on two main grounds. The first was the manner in which the derivative claims were to be treated under the proposed settlement. The plaintiffs were proposing that the derivative claims would be extinguished under the settlement without any compensation being provided. I found this to be unacceptable.

¶ 12 The settlement now proposed to the Court contemplates that certain monies will be distributed equally among all infected class members, in three instalments. The payments will be made by instalment to insure that the fund is not depleted in the event that there are delayed claims from class members due to individual circumstances. In addition, the derivative claimants will receive payments in accordance with their relationship to the infected claimant. Spouses and minor children of a claimant or the parents of a minor infected child will receive $300.00, while all other close relatives, including siblings, will receive $100.00. However, the total amount payable in respect of all of the derivative claims relating to a single infected class member will be capped at $800.00. If the total potential derivative claims for any one infected class member exceed that amount, the derivative claimants will receive pro-rated amounts totalling $800.00. Further, if there are no derivative claims asserted in respect of an infected class member, that class member will be entitled to receive the $800.00 amount set aside for derivative claims.

¶ 13 The Children's Lawyer has expressed concerns regarding the manner in which the settlement proposes to deal with the derivative claims. The concerns relate to the unequal payments that will be made depending on the number of derivative claims asserted and the possibility that the manner in which the settlement is structured will discourage derivative class members from making claims. I am not persuaded that these concerns are sufficient to justify a rejection of the settlement.

¶ 14 Settlements in class proceedings do not have to meet a threshold of perfection. Rather, the test is whether or not the settlement is fair, reasonable and in the best interests of the class as a whole. Further, in determining this the Court looks to whether the settlement is within a zone or "range

of reasonableness". In this case, there is a finite settlement fund available.

¶ 15 The proposed distribution of that settlement is "fair, reasonable and in the best interests of the class as a whole". Although there will likely be unequal amounts distributed under the settlement, the cap on derivative claims is set in such a manner that the potential inequality is insignificant in the context of the test to be applied on settlement approvals. Further, the capped amount is reasonable in consideration of the total compensation being offered under the settlement. Treating the infected class member and the derivative claimants associated with him or her as a unit for the purposes of compensation is an innovative method of distributing a limited fund to class members with differing bases for claims.

¶ 16 I turn now to the second ground upon which the earlier motion for settlement approval was rejected. The nature of the funding for the settlement was set out in detail in my earlier reasons. My concerns regarding the element of the settlement agreement relating to the Plan Participants were, in essence, threefold. The Court was not provided with:

(a) information concerning the involvement of each Plan Participant in the underlying events giving rise to the cause of action asserted;
(b) an analysis of the potential liability of each Plan Participant; and
(c) information regarding the contribution of each Plan Participant to the settlement fund.

¶ 17 The supplementary material filed addresses the foregoing concerns in a satisfactory manner. A chart has been provided setting out in summary form the contributions of each of the Plan Participants to the settlement fund together with an analysis of their involvement and potential liability. This chart is supported by affidavit evidence that in all respects satisfies me that the release the Plan Participants seek in return for their contribution is a fair and reasonable compromise for the class.

¶ 18 The deficiencies noted in the prior settlement proposal have now been remedied. In light of the principles enunciated in Dabbs v. Sun Life Assurance of Canada (1998), 40 O.R. (3d) 429 (Gen. Div.), Parsons v. The Canadian Red Cross (1999), 40 C.P.C. (4th) 151 (Ont. S.C.J.) and Reichhold v. Boyer (2000), 43 C.P.C. (4th) 263 (Ont. S.C.J.), I find that the settlement is fair, reasonable and in the best interests of the class as whole. The settlement was reached after extensive arms length negotiations. The primary defendant is the subject of a proceeding under the CCAA and there is no more money available from that source to fund the settlement. There is a significant risk involved for the class in establishing liability in the class period. Any litigation will be protacted and complex. It is in the interests of the class members to have a timely and prompt payment, given their circumstances as confirmed by the vive voce evidence of certain class members testifying in support of the motion for approval of the settlement. Accordingly, the settlement is approved.

¶ 19 I conclude this part of my reasons with the following observations. The Court is obligated to carefully scrutinize proposed settlements in a class proceeding. Nonetheless, where settlement proposals are advanced on uncontested motions, in my view, there is a positive obligation on all parties and their counsel to provide full and frank disclosure of all material information to the Court. This is a well developed principle of law in respect of ex parte motions for injunctive relief but the underlying concerns it addresses are equally applicable in the context of unopposed motions in class proceedings or on motions where there is the appearance of a risk of collusion among the parties.

¶ 20 As Sharpe J. states aptly in United States of America v. Friedland, [1996] O.J. No. 4399 (Gen. Div.) at para 26 "The Judge hearing an ex parte motion and the absent party are literally at the mercy of

the party seeking injunctive relief. The ordinary checks and balances of the adversary system are not operative." Sharpe J. then adopts a statement from a British Columbia decision, [1996] B.C.J. No. 1885, that "there is no situation more fraught with potential injustice and abuse of the Court's powers than application for an ex parte injunction."

¶ 21 By comparison, a class proceeding by its very nature involves the issuance of orders or judgments that affect persons who are not before the Court. These absent class members are dependent on the Court to protect their interests. In order to do so, the Court must have all of the available information that has some bearing on the issues, whether favourable or unfavourable to the moving party. It is the obligation of counsel to provide that information in a manner that is consonant with the duty to make full and frank disclosure. Moreover, that information must be provided in a manner that is not misleading or even potentially misleading. In most class proceedings, voluminous records develop as a consequence of the complexity of the litigation. The Court is not equipped, nor should it be required, to engage in a forensic investigation into the material or to mine the record to inform itself. Counsel must direct the Court to all relevant information that would impact on the Court's determination. This is especially important where the motion is for the approval of settlement agreements, class counsel fees or consent certifications for the purpose of settlement.

Certification

¶ 22 The defendants and Plan Participants consent to certification contingent upon approval of the settlement. Nevertheless, the Court must be satisfied that the requirements for certification under s. 5(1) of the CPA have been met. There is a cause of action, an identifiable class, common issues for the class arising from the cause of action asserted and a class proceeding would be the preferable procedure for dealing with the common issues. The representative plaintiffs do not appear to have any conflicts with the class members on the common issues and the plan of proceeding advanced is workable. In the result, the proceeding is certified as a class proceeding.

Fee Approval

¶ 23 Section 32(2) of the CPA mandates that the Court approve an agreement regarding the fees and disbursements between a solicitor and a representative plaintiff. This proceeding is brought along with companion proceedings in British Columbia and Quebec. The respective plaintiffs and counsel in each of these proceedings have agreed that the fees of class counsel will not exceed 10% of the settlement fund, such amount to be divided equally among the class counsel in all three proceedings.

¶ 24 Class counsel in this proceeding therefore seek approval of a lump sum fee of $2,100,000 plus disbursements for the services rendered on behalf of the representative plaintiffs and class members. In class proceedings, the reasonableness of a class counsel fee is to be determined in consideration of the risk undertaken and the result achieved. This Court has previously analysed the risks attendant to litigation involving the Canadian blood supply problems in Parsons v. The Canadian Red Cross (2000), 49 O.R. (3d) 281 (S.C.J.). If anything, the risk was more pronounced in this case due to the greater difficulty that would be experienced in proving liability. As for the result achieved, it was limited somewhat by the circumstances of the Canadian Red Cross and the ongoing CCAA proceeding but it appears that counsel have generated, through the settlement, the maximum recovery possible for the class.

¶ 25 A lump sum fee is an appropriate method of compensating class counsel, especially where experienced counsel with a particular expertise are involved with complex litigation directly related to their area of expertise. To limit the compensation available in such a situation to that calculable on a

base fee and multiplier approach would unduly penalize efficiency. Here, the lead counsel, Mr. Harvey, has considerable expertise in blood litigation, and more to the point, experience with the factual background of this litigation that was gained from his involvement in other related matters. That permitted him to conduct this litigation in an efficient manner without the normal, and otherwise necessary, expenditures of time that a competent counsel not versed in the area and facts would require in order to be able to prosecute the proceeding effectively or at all.

¶ 26 The fee requested is supported by the representative plaintiff, Mr. McCarthy. Because the class counsel in each of the three class proceedings have agreed to an equal division of the fees even though there are not equal numbers of class members in each of the three actions, the amount sought in this action is approximately 8.5% of the recovery of the class members covered. The total fees sought will average approximately $865 per infected class member based on the numbers of those class members currently estimated to exist. This is reasonable when compared to the potential recovery that will be received by each infected class member.

¶ 27 In consideration of the foregoing, I find that the requested fee is reasonable and it is accordingly approved.

Motion to Join the Plan Participants

¶ 28 In order to effect the implementation of the settlement, the Plan Participants intervene on a motion to be added as parties for the purposes of certification and settlement. The motion is granted.

¶ 29 Orders to go accordingly. I will remain seized in the event that there are any further matters to be spoken to.

WINKLER J.

QL Update: 20010629
cp/d/ln/qlhcc/qlbdp

Case Name:

McCutcheon v. The Cash Store Inc.

IN THE MATTER OF a Claim under the Class Proceedings Act, S.O. 1992, c.6

Between
Thompson McCutcheon, Plaintiff, and
The Cash Store Inc. and Rentcash Inc., Defendants

[2006] O.J. No. 1860
Court File No. 04-12118 CP

Ontario Superior Court of Justice
M.C. Cullity J.

Heard: April 18, 2006.
Judgment: May 10, 2006.
(85 paras.)

Civil procedure — Parties — Class or representative actions — Certification — Common interests — Application by McCutcheon for certification of a class proceeding against Cash Store and Rentcash for charging interest for loans at a criminal rate in breach of s. 347(1)(a) of the Criminal Code allowed in part — The pleadings against Rentcash were dismissed as there were no direct dealings with that company pled — In light of the common issues, McCutcheon established a strong case for a finding that certification would accord with the three objectives of the Class Proceedings Act.

Application by McCutcheon for certification of a class proceeding against Cash Store and Rentcash for charging interest for loans at a criminal rate in breach of s. 347(1)(a) of the Criminal Code — The action arises out of the agreements in the payday loan arrangements with the Cash Store — Terms of the loan agreements included payment of a broker's fee of 22.54 per cent of the principal amount of each loan, interest of 59 per cent on the principal amount and a fee of $10 for the cash card required to access the funds advanced to the customer — Cash Store had direct dealings with the plaintiffs whereas Rentcash was a parent company — The various plaintiffs sought a declaration that the agreements were harsh, unconscionable, illegal, and unenforceable at least to the extent of the illegality — HELD: Certification allowed in part — The pleadings against Rentcash were dismissed as there were no direct dealings with that company pled — The Court was satisfied that the proposed common issues and the potential liability of the Cash Store for unjust enrichment and of the unconscionable transactions legislation of Ontario, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan, would be shared by all class members — Although breaches of provincial consumer protection law were pleaded, no common issues in respect of such breaches were proposed or addressed at the hearing — The resolution of the common issues in favour of the plaintiff was likely to advance the proceedings substantially — In light of the common issues, the plaintiff established a strong case for a finding that certification would accord with the three objectives of the Class Proceedings Act.

Statutes, Regulations and Rules Cited:

Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2,

Civil Code of Quebec, Article 3168

Civil Procedure Rules, Rule 5.03(1), Rule 5.03(5), Rule 25.06(8)

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5, s. 5(1)(a), s. 5(1)(b), s. 5(1)(c), s. 5(1)(d), s. 5(1)(e), s. 24(1), s. 26, s. 26(4)

Consumer Protection Act,

Criminal Code, s. 347, s. 347(1), s. 347(1)(a), s. 347(1)(b), s. 347(1)(c), s. 347(1)(d), s. 347(2)

Unconscionable Transactions Act, R.S.O. 1990, c.U.2,

Counsel:

David Thompson and Matthew G. Moloci for the Plaintiff

Timothy Pinos, Robin Moodie and Peter Henein for the Defendants

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¶ 1 **M.C. CULLITY J.**:— The plaintiff entered into numerous short-term loan transactions ("payday loans") with the defendant, the Cash Store Inc. ("Cash Store"). In these proceedings commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA"), he claims that, by virtue of their involvement in those transactions, the Cash Store and its parent, Rentcash Inc. ("Rentcash"), breached the provisions of section 347(1)(a) and (b) of the *Criminal Code of Canada,* R.S. 1985, c. C-46 by entering into an agreement, or arrangement, to receive interest at a criminal rate, and by receiving such interest. He seeks a declaration to that effect and that the agreements or arrangements are harsh, unconscionable, illegal, and unenforceable at least to the extent of the illegality. He claims an accounting and reimbursement of all such "illegal amounts" on the basis of unjust enrichment. Breaches of the *Unconscionable Transactions Act,* R.S.O. 1990, c.U.2, the *Consumer Protection Act*, and similar legislation in other provinces, are also alleged and as grounds for further claims to restitution. These claims are made pursuant to the CPA on behalf of a class of persons who entered into similar payday loan arrangements with the Cash Store.

¶ 2 The Cash Store is a corporation incorporated under the laws of Alberta. It carries on business at locations in nine provinces - including Ontario - and two territories. It is a wholly-owned subsidiary of Rentcash which was incorporated in Ontario but has its head office in Alberta. The plaintiff has pleaded that Rentcash was the "directing mind and will" of the Cash Store.

¶ 3 Although, in their statement of defence, the defendants deny that any of the borrowers dealt directly with Rentcash, all the allegations of fact and law in the statement of claim are made against the "Defendants".

¶ 4 It is pleaded that the defendants held themselves out not as lenders but as brokers engaged by their customers to obtain loans from independent third parties. The plaintiff alleges that the defendants are not independent of, or at arm's length with, the alleged lenders. It is pleaded that the defendants:

(a) represented themselves as agents of their customers when they were actually agents of the lenders;
(b) guaranteed the repayment of all loans to the lenders, plus an annual return on their investments;

(c) agreed with the lenders to undertake all collection and enforcement measures with respect to the loans; and

(d) agreed to indemnify the lenders with respect to any losses.

¶ 5 It is an essential element of the plaintiff's claims, as pleaded, that all of the payday loans were made on the same - or substantially the same - terms. These included payment of a broker's fee of 22.54 per cent (25 per cent after March 11, 2004) of the principal amount of each loan, interest of 59 per cent on the principal amount and a fee of $10.00 for the cash card required to access the funds advanced to the customer.

¶ 6 The plaintiff moved for certification of the proceeding under the CPA. The motion was opposed by the defendants. In their counsel's submission, none of the requirements in section 5(1)(a) through 5(1)(e) of the CPA is satisfied.

Section 5(1)(a): disclosure of a cause of action.

¶ 7 As I have indicated, the plaintiff's claims for restitution are based on breaches of section 347 of the *Criminal Code*, of provisions of the *Unconscionable Transactions Act* and the *Consumer Protection Act* and of those of similar statutes in other provinces.

¶ 8 Section 347(1) of the *Criminal Code* reads as follows:

347(1) Notwithstanding any Act of Parliament, everyone who:

(a) enters into an agreement or arrangement to receive interest at a criminal rate, or
(b) receives a payment or partial payment of interest at a criminal rate is guilty of
(c) an indictable offence and is liable to imprisonment for a term not exceeding five years, or
(d) an offence punishable on summary conviction and is liable to a fine not exceeding $25,000.00 or to imprisonment for a term not exceeding six months or to both.

¶ 9 For the purposes of this case, "interest" - as defined in section 347(2) - includes the aggregate of all charges and expenses paid or payable for the loans and the term "criminal rate" means:

> ... an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principles that exceeds 60 per cent on the credit advanced under an agreement or arrangement.

¶ 10 Although it is pleaded that each of the three payments charged to the customers was interest within the meaning of section 347(1), plaintiff's counsel emphasised that no claims were made against the lenders and that those against the defendants for breaches of section 347(1) were limited to the

broker's fee of 22.54 per cent (25 per cent after 11th March, 2004) of the amount of each loan. The fee is alleged to have been levied as a lump sum at the inception of the loan and at the time of any subsequent rollover. It is pleaded that, by itself, a fee of approximately 22.5 per cent resulted in an effective annual rate of interest of 1170 per cent, 585 per cent and 270 per cent on loans of seven days, 14 days and 30 days respectively, without compounding. Given this limitation, I believe plaintiff's counsel were correct in their submission that, contrary to that of counsel for the defendants, the lenders were not necessary parties to the proceedings to the extent that the claims are based on breaches of the *Criminal Code*.

¶ 11 In my opinion, sufficient material facts have been pleaded in respect of the claims based on such breaches to satisfy the "plain and obvious test" propounded in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 that, unquestionably, is applicable for the purpose of determining whether the statement of claim discloses a cause of action against the Cash Store.

¶ 12 The claims based on alleged breaches of the *Unconscionable Transactions Act*, and the *Consumer Protection Act* and the similar legislation in other jurisdictions received little attention at the hearing or in the factums of counsel. I am satisfied that the material facts that give rise to causes of action with respect to these claims have been pleaded. Defendants' counsel did not suggest otherwise. Their objection was that the pleading is defective for a failure to join the lenders as parties.

¶ 13 As pleaded, these claims extend to the interest of 59 per cent and the cash card fee of $10.00, as well as the broker's fee. However, only one of the 13 common issues proposed by the plaintiff refers to the provincial legislation and that issue is conditioned on a prior finding that the Cash Store, or Rentcash, was unjustly enriched by the payment of interest at a criminal rate. It raises the question whether the provincial legislation was breached by the provision for the payment of such interest.

¶ 14 As, reading the pleading generously, I am prepared to accept the submission of plaintiffs counsel that the allegation of a criminal rate of interest relates only to the broker's fee, it must follow, I believe, that, despite the more extensive allegations in the pleading, certification is requested on the basis that the claims of breaches of the provincial legislation are intended to be similarly restricted. I am not aware of anything in the CPA, or of any other reason, that would prevent a plaintiff from seeking to certify proceedings on the basis of only some of the claims - or of more limited claims - than those pleaded.

¶ 15 If, therefore, the plaintiff claims only against the defendants for restitution of amounts received in breach of the provincial legislation - and only with respect to the broker's fee that one or the other of them would retain - I do not believe that these causes of action should be considered to be materially deficient because of the failure to join the lenders as parties. In my opinion they are not persons "whose presence is necessary to enable the court to adjudicate effectively and completely on the issues" in the proceeding within the mandatory language of rule 5.03(1) on which Mr Pinos relied. The lenders may, or may not, be helpful - or even necessary - witnesses if and to the extent, for example, that the plaintiff seeks to rely on the allegation that the lenders were undisclosed principals of the defendants, but that is not the same thing: see *Amon v. Raphael Tuck & Sons Ltd*, [1956] 2 W.L.R. 372 (Q.B.D.), at page 392, *per* Devlin J.

¶ 16 Independently of his submission that the lenders were necessary parties to the proceedings, Mr Pinos submitted that the material facts that would constitute, or give rise to, a cause of action against Rentcash have not been pleaded.

¶ 17 It is fundamental to this submission that - as the defendants have pleaded in their statement of defence - Rentcash did not deal directly with the customers and could only be liable on the causes of

action pleaded if, as a parent corporation, it was to be identified with its subsidiary. This would, in effect, require the corporate veil to be pierced - an exercise that is permitted only in exceptional cases. As Cumming J. stated in *Wilson v. Servier Canada Inc.* (2000), 50 O.R. (3d) 219 (S.C.J.), at para 22:

> The autonomous and independent existence of the corporate entity as a juristic person separate and apart from its shareholders is a cornerstone of Canadian law. A stringent test must be satisfied before one may pierce the corporate veil of a subsidiary corporation and impose liability upon a parent corporation on the basis of an asserted agency relationship ...

¶ 18 In response to this submission, plaintiff's counsel pointed to the allegation in the statement of claim that Rentcash was "the directing mind and will" of the Cash Store and to the fact that all of the allegations and claims pleaded by the plaintiff were made against the defendants jointly. For the purposes of section 5(1)(a), it is to be assumed that the factual allegations in the statement of claim will be proven at trial.

¶ 19 There is ample authority that, exceptionally, the corporate veil may be pierced if it is proven that a parent corporation has exercised complete domination and control over the affairs and activities of a subsidiary. The authorities include *Aluminum Co. of Canada Ltd. v. City of Toronto,* [1944] S.C.R. 267, at page 271, *per* Rand J.; *Dominion Bridge Co. Ltd v. The Queen* [1975] C.T.C. 263 (F.C.T.D.), aff'd. [1977] C.T.C. 554 (F.C.A.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.); *Haskett v. Equifax Canada Inc.* (2003), 63 O.R. (3d) 577 (C.A.); and *Smith v. National Money Mart Company et al.*, [2006] O.J. No. 1807, (Court of Appeal, Reasons May 5, 2006).

¶ 20 In *Haskett,* at paragraphs 61-63, Feldman J. A. stated:

> In order to found liability by a parent corporation for the actions of a subsidiary, there typically must be both complete control so that the subsidiary does not function independently and the subsidiary must have been incorporated for a fraudulent or improper purpose or be used by the parent as a shield for improper activity: ...
> The pleading falls short of suggesting that the relationship of the respective related respondent corporations is that of a conduit to avoid liability, nor is there an allegation that the parent company controls the subsidiary for an improper purpose.
> For the above reasons, the claims against the companies as pleaded must be struck out as disclosing no reasonable cause of action.

¶ 21 In Mr Pinos' submission, the pleading here is similarly deficient. Although it is alleged that Rentcash was "the directing mind and will" of the Cash Store - an allegation that reflects the language that appears in a number of the decisions - it was neither pleaded nor suggested that the Cash Store was incorporated for a fraudulent or improper purpose, or that it was to be used, or was used, by Rentcash as a shield for improper activity. It followed, said Mr Pinos, that in accordance with *Haskett* and rule 25.06 (8), the material facts required to disclose the existence of cause of action against Rentcash have not been pleaded and the claims against it could not properly be included in any order certifying the proceedings.

¶ 22 I am satisfied that, to the extent that the plaintiff seeks to rely on the control exercised by Rentcash over its subsidiary, the plea that it was the directing mind and will of the Cash Store is, on the authority of *Haskett*, insufficient. For the purpose of piercing the corporate veil between a parent corporation and its subsidiary, it is, apparently, not enough to establish that the latter was a mere puppet of the former. Some fraudulent or other "improper" motive for the former's existence must be pleaded,

and proven.

¶ 23 It follows that the plea with respect to the directing mind and will of Rentcash does not, by itself, provide the material facts required to disclose a cause of action against it for the purpose of the motion to certify the proceedings.

¶ 24 It is possible that the claims against Rentcash could be saved if - reading the pleading generously - the factual allegations made against the defendants jointly are viewed separately and independently from those relating to the control exercised by Rentcash. On that reading of the statement of claim, it could be implied that the plaintiff and the other members of the putative class dealt directly with Rentcash. As the question that arises under section 5(1)(a) must be decided solely on the pleadings, Mr Pinos' attempt to rely on the cross-examination of the plaintiff to demonstrate that he had no direct dealings with Rentcash cannot be accepted. (By the same token, the suggested inadequacy of the affidavit evidence filed on behalf of the plaintiff to prove that Rentcash exercised complete dominion and control over the activities and operations of the Cash Store could have no bearing on the issues under section 5(1)(a)).

¶ 25 However, as I understand the plaintiff's position to be that the claims against Rentcash are based solely on its relationship with the Cash Store - and that he does not intend to assert and rely on any direct contact or dealings between Rentcash and the customers - I do not believe that the rule that the pleading should be construed generously would justify a different interpretation.

¶ 26 In consequence, the claims against Rentcash will not be included in any order certifying the proceedings. Plaintiff's counsel indicated that, if only the claims against the Cash Store are accepted for certification, the plaintiff might subsequently move for leave to amend the statement of claim to rectify the deficiency in the pleading of claims against Rentcash. Counsel also advised that, if leave to amend was granted, the plaintiff might also move to include the claims in any certification order that may be made on this occasion. It would obviously be inappropriate for me to comment on the likely outcome of any such hypothetical motions, and I refrain from doing so.

Section 5(1)(b): an identifiable class

¶ 27 At the hearing, plaintiff's counsel proposed the following class definition which had been revised to meet a number of objections raised by defendants' counsel in their factum:

> Any person in Canada, resident outside the Province of British Columbia, who borrowed money as a 'payday loan' from a Cash Store location, and who repaid the loan and the standard broker fee charged by the Cash Store (22.54 % of the loan amount to March 11, 2004; 25 per cent of the loan amount after March 11, 2004) on or after the due date of the loan.

¶ 28 The definition excludes persons resident in British Columbia in deference to the similar proceeding against the present defendants that was certified in *Bodnar v. The Cash Store Inc. et al.,* [2005] B.C.J. No. 1904 (B.C.S.C.) where the class was confined to residents of British Columbia.

¶ 29 Subject to the defendants' objections to the inclusion of persons resident outside Ontario, the definition is in my opinion acceptable. The criteria are objective, rather than subjective, and the class is not over-inclusive in the sense explained by McLachlin C.J. in *Hollick v. City of Toronto* (2001), 205 D.L.R. (4th) 19 (S.C.C.), at para 21. There is also the necessary rational connection between the members of the class and the common issues to which I will refer.

¶ 30 Defendants' counsel raised two objections to the inclusion of persons not resident in the province. The first - and the more fundamental - is that the court has no jurisdiction to bind persons who obtained loans from the Cash Store in the other provinces or territories in which they were resident. The second - alternative - objection is that, even if such jurisdiction exists, the court should not exercise it in the circumstances of this case.

¶ 31 The challenge to the court's jurisdiction raises issues that have yet to be decided definitively by an appellate court in Ontario, or by the Supreme Court of Canada. They have been debated at length in numerous learned articles and in papers presented at legal conferences. They have also been discussed in a number of decisions at first instance in this court - some of which have been upheld on appeal without any specific analysis of the jurisdictional questions. In two decisions released earlier this year, judges in Quebec and Saskatchewan expressed reservations about the width of the jurisdiction that this court had been asked to exercise.

¶ 32 At the most general level, the problems raised by so-called "national classes" relate to the manner in which the real and substantial connection test endorsed by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye,* [1990] 3 S.C.R. 1077, *Hunt v. T&N plc,* [1993] 4 S.C.R. 289 and *Beals v. Saldanha,* [2003] 3 S.C.R. 416 - and applied by the Court of Appeal in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) and *Currie v. McDonald's Restaurants Canada Ltd.* (2005), 74 O.R. (3d) 321 (C.A.) - is to be adapted to the special features of class proceedings and, in particular, to those that exist in Ontario and Alberta - and in some foreign jurisdictions - where legislation enables the court to bind class members who do not opt out of the proceedings. The issues are whether a real and substantial connection must exist between each member of the class and the forum and, if so, what connecting factors will be relevant and acceptable for this purpose.

¶ 33 Although the traditional roles in *Emanuel v. Symon,* [1908] 1 K.B. 302 (C.A.) have now been replaced by the more flexible principles in *Morguard*, the emphasis in proceedings other than class actions is still, for the most part, placed on the contacts between the defendant and the forum. Of these the defendant's activities within the forum that are material facts, or otherwise closely connected with the cause of action, are particularly important. When extending the real and substantial connection test to non-resident class members in opt-out jurisdictions, there is clearly an analogy between the position of such members and that of defendants in individual actions in that the issue is whether the court has power to bind them. There are, however, differences. One is that the class members are also in the position of plaintiffs - albeit passive plaintiffs. The purpose of the litigation is, or should be, to confer benefits upon them and even where - as is most commonly the case - the proceedings end with a settlement, this purpose is reflected in the requirement that the court must approve it as being in the class members' interests.

¶ 34 The potential detriment to class members is the reverse of that confronting defendants contesting jurisdiction in individual proceedings. The members face the risk of being bound by a decision in favour of the defendants, or one that will provide them with less compensation than they believe is their entitlement. Depending on the significance to be attributed to the right to opt out, these consequences effect a loss of autonomy and, even independently of them, such a loss will result from the members' compelled involvement with proceedings in which they may not desire to participate. I note that this result can occur in any proceeding in the limited circumstances in which rule 5.03(5) is applicable.

¶ 35 The significance to be placed on the existence of the right to opt out is, of course, an important consideration. If the failure to do so could be regarded as analogous to an implied submission to the jurisdiction by a defendant, the arguments against acceptance of national classes would be much weaker.

¶ 36 On the present state of the authorities that I must, or should, follow, it is settled that the inclusion of non-residents within a class for the purposes of the CPA will not *per se* amount to an excess of jurisdiction: *Western Canadian Shopping Centres Ltd. v. Dutton,* [2001] 2 S.C.R. 534 (a class of "foreign investors"); *Currie* (customers of McDonald's restaurants in Canada included in a class certified in Illinois). In other cases, involving claims in tort, a sufficiently substantial connection between Ontario and non-resident class members has been found to exist if the locus of the tort was in Ontario, or aspects of the alleged tortious conduct of the defendants *vis a vis* each of the class members occurred here: *Nantais v. Teletronics Proprietary (Canada) Ltd.* (1995), 25 O.R. (3d) 331 (G.D.)*; Carom v. Bre-X Minerals Ltd.* (1999), 43 O.R. (3d) 441 (G.D.). The decision of the Court of Appeal in *Currie* - a case of recognition of a foreign judgment - is consistent with the findings in such cases.

¶ 37 The more difficult cases - of which this is one - are those in which the claims of the non-resident class members are based entirely on material facts that occurred outside Ontario. In such a case, the only connecting factor between Ontario, on the one hand, and such members and their claims, on the other, may be that they have claims against the same defendants and that these raise the same common issues as the claims of class members resident in Ontario over whom - and whose claims against the defendants - the court has jurisdiction.

¶ 38 In some of the cases, the existence of such a connection has been found to be sufficient. In *Wilson*, for example, at paras 65 and 66 Cumming J. stated

> As already discussed, there is a real and substantial connection between the alleged cause of action in tort by Ontario residents against the defendants. In my view, this court's jurisdiction is well-founded in respect of the claims of Ontario residents ....
> The CPA is merely a procedural statute. It affords the latitude to a court to establish a "national class" in a class proceeding. In my view, the CPA is not unconstitutional on the basis that the Ontario legislature is legislating extraterritorially. The CPA allows this court to include non-residents as parties in an action in which Ontario has unquestioned jurisdiction with respect to Ontario residents.

¶ 39 Essentially the same approach was, I believe, followed by the learned judge in *Vitapharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2005] O.J. No. 1118 (S.C.J.), referring back to his earlier decision in the same case: [2002] O.J. No. 298 (S.C.J.), paras 100-101.

¶ 40 Similarly, in *Harrington v. Dow Corning* (1997), 29 B.C.L.R (3d) 88 (B.C.S.C.), Mackenzie J. noted that resident and non-residents shared the same common issue and stated:

> It is that common issue which establishes the real and substantial connection necessary for jurisdiction.

¶ 41 Again, in *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389 (S.C.J.), in accepting and national class, Brockenshire J. stated:

> Here, I regard the common interest of the class members, the commercial realities of the situation, and the broad objectives of the Ontario Act, as outweighing any concerns expressed over extra territorial involvement of the Ontario court.

¶ 42 I believe it is fair to say that the learned judges in the decisions at first instance in Ontario and British Columbia were influenced by the utility of having all claims decided in one court in the same proceeding and, also, in the earlier cases, by the fact that class proceedings statutes were then in force in

only three provinces.

¶ 43 The reasoning in the last three cases I have mentioned does not fit happily with that of the courts of Quebec and Saskatchewan in *HSBC Bank Canada Ltd. v. Hocking*, [2006] J.Q. No. 507 (S.C.) and *Englund v. Pfizer Canada Inc.*, [2006] S.J. No. 9 (Q.B.), respectively.

¶ 44 *Hocking* involved claims against the defendant bank for an alleged overcharging of penalties when mortgages, or hypothecs in Quebec, on residential properties were prepaid. The bank operated through its offices in different Canadian jurisdictions including Ontario and Quebec and its customers presumably dealt with an office in the jurisdiction where they were resident and the property was located. This court certified an action brought against the bank in Ontario on behalf of a national class and approved a settlement of the proceeding. The settlement was to be binding only if an order recognising and giving effect to that of this court was made by the Superior Court of Quebec. Roy J. subsequently refused to grant such an order on a number of grounds. In her judgment, this court had no jurisdiction to make an order in a proceeding in Ontario that would bind residents of Quebec; if it had possessed such jurisdiction, it should have declined to exercise it on the ground of the doctrine of *forum non conveniens*; there been a lack of procedural fairness at the certification hearing in this court in which the objections of a Quebec resident had not been accepted; and the notice given to the Quebec members of the class was inadequate.

¶ 45 On the first ground, I understand the finding of the learned judge to have been based, strictly, on the provisions of Article 3168 of the *Civil Code of Quebec* which stipulates that, in personal actions of a patrimonial nature, the jurisdiction of a foreign court will be recognised only in specified circumstances that did not include those of *Hocking*. Roy J. did, however, refer to the decisions in Ontario in the context of her consideration of the following submission of counsel for the objector in this court:

> [The objector] submits that a court which is not competent to hear the case of a class member cannot gain such jurisdiction through the assertion of collective rights. The class members who are residents of Quebec did business with HSBC in Quebec, and as such the contractual obligations had to be enforced in Quebec; the fault alleged took place in, and the injury was suffered in Quebec. The action of class members resident in Quebec thus had no connection with Ontario. (para 43)

¶ 46 The learned judge then noted that the decisions cited by counsel did not directly address the issue that counsel had raised. She then commented:

> A careful study of the authorities submitted by the parties demonstrates that, in the majority of cases where the court found a real and substantial connection in the context of class actions involving class members resident in several provinces, the connection was between the forum, the action and each individual member of the class. (para 45)

¶ 47 Roy J. then referred to *Carom, Nantais* and *Currie* as cases where a real and substantial connection was found to have existed between each class member, Ontario and the proceedings in this court.

¶ 48 A similar lack of enthusiasm for national classes was indicated by Klebuc J. in *Englund*. The case concerned allegedly harmful effects of drugs marketed throughout Canada by a subsidiary of a German corporation. The subsidiary had its business office in Ontario but sales representatives in Saskatchewan as well as in Ontario and other provinces. An application for a stay of proceedings of a class action in Saskatchewan was sought on the ground that a similar proceeding was pending in

Ontario. Each of the actions was brought on behalf of a national class. Although the action for a stay was based on the principle of *forum non conveniens*, the court's reasons for denying a stay were more widely framed. Klebuc J. stated (at para 44):

> I reject [the defendant's] submission that the Ontario CPA allows for the creation of a "national class" that binds non-Ontario residents unless they opt out of a class action certified in Ontario because the laws of Saskatchewan do not recognize legislation enabled by other jurisdictions that intentionally encroaches on the right of its residents to seek judicial recourse for losses they suffered as a consequence of a tort or other breach of law committed within the Province. (para 44)

¶ 49 Neither in *Hocking* nor in *Englund* was any reference made to the reasoning in the decisions in Ontario, and in British Columbia, that have accepted a more expansive approach to jurisdiction. While the courts in Quebec and Saskatchewan may limit the jurisdiction of the court to cases where one or more of the material facts that constitute each class member's cause of action against the defendants occurred in Ontario, the more expansive approach accepts as a sufficiently real and substantial connection a commonality of interest between non-resident class members and those who are resident in the forum and whose causes of action have sufficiently real and substantial connections to it to ground jurisdiction over their claims against the defendants.

¶ 50 Until further guidance is provided by an appellate court, I intend to follow the decisions of this court that apply the wider approach to jurisdiction. I do not believe that to do so would be inconsistent with the decision in *Currie* - the one decision of the Court of Appeal in which jurisdictional issues created by the inclusion of non-residents in a class have been considered. In *Currie,* the issue related to the recognition of a foreign judgment and not to the jurisdiction of this court. As, however, the Court of Appeal found that the decision of the foreign court was made without jurisdiction and, as, in the modern law, jurisdiction for the purpose of recognition and for the purpose of an assumption of jurisdiction by a court of the forum can require an application of the real and substantial connection test, as well as principles of order and fairness, the reasoning of the court has some bearing on the jurisdictional question that arises in this case.

¶ 51 Sharpe J.A. commenced his analysis by recognising that the application of the real and substantial connection test and of principles of order and fairness, to unnamed non-resident plaintiffs in a class action raised a novel point. He referred to the differences between the position of a class member and that of a typical defendant in a traditional two-party lawsuit and was of the opinion that rules for recognition and enforcement should reflect these differences. While recognising the duty of the court to ensure that the interests of class members are adequately represented and protected, he insisted that it would be wrong to approach the issue by asking simply whether the court in Illinois would have had jurisdiction over the defendants at the suit of a Canadian plaintiff:

> The court must have regard to the rights and interests of unnamed plaintiffs who did not participate in the [Illinois] proceedings. The question of jurisdiction should be viewed from the perspective of the Ontario client of a McDonald's Canada restaurant, participating in a promotional prize giveaway presented by McDonald's Canada, who has done nothing to invoke or submit to the jurisdiction of the Illinois court. (para 21)

¶ 52 On the basis of his analysis and assessment of the competing considerations - in which he emphasised the importance of procedural fairness to the class members - the learned judge concluded:

> In my view, provided (a) there is a real and substantial connection linking the cause of

> action to the foreign jurisdiction, (b) the rights of non-resident class members are adequately represented, and (c) non-resident class members are accorded procedural fairness including adequate notice, it may be appropriate to attach jurisdictional consequences to an unnamed plaintiff's failure to opt out. In those circumstances, failure to opt out may be regarded as a form of passive attornment sufficient to support the jurisdiction of the foreign court. (para 30)

¶ 53 While the reasons, and the decision, in *Currie* make it clear that the special position of class members may have a serious impact on issues of jurisdiction, I do not think they provide unequivocal guidance for a case like this where all the material facts that give rise to a non-resident class member's cause of action would have occurred outside Ontario and their only other connection to Ontario consisted of a commonality of interest with the proposed representative plaintiff and the resident class members over whose claims against the defendants this court has jurisdiction.

¶ 54 In *Currie* the court in Illinois was found to lack jurisdiction for the purpose of recognition and enforcement because of inadequacies in the notice given to the Canadian residents. In consequence the third of the preconditions to jurisdiction identified by Sharpe J.A. was not satisfied. The first - "a real and substantial connection linking the cause of action to the foreign jurisdiction" - was found to have been satisfied in the following passage (at para 22):

> The principal connecting factors linking the cause of action asserted in Currie's proposed class action to the state of Illinois are that the alleged wrong occurred in the United States and Illinois is the site of McDonald's head office. The alleged wrongful conduct, manipulating the "random" selection of winners of "high-value" prizes to ensure that no such prizes would be awarded to contestants in Canada, occurred in the United States. This factor is a "real and substantial connection" in favour of Illinois jurisdiction.

¶ 55 As I read that passage, and the reasons as a whole, the court was not required to, and did not, consider whether the position would have been different if all material facts constituting the causes of action of the non-resident and resident class members had occurred outside, and inside the forum, respectively. Before one could apply the first of the learned judge's preconditions to jurisdiction to such a case, it would be necessary to answer the question: "Whose cause of action?" It is with respect to that situation that the views of the courts in Quebec and Saskatchewan may be at variance from those expressed in this court and it is the situation that arises in this case.

¶ 56 By incorporating fairness considerations into the rules for jurisdiction, the reasoning in *Currie* abandons some of the traditional distinctions between jurisdiction and recognition. As between the provinces and territories of Canada, the latter must still, however, accommodate the requirements of full faith and credit referred to in *Hunt*. It is possible that what I have described as the expansive approach to jurisdiction adopted in some of the previous decisions in this court can co-exist with rules of recognition that give weight to such requirements, as well as with an application of the principle of *forum non conveniens* - modified if necessary - where proceedings have been commenced in more than one jurisdiction. Whether or not this would be an appropriate method of dealing with the problems of national classes in the absence of uniform legislation, I believe I should follow the previous decisions of this court in deciding the jurisdictional question posed by the facts of this case.

¶ 57 For these reasons, I am not prepared to accept the defendants' submissions that there is no real and substantial connection between Ontario and the claims of residents of other Canadian provinces and territories, and that this is sufficient to deprive the court of jurisdiction to bind them in these proceedings.

¶ 58 There remains, of course, the question whether the other two preconditions to jurisdiction identified in *Currie* have been, or will be, satisfied. They relate to the requirements of order and fairness that the Court of Appeal insisted were pre-requisites to a finding of jurisdiction, and not separate defences to an action to enforce a foreign judgment.

¶ 59 The issues relating to adequate representation and notice are likewise not considered to bear only on the circumstances in which a court might properly decline to exercise a jurisdiction that has been found to exist. Although, perhaps inevitably, the submissions of counsel tended to blur the distinction between matters that go to jurisdiction and those relate to the appropriateness of its exercise, both adequate representation and notice are required by the provisions of the CPA. The adequacy of representation arises under section 5(1)(e) and will be dealt with in that context. The appropriate notice to be given to class members is usually considered if and when the requirements for certification have been found to be satisfied. Defendants' counsel did, however, submit that order and fairness would not be served if I included persons resident outside Ontario within the class. This, said Mr Pinos, would be unfair to both the defendants and such persons because of the lack of any specific connections between the latter and Ontario, and because the claims of each such class member arise under a separate contract governed by the laws of the province or territory in which it was effected.

¶ 60 I do not find these submissions to be compelling in the circumstances of this case. The claims based on section 347(1) of the *Criminal Code* will not be affected by variations in the governing laws, the same general principles of contract law will apply in all jurisdictions other than Quebec and the submission of plaintiff's counsel that the specific provincial statutes that have been pleaded are similar in their language and effect was not disputed. In these respects, the case is materially different to that in *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2003), 66 O.R. (3d) 112 (S.C.J.), where Haines J. declined to exercise jurisdiction over non-resident members of a putative class. In my judgment, considerations of order and fairness militate in favour of extending the class to include persons outside Ontario so as to make it unnecessary for a separate action to be commenced on behalf of claimants in each of the other Canadian jurisdictions. It is, I believe, in the interest of class members to keep the number of law suits to a minimum and I see no unfairness to defendants in permitting this to be done by accepting a class that includes persons not resident in Ontario. The possibility that, if the class was restricted to residents of the Province, separate lawsuits in each other province and territory might not be commenced and that, in consequence, the defendants' exposure to liability would be more limited would not, in my opinion, give rise to unfairness in any relevant sense.

¶ 61 Mr Pinos submitted that, even if non-residents are to be included within the class, residents of Nunavut and Quebec should be excluded because the Cash Store did not operate in those jurisdictions. Although this must significantly reduce the likelihood that class members will be resident in those jurisdictions, it does not eliminate the possibility that persons now resident in those provinces had previously obtained payday loans from a Cash Store located elsewhere in Canada. Just as former residents of British Columbia could be included in the class, I do not think I would be justified in accepting the proposed limitation.

¶ 62 I was also asked by defendants' counsel to exclude residents of Alberta on the ground that similar litigation against the defendants is pending there. Although counsel understood that the litigation is "in abeyance", they did not appear to be certain about its exact status. I have, in previous cases, indicated that, for reasons of comity, I would ordinarily defer to the jurisdiction of other Canadian courts - in which substantially identical or overlapping proceedings are pending - by excluding persons resident within their respective provinces or territories from a class to be accepted for the purpose of the CPA. I would follow the same practice in this case subject to the possibility that an order certifying the proceedings in this case might subsequently be amended to expand the class in the event that the proceedings in Alberta are permanently stayed, or discontinued, without a settlement on the merits.

(Since these reasons were prepared, I have been informed by plaintiff's counsel that he now recalls having advised the Court in Alberta that he would not be seeking to have residents of that province included in the class in this proceeding).

Section 5(1)(c): common issues

¶ 63 The common issues proposed on behalf for the plaintiff relate solely to the broker's fees charged, and to be retained, by the Cash Store. In general terms, the issues have been framed to determine:

(a) whether the agreements with the Cash Store, or its receipt of the brokerage fees, breached the provisions of section 347(1)(a) or (b) of the *Criminal Code*;
(b) if the infringement of section 347(1)(b) occurred, whether the Cash Store was unjustly enriched and to that extent is a trustee, or is liable to account, to the class members; and
(c) whether transactions by the Cash Store that infringed the provisions of section 347 (1)(a) or (b) constituted harsh and unconscionable practices in contravention of applicable provincial legislation.

¶ 64 Similar issues are proposed with respect to Rentcash but, in view of my finding that no cause of action has been adequately pleaded against it, they cannot be accepted. For essentially the same reason, an issue relating to the liability of the defendants for punitive damages - an issue that, it seems, is premised on a finding that Rentcash was unjustly enriched - must be rejected.

¶ 65 The defendants did not dispute that the question whether the transactions between the Cash Store and its customers breached sections 347(1)(a) would be a common element of the claims of each member of the class. It was not disputed that the terms on which the loans were advanced - including the payment of the broker's fee - were standard terms at all Cash Store locations across Canada.

¶ 66 Defendants' counsel submitted that a resolution of each of the other proposed common issues would require an examination of the facts relating to each loan and, in consequence, could not be effected at a trial of common issues. In Mr Pinos' submission, the question whether breaches of section 347(1)(b) had occurred could not be a common issue because it is established that there is no such breach if the payment of interest at a criminal rate arises from a voluntary act of the debtor: *Garland v. Consumers Gas Co.*, [1998] 3 S.C.R. 112, at para 58; *Degelder Construction Co. v. Dancorp Developments Ltd.*, [1998] 3 S.C.R. 90 at para 34. Whether a payment was voluntary was, he submitted, essentially a question that could only be answered after an examination of the facts relating to each individual loan. I do not accept that submission.

¶ 67 In *Degelder*, Major J defined the concept of a voluntary act as "an act wholly within the control of the debtor and not compelled by the lender or by the occurrence of a determining event set out in the agreement". Here the payment of the brokerage fee was required by the agreement and there is no suggestion that there could be any subsequent events that would provide the borrowers with any option, or ability, to determine whether or not it would be charged. I do not consider that the decision of the Divisional Court in *Markson v. MBNA Canada Bank*, [2005] O.J. No. 4625 - or my decision at first instance in the same case, [2004] O.J. No. 3226 - provides any support for the defendants' position on this point. In *Markson*, I accepted a common issue relating to a breach of section 347 - without distinguishing between paragraphs (a) and (b) of section 347(1) - but held that the plaintiff had not discharged the burden of demonstrating that a resolution of certain common issues relating to each class member's claim for restitution would constitute a sufficiently significant step in the attempts by the class

members to enforce their claims. On the appeal, the majority of the Divisional Court agreed with that conclusion (at para 49). The facts of *Markson* differed from those of this case in that there were several variables that could affect whether the interest charged exceeded a criminal rate and a number of these were within the control of the debtors. While, in view of these variables, an examination of the individual facts of each transaction would be required to determine whether interest at a criminal rate had been received and the extent, if any, of the defendants' unjust enrichment, the threshold question whether, and in what circumstances, the payments at such a rate were voluntary depended, as here, on the terms of the agreements between the parties and could therefore be accepted as a common issue.

¶ 68 In my judgment, the existence of the variables that, in *Markson*, would affect the question whether interest at a criminal rate was received on any particular loan - and the amount of such interest - distinguishes the facts on which the decision was based from those of this case. The broker's fee was charged upfront, and the question whether it is to be considered to be interest at a criminal rate can be determined as a common issue without an inquiry into the subsequent acts of the borrower and the other circumstances of the transactions. I do not accept the submission of defendants' counsel that "only a minimal number of circumstances surrounding the contract can be determined at a class-wide level" if the word "minimal" is intended to suggest that material facts relating to the common issue could not be decided on this basis.

¶ 69 To a large extent, the defendants' objections to the commonality of the issue relating to the unjust enrichment of the Cash Store were based on what I have found to be an incorrect assumption that the plaintiff's claims extend to the 59 % interest and the $10 cash card fee, and were not confined to the broker's fee. In addition, it is pleaded in the statement of defence that the terms of the contract provide a juristic reason for any enrichment that may have occurred. While the existence of a contract has often been referred to as an adequate juristic reason, I do not believe that this can be so when the enrichment is alleged to have resulted from a contract that breached the provisions of section 347 and is alleged to have been unjust for that reason. Just as in *Garland v. Consumers Gas Co. (No. 2)* (2004), 237 D.L.R. 4th) 385 (S.C.C.), compliance with orders of the Ontario Energy Board that conflicted with section 347 of the *Criminal Code* was held not to provide a juristic reason, a finding that interest received in contravention of the section was pursuant to a contract will not provide a defence to a claim for unjust enrichment. An illegal reason surely cannot be an acceptable juristic reason. On that basis, the contract in this case would not fall into one of the "established categories" of juristic reasons referred to in *Garland No. 2*.

¶ 70 In *Garland No. 2* it was held that, if a plaintiff can satisfy the court that the established categories are not applicable, the defendant may still establish the existence of a juristic reason by reference to public policy considerations and the reasonable expectations of the parties. In that case, the relevant public policy consideration was found to be that "a criminal should not be permitted to keep the proceeds of their crime" and the same must be the case here. Mr Pinos, however, submitted that the court must consider the reasonable expectations of the parties and that this will require it to look at all the circumstances surrounding each loan. However, in the absence of any evidence that might suggest that either of the parties had, or might reasonably have had, expectations of sufficient relevance to constitute a juristic reason for the enrichment of the defendants - and evidence that such expectations with respect to the loan would have varied from case to case - I would not reject the proposed common issues relating to the unjust enrichment of the Cash Store. Nor would I do so on the basis that the plaintiff is seeking an equitable remedy and that all such remedies are said to be discretionary. Judicial discretions are exercisable in accordance with settled principles and not at the whim of the court. In the absence of any minimum evidential basis for a finding of facts that might attract an application of such principles, a bald assertion that a remedy lies within the discretion of the court will not detract from any commonality it would otherwise possess.

¶ 71 I understand the proposed common issue that refers to the provincial legislation to be confined to the question whether loan transactions entered into in breach of section 347(1)(a) of the *Criminal Code* are to be considered as, *per se*, "harsh and unconscionable" and, as such, also in contravention of the statutes in force in some of the provinces. Construed in that manner, it would not give rise to individual issues relating to the circumstances of the parties and of the negotiations for each loan, as suggested by counsel for the defendants.

¶ 72 In the result, I am satisfied that the proposed common issues relating to a breach of section 347 (1)(a), and the potential liability of the Cash Store for unjust enrichment in respect of the alleged breach of section 347(1)(b), and of the unconscionable transactions legislation of Ontario, Manitoba, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and Saskatchewan, would be shared by all class members. These issues do not extend beyond the agreement to receive, and the receipt of, the broker's fees. Although breaches of provincial consumer protection law were pleaded, no common issues in respect of such breaches, as such, were proposed or addressed at the hearing.

¶ 73 I note that very similar common issues with respect to breaches of section 347, and a consequential unjust enrichment of the Cash Store, were accepted in *Bodnar* for the purpose of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. However, the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 that was referred to in that case has not been pleaded in these proceedings. I do not know whether this was an oversight. The statute would be relevant only with respect to any customers who obtained payday loans in British Columbia and are now resident elsewhere in Canada.

¶ 74 I am also satisfied that the resolution of the common issues in favour of the plaintiff is likely to advance the proceedings substantially. For the reasons I have given, I do not accept the defendant's identification of a myriad of individual issues that, it was submitted, would remain to be determined and would outweigh any benefits to be obtained from the common issues trial. If, at the trial, the plaintiff is successful in proving a breach of section 347(1)(b), and a consequential unjust enrichment, this would appear to be a case where the court could, and probably would, make an aggregate assessment of restitutionary damages pursuant to the powers conferred by section 24(1) of the CPA.

¶ 75 The parties have not been able to provide a precise estimate of the size of the class but it appears that there may be several hundred thousand members though, possibly, significantly less than 1 million. The evidence of the president and secretary of the Cash Store - who was also the president and chief executive officer of Rentcash - was that, from the beginning of 2003 to the third quarter of 2005, the Cash Store brokered 1,135,463 loan transactions and that the average amount of the loans was $367. There was no evidence of the number of individuals who were involved in more than one such transaction although counsel considered that this would probably have occurred.

¶ 76 The defendants have not denied the likelihood that, if breaches of section 347(1) are proven, it will be possible for the defendant to estimate from its records the aggregate amount of interest charged, and received, at a criminal rate. It is essential to the plaintiff's case for certifying the proceedings that the transactions between the Cash Store and its customers at each of its locations followed a standard pattern and that the terms on which the loans were arranged and the broker's fees were charged did not vary significantly. The only significant variations are likely to relate to the term of each loan - which, on the evidence, would not have exceeded 18 days - and the amounts advanced to the class members. In consequence, a resolution of the proposed common issues should substantially resolve the claims of the class members one way or the other. If the issues are decided in favour of the class, the only steps remaining should be to make an aggregate assessment of damages, to determine the manner in which these are to be applied for the benefit of the class members and - subsequent to the trial - to identify them and the loan, or loans, each received, if this is found to be necessary. In this connection, I note that the provisions of section 26 of the CPA authorize the trial judge to make *cy pres* distributions whether or

not all of the class members can be identified, or the exact share of each can be determined, and notwithstanding the fact that persons other than class members may incidentally benefit.

Section 5(1)(d) - a class action as the preferable procedure.

¶ 77 In view of the common issues I have accepted, the plaintiff has, in my judgment, established a strong case for a finding that certification would accord with the three objectives of the CPA: access to justice, judicial economy and behavioural modification. For the purposes of the statute, access to justice does not require that each claimant will receive a distribution of part of the amount for which a defendant has been found liable. Section 26(4) of the CPA recognizes that members may benefit otherwise than from a direct distribution to each of them. Justice is, moreover, accessed by proceedings that will recognize and affirm that the rights of class members have been infringed.

¶ 78 The amounts that each of the class members may claim to have been unjustly deprived of are likely to be so small that I would be reluctant to certify the proceedings if I had accepted the submission of defendants' counsel with respect to the issues that would have to be decided on a case by case basis through a series of mini-trials. A costs benefit analysis would then suggest - as I believed to be the case in *Markson* - that any benefit to the class to be obtained by certification as a class proceeding would be non-existent. I do not believe that certification should be denied in a case like this - where a trial of the common issues may well determine the question of liability - just because the amounts each class member could legitimately claim are likely to be so small - so small, in fact, that even the enforcement of individual claims in the small claims court would very likely be prohibitively expensive.

¶ 79 In his dissenting judgment on the appeal to the Divisional Court in *Markson*, O'Driscoll J. accepted, and endorsed, the submission of the appellant's counsel that a "classic case for certification as a class proceeding" was presented when:

1. The defendant has received interest at a criminal rate;
2. The damages each class member has suffered are small;
3. Absent a class proceeding, the class members will be denied access to justice;
4. Absent a class proceeding, the defendant may continue to flout its legal obligations;
5. Absent a class proceeding there will be no remedy reasonably available to the class; and
6. Absent a class proceeding, the defendant will be permitted to keep the proceeds of its crime.

¶ 80 Although I had not regarded such considerations as determinative on the particular facts and the issues in *Markson*, I believe they are compelling on the facts of this case given the extent to which the common issues would dispose of the question of the Cash Store's liability and, probably, the computation of the total amount of any unjust enrichment to be attributed to it. In consequence, the conclusion of O'Driscoll J. that "this case fits perfectly into the mould of design for class proceedings" is one that I would respectfully echo in disposing of this motion.

Section 5(1)(e) - A suitable representative plaintiff with a litigation plan

¶ 81 The defendants challenged the ability of the plaintiff to represent the class on the ground that his answers in cross-examination reveal that he is unable to recollect facts relating to his numerous transactions with the Cash Store. I am not able to attribute any significant weight to this objection. Mr McCutcheon's personal recollections of the number, the amounts and the terms of the loans made to him

are likely to be of far less importance than the evidence in the documents obtained from the defendants at discovery. It is on the basis of these that his claims and those of the other class members will likely stand or fall. He has retained experienced counsel and - notwithstanding the need to prove and rely upon the laws of other Canadian jurisdictions to a limited extent - I see no reason to doubt that his interests and those of the class will be adequately represented. The other facts that he could not remember include matters such as the layout of the Cash Store he attended, the names of the employees he dealt with and the details of the conversations he had with them. I do not believe that these facts should be material at a trial of the common issues I have accepted.

¶ 82 There is nothing to suggest that Mr McCutcheon has any potential conflicts of interest with the other class members, or that his transactions with the Cash Store were in any way atypical. Contrary to the submission of defendants' counsel I do not accept that "his individual circumstances may differ greatly from those of a large number of other class members" in any respect that could materially affect a determination of the common issues. As was the case with counsel's submissions on the preferable procedure, the objections to Mr McCutcheon as a representative plaintiff were premised largely on the existence of numerous individual issues that I do not consider should arise.

¶ 83 For the same reason, I believe that most of the defendants' objections to the proposed litigation plan miss the mark. Given the small size of the maximum amounts recoverable if the broker's fees are held to include interest at a criminal rate, and the likelihood that an aggregate assessment of damages could be made, plaintiff's counsel submitted that it was neither necessary nor appropriate for him to provide a detailed litigation plan that would deal with the distribution of any amount recovered. In his submission, this question would best be left to the discretion of the judge at the trial of the common issues after the facts relating to the size of the class and the amounts recoverable have been determined and the question of an aggregate assessment has been dealt with. Counsel submitted that, if the common issues were decided in favour of the plaintiff and the members of the class, the powers conferred in section 24 and 26 of the CPA - including the power to order a *cy pres* distribution pursuant to section 26 (4) - would provide the trial judge with ample authority to fashion an appropriate distribution procedure. I am in agreement with these submissions.

¶ 84 I do, however, agree that further attention is required to the form of notice to be given to class members and the manner in which this will be done. Subject to a satisfactory resolution of that matter - which can be dealt with at a case conference - there will be an order certifying the proceedings against the Cash Store in accordance with these reasons.

¶ 85 Counsel should seek an appointment to deal with the question of costs or, if they would prefer to make their submissions in writing, those of the plaintiff should be made within 14 days of the release of these reasons and any responding submissions of the defendants should be made within a further 10 days.

M.C. CULLITY J.

QL UPDATE: 20060516 cp/e/qw/qlrxl/qlrsg/qlhcs/qlltl

Indexed as:

Nantais v. Telectronics Proprietary (Canada) Ltd.

Between
Nantais et al., and
Telectronics Proprietary (Canada) Limited et al.

[1996] O.J. No. 5386

Ontario Court of Justice (General Division)
Brockenshire J.

March 19, 1996.
(32 paras.)

Practice — Costs — Entitlement.

Motion by the plaintiffs for an order that the contingency fee agreement did not affect their right to recover costs of motions generally, and particularly of the motion re jurisdiction. A class action by over 1,000 persons had been certified. The action was a product liability case. Various defendants objected to the jurisdiction of the Court. A finding was made in favour of the plaintiffs and the question of costs was reserved. The plaintiffs claimed costs on that motion on a solicitor/client scale. Subsequent to the jurisdiction motion, they moved successfully for certification, which certification order included a grant of party-party costs. The plaintiffs claimed $158,980, including disbursements under that costs order. After the certification, plaintiffs' counsel entered into a fee agreement with the representative plaintiffs that was approved by the court. One defendant argued that the plaintiffs' fee arrangement was illegal as not being authorized by the Class Proceedings Act.

HELD: Motion allowed. The contingency agreement could not affect the entitlement to costs on the certification motion. The fee agreement was not illegal as not authorized under the Act. Costs were intended to indemnify the party to whom they were awarded for the costs that party had to pay to his own counsel. Here, pursuant to the fee agreement, the plaintiffs were not liable to pay any costs per se to their solicitors. The litigation was a proceeding, and under section 131(1) of the Courts of Justice Act, the costs of, or incidental to, a proceeding or a step in a proceeding were in the discretion of the Court. This entitlement to costs was a property right. Section 33(1) of the Act removed the prohibition regarding a class proceeding. The right to claim for costs against the plaintiffs was implicitly acknowledged in the assignment by the client to counsel. The entitlement by counsel to costs did not result in a profit to the lawyer as prohibited by section 20(2) of the Solicitors Act. Under the contingency fee agreement, entitlement of the solicitor was contingent on success by trial or by settlement.

Statutes, Regulations and Rules Cited:

Act Respecting Champerty, R.S.O. 1897, c. 327.

Courts of Justice Act, R.S.O. 1990, c. C-43, s. 131(1).

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 31, 31(2), 32, 32(1)(c), 33, 33(1), 33(2), 33(4)-33(9).

Ontario Rules of Civil Procedure, Rules 12.05(1)(c), 49, 59.03(6).

Solicitors Act, R.S.O. 1990, c. S-15, s. 20(2).

Counsel:

Harvey T. Strosberg, Q.C., for the plaintiffs.
William J. Burden, for the defendant, Pacific Dunlop Ltd.
Ian V.B. Nordheimer, for the other defendants.

¶ 1 **BROCKENSHIRE J.**:— This motion raises, as a threshold issue, the question of entitlement to costs in Ontario, of plaintiffs and their counsel, where an action has been certified under the Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Act"), and a contingency fee arrangement has been entered into. As perhaps befits such new legislation, this motion was argued by telephone conference call, with the decision being reserved.

¶ 2 The Act is new legislation, and its s. 33 is to date the only exception to the rule in Ontario against contingent fees. Although by now a number of class proceedings have been certified in Ontario, counsel tell me that their diligent searches have not turned up any reported or unreported Ontario decision relating to costs where a contingent fee arrangement under the Act is in place.

Positions of Parties

¶ 3 The basic position of the defence is simple -- costs are awarded as a partial or total indemnification of the obligation of a client to his solicitor. If the fee arrangement is such that the client does not owe costs to the solicitor, then the client cannot claim costs from a third party. Further, the defendant Pacific Dunlop Ltd. argues the plaintiff's fee arrangement is illegal.

¶ 4 The response of the plaintiff is based on the provisions of the Act, general policy grounds, and decisions from other jurisdictions. The amounts in issue are substantial, and the outcome is quite important to these parties, and perhaps to others facing similar problems.

Background

¶ 5 A brief background may be helpful in placing the problem in context. This is a class action by over 1,000 people who have had implanted pacemaker leads developed, manufactured and marketed by the defendants, many of which are not Ontario corporations. The plaintiffs allege the leads are subject to fracture, and that on fracture the result can be death or very serious injury to the implanted person. The action is basically a products liability case, framed in negligence, but complicated by the number of plaintiffs, a complex factual background, differing professional opinions, and the number of defendants. Similar litigation, for different plaintiffs, is ongoing in the United States.

¶ 6 Two substantial motions have been fully argued in the action. Various defendants objected to the jurisdiction of this court. A finding was made in favour of the plaintiffs as to most of the defendants then named. The question of costs was reserved, and the plaintiffs now claim costs on that motion on a solicitor/client scale, of $293,205.59 including $47,010.96 in disbursements. Subsequent to the jurisdiction motion, the plaintiffs moved successfully for a certification, which certification order included a grant of party-party costs. The plaintiffs now claim $158,980.11, including $18,136.66 disbursements under that costs order.

¶ 7 Subsequent to certification, the plaintiff's counsel entered into a fee agreement with the representative plaintiffs, binding on all class members and approved by the court. The essence of the agreement was that if the plaintiffs are successful, their counsel shall get all party-party costs plus applicable taxes irrespective of the scale upon which the party-party costs are awarded, interest accruing on such costs, any disbursements not recovered as party-party costs, and the fixed sum of $5,000 per implanted class member. It was deposed, on behalf of the plaintiff's counsel, that if the costs had not been payable to the counsel, the stipulated fixed sum would have been higher. I have nothing to contradict that testimony.

¶ 8 In my view, the certification motion was heard, and an order granted, including an award of costs, before the contingency agreement was entered into. The subsequent contingency fee arrangement cannot affect the entitlement to costs on the certification motion. However, that agreement is now in effect, and the motion re costs on the jurisdiction motion is yet to be argued. In my view, that claim could be affected by the agreement.

Costs as a Sanction

¶ 9 It was conceded by defence counsel that the court would always retain the right, in controlling its process, to make an award of costs against a party, as a sanction for vexatious, frivolous or improper actions. That indeed is the law of Ontario, as most recently enunciated by Feldman J. in Singh v. Singh (1992), 10 C.P.C. (3d) 42 (Ont. Gen. Div.). However, the defence submits that is not an issue on this motion. I accept that for the purposes of this motion, the question involves costs awarded to one side rather than costs awarded against the other side.

Illegality -- The Statute

¶ 10 Counsel for Pacific Dunlop Ltd. argues that the fee agreement of plaintiff's counsel is illegal as not being authorized by the Act, and as offending the Solicitors Act, R.S.O. 1990, c. S.15, and An Act Respecting Champerty, R.S.O. 1897, c. 327. Much is made of the "multiplier" provision of the Act, which this counsel portrays as the only permitted contingency arrangement.

¶ 11 In my view, this interpretation flies in the face of the wording of the Act. I find the wording to be clear, but also find the arrangement of the sections somewhat confusing. The special provisions as to costs are found in ss. 32 and 33 of the Act. In my view it would have been clearer if s. 33(1) and (2) had come first, followed by s. 32 and then followed by s. 33(4) through (9). Section 33(1) and (2) make it clear that generally under the Act, despite the Solicitors Act and the Act Respecting Champerty, there can be an agreement between a solicitor and a representative party (on behalf of that party and those represented by that party) for the payment of fees and disbursements only in the event of success. Section 32 makes it clear that any fee arrangement entered into is not enforceable unless approved by the court, and unless it estimates the expected fee, whether contingent or not, and states the method by which payment is to be made, whether by lump sum, salary or otherwise. If so approved, any amounts owing thereunder are a first charge on any settlement funds or monetary award. Section 33(3) through (9), in my view, creates a special type of "otherwise" under s. 32(1)(c) -- an arrangement under which hourly rates are quoted, with a provision for applying to the court after the fact, for an increase in such hourly rate, based on the risk incurred in undertaking the case under an agreement to be paid only if successful.

¶ 12 I do not view the special provisions relating to "multipliers" for hourly rates as preventing, in any way, other arrangements as specifically authorized under s. 32(1) (c). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just

hourly rate multipliers. I reject the contention that the fee agreement is illegal, as not authorized under the Act.

Cost Awards After Motions

¶ 13 Defence counsel have, among other submissions, placed reliance upon the statement in M.M. Orkin, The Law of Costs (Aurora: Canada Law Book, 1994), at para. 402.1 that normally costs are not payable until the conclusion of the litigation, and that it is only in exceptional circumstances that costs are ordered payable forthwith.

¶ 14 That statement in Orkin is qualified, at least in the update I looked at, later in the same paragraph by a reference to Apotex Inc. v. Egis Pharmaceuticals (1990), 2 O.R. (3d) 126, (Gen. Div.), and to what has now developed into the standard practice in Ontario of fixing costs at the end of a motion. I do not regard the outdated general statement in Orkin as barring in any way the present claim for costs by the plaintiffs.

Costs as Funding

¶ 15 Defence counsel also relied upon Re Ontario Energy Board (1985), 51 O.R. (2d) 333, (Div. Ct.), and other like cases for the proposition that costs are not awarded to a party to permit that party to participate in the litigation -- costs are not to be used as a funding mechanism. I accept that statement of the law as applicable not only to matters before administrative tribunals, but also to matters before the courts and note that to provide assistance to litigants in need, the Class Proceedings Fund of the Law Foundation was created. I was reminded that plaintiffs' counsel, in the certification proceedings, had held out an ability to finance the lawsuit. However, I have no evidence before me of costs being sought to finance further participation. Plaintiff's counsel here simply states an entitlement to costs, not a need of costs as was stated in Ontario Energy Board and other like cases. I reject that argument.

Contingency Fees

¶ 16 The principal issue before me is whether costs can be claimed in view of the contingency fee arrangement.

¶ 17 Plaintiff's counsel argues generally that the act is remedial legislation, intended to improve access to justice. If the defence objection was accepted, the effect would be that only the plaintiffs would be at risk during the lawsuit, with the defendants at liberty to try to grind the plaintiffs down through procedural motions, without facing costs consequences. Further, if the usual costs consequences did not apply, some of the rules, specifically imported into class proceedings, such as the rule on cost consequences of Rule 49 offers would not be effective. Plaintiff's counsel pointed to a recommendation of the Law Society of Upper Canada, that Ontario legislation be amended to permit contingency fees of up to 20 per cent plus party and party costs, and to pronouncements of the Ontario Attorney General that contingency fees shall be permitted. These pronouncements indicate some possible changes may occur in future, but are of little help with the present problem.

¶ 18 The problem, as put by defence counsel, is that costs are intended to indemnify the party to whom they are awarded for the costs that party must pay to his/her own counsel. ere, pursuant to the fee arrangement, the plaintiffs are not liable to pay any costs per se to their solicitors. Since the plaintiffs have no liability, they have no right to claim indemnification. Ryan v. McGregor (1925), 58 O.L.R. 213 at p. 216, (C.A.), was cited in support of this proposition as was Feldman v. Law Society of Upper Canada (1989), 68 O.R. (2d) 157, (H.C.J.). Both of those cases refer back to and again affirm the

conclusion in Jarvis v. Great Western Railway Co. (1858), 8 U.C.C.P. 280 (C.A.). Jarvis was referred to by Seaton J.A. in Coronation Insurance Co. v. Florence (1992), 12 C.P.C. (3d) 340, (C.A.), who in tracing the history of costs awards, cited this Ontario case as determining that the Ontario courts were not going to adapt their costs rules to the situation of a salaried solicitor. The courts of England and of a number of Canadian provinces did make that adaptation.

¶ 19 As Jarvis is the seminal case, it is important to appreciate what it really decided. Chief Justice Draper, at p. 286, found, from the somewhat confusing affidavits that the attorney for the railway (who apparently was a member of a firm of solicitors) had agreed that in consideration of an annual salary, he would bring or defend all actions involving the railway without a charge to them for his services in any such action. He was not to deliver any bill of costs to the railway and he would not have any right to recover costs against them except actual disbursements. That agreement covered "the whole ground of costs between Attorney and client" and "the annual salary is a full compensation, and by the agreement is to bar the Attorney from further claim against his own client". Additionally, however, and as Draper C.J. remarked, "to stimulate the exertions of the Attorney" the attorney was to be entitled to any costs he could recover from other parties. On the basis of that particular agreement, Draper C.J. concluded that

> ... the principal of reimbursement must govern; and as the defendants have made such an arrangement as renders it impossible to apply any part of what they pay their Attorney as a payment on account of the costs of this cause, they are only entitled to tax disbursements.

¶ 20 In Ryan v. McGregor, supra, Middleton J.A. was dealing with a situation where solicitors were employed by an insurance company, and not by the named defendants, who could not be liable for the solicitor's costs. After reviewing the previous cases, Middleton J.A. stated the test be "whether the solicitor can successfully maintain an action against the client for the costs in question". He affirmed Jarvis as having been the law for so long that it should not be disturbed. However, he emphasized the fact that his decision was based on the finding that there was no obligation on the part of the defendants to the solicitors. He made the point that if this was the usual arrangement, whereby the insured defendants had an agreement binding the insurers to indemnify them from costs and the insurer did pay the costs and become subrogated, the insurer could then pursue a claim for costs.

¶ 21 In Feldman v. Law Society, supra, Doherty J. (as he then was) considered a claim for costs, re a full-time and salaried employee of the Law Society, where the Law Society did not have any arrangement with its salaried counsel whereby they were entitled to receive any costs awarded the Law Society in litigation. Doherty J. reviewed all the case-law in Ontario and England and concluded he much preferred the English rule where salaried solicitors could claim costs. He also noted that, by statute, federal, provincial and municipal salaried solicitors could claim for costs, and that by s. 37 of the Solicitors Act, where a corporate solicitor is wholly or partly paid by salary, the corporation could claim costs if the costs are by the terms of employment payable to the solicitor as part of his remuneration in addition to salary. However, in the end, Doherty J. found the well-established line of Ontario authority prohibiting awarding counsel fees where a litigant is represented by salaried counsel, still stands in Ontario.

¶ 22 Clearly the fact situation in Jarvis, Ryan and Feldman is not the fact situation here. I interpret the strong comments of Doherty J. in Feldman as his conclusion that this line of cases should be restricted to their factual background. That is my own view.

¶ 23 I am here dealing with a contingency fee arrangement, which is a new concept in Ontario. Mr. Justice Cory, in an unreported motion decision of the Supreme Court of Canada dated August 8, 1994 in Coronation Insurance Co. v. Florence, had this to say regarding contingency fees:

> The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. For many years it has been rightly observed that only the very rich and those who qualify for Legal Aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. There he noted that the total legal bills of all parties in an average General Division lawsuit (including those that settle before trial) may easily amount to between $40,000 and $50,000. Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the court's facilities in civil matters for the wealthy and powerful.

¶ 24 In this case, without the fee arrangement, the representative parties would have been entitled to claim costs. The litigation is clearly a proceeding, and under s. 131(1) of the Courts of Justice Act, R.S.O. 1990, c. C.43, the costs of, or incidental to, a proceeding or a step in a proceeding are in the discretion of the court. Section 31 of the Act gives some specific direction to the court in exercising its discretion and provides in s. 31(2) that class members other than the representative party are not liable for costs except in relation to their individual claims.

¶ 25 Rule 12.05(1)(c) of the Rules of Civil Procedure provides that judgments or orders disposing of class proceedings shall contain directions with respect to the payment of costs.

¶ 26 This entitlement to costs is clearly a property right, which would be assignable by the client, were such assignment not somehow prohibited. Section 33(1) of the Act removes the prohibitions in relation to class proceedings.

¶ 27 Also clearly, counsel is entitled to be paid by the clients, and can enter into an agreement on that payment. The contingency fee agreement here, whereby counsel is to receive a lump sum plus party and party costs, clearly is completely different from the agreements in Jarvis, Ryan and Feldman where the solicitor agreed, in exchange for a salary to have no right to claim for costs against the client. Here the right to such claim is implicitly acknowledged in the assignment by the client to counsel. The entitlement by counsel to costs does not result in a "profit" to the lawyer as is prohibited under s. 20(2) of the Solicitors Act and as discussed at some length by Master Powers in Zsigmond v. Sabulsky (1993), 20 C.P.C. (3d) 184 (B.C.S.C.), because by the very terms of the agreement, the amount to be received by counsel is no more than the client agreed to pay.

¶ 28 As between the parties, any party-party costs awarded are the property of the client. Under rule 59.03(6), an order for the payment of costs shall direct payment to the party entitled, and not to the party's solicitor. However, the client can, and commonly does, agree with the solicitor to assign such entitlement to the solicitor, and directs payment accordingly.

¶ 29 Here, under the contingency fee agreement, the entitlement of the solicitor is contingent on success at trial or by settlement. If pursuant to the client's direction or otherwise, payments of costs are received by the solicitor before judgment or settlement there would be an obligation to account, if in the end the proceedings should fail.

¶ 30 However, that is a matter between counsel and the client. It does not in any way affect the right of the client to claim costs or the power and authority of the court to award costs.

Disposition

¶ 31 The plaintiffs seek an order that the contingency fee agreement does not affect their right to recover costs of motions generally, and particularly of the motion re jurisdiction. For the reasons above given, I grant that order.

Costs

¶ 32 The plaintiffs also seek costs of this motion on a solicitor/client basis against the defendants given the alleged scandalous nature of the submissions in Pacific Dunlop Ltd.'s factum. These are the allegations that the contingency fee agreement was somehow illegal. While the factum referred to is strongly worded, the oral submissions made it clear that the questions raised were not ones of moral turpitude, but of statutory and contract interpretation. The plaintiffs shall have their costs of this motion on a party and party basis payable forthwith after either being fixed by me or being assessed. The question of whether the costs shall be fixed or assessed shall be determined together with the questions of entitlement to and the scale of costs on the jurisdiction motion, all on a date to be arranged among counsel with the trial co-ordinator or direct with me.

QL Update: 20010425
qp/s/np/qlmjb

Nash et al. v. The Queen in Right of Ontario et al.

Nash et al. v. CIBC Trust Corporation et al.

Falloncrest Financial Corporation et al. v. The Queen in Right of Ontario

[Indexed as: Nash v. Ontario]

27 O.R. (3d) 1
[1995] O.J. No. 4043
Nos. C22206, C22998, C22185

**Court of Appeal for Ontario,
Finlayson, Carthy and Austin JJ.A.**

December 22, 1995

Civil procedure — Pleadings — Statement of claim — Striking out — Test for striking out pleading as not disclosing cause of action — Crown freezing assets of mortgage broker and land development company — Mortgage broker, land development company, and investors, bringing actions against Crown alleging breach of statutory duty, negligent performance of statutory duty or power and negligent investigations — Crown moving to strike pleadings — Court must accept facts alleged in statement of claim as proven unless they are patently ridiculous or incapable of proof — Court should not dispose of matters of law not fully settled in jurisprudence — Appellate court reversing motions court judge and dismissing motions to strike.

Civil procedure — Stay of proceedings — Crown freezing assets of mortgage broker and land development company — Criminal proceedings brought against principals of mortgage broker and of land development company — Mortgage broker, land development company, and investors, bringing civil actions against Crown alleging breach of statutory duty, negligent performance of statutory duty or power and negligent investigations — Crown moving for stay of civil proceedings — High threshold test for staying civil proceedings — Civil actions by investors not stayed — Civil actions by mortgage broker stayed as interference with criminal process for purpose of having pre-trial access to Crown witnesses beyond that afforded on preliminary hearing.

Morgan Trust (later CIBC Trust) was the trustee of funds invested by Dr. Nash and others (the "Nash appellants") in syndicated mortgages on properties owned by Mater's, a development company whose principal was AD. The mortgage brokers for Mater's projects were Falloncrest Financial Corp. and Falloncrest Properties Inc., whose directing minds were PF Sr. and PF Jr. (collectively, the "Falloncrest appellants"). In January 1990, the Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Relations (the "Director") acting under the Mortgage Brokers Act, R.S.O. 1990, c. M.39, froze the assets of Mater's and Falloncrest Financial Corp. and appointed an investigator and Morgan Trust, allegedly at the instigation of the Director, sought the appointment of a receiver and manager of Mater's. Later in 1990, Mater's was placed in bankruptcy. In 1992, AD, PF Sr. and PF Jr. were charged with 26 offences in relation to the operation of Falloncrest Financial Corp. In 1994, in three separate actions, the Falloncrest appellants sued the Crown, the Nash appellants sued CIBC Trust, and the Nash appellants sued the Crown. In the latter action, Dr. Nash appeared on his own behalf, as a

representative plaintiff under the Class Proceedings Act, 1992, and as an assignee of Mater's claims pursuant to an order of the Registrar in Bankruptcy. In 1995, upon the motion of the defendants, the paragraphs in the statements of claim in the actions against the Crown that alleged breach of statutory duty, negligent performance of a statutory duty or power and negligent investigations were struck from the pleadings and all three actions were stayed pending the completion of the criminal proceedings. The Nash appellants and the Falloncrest appellants appealed.

Held, the appeals should be allowed in part.

The standard for striking pleadings was not satisfied in this case. On a motion to strike out a pleading, the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies. At this stage of the proceedings, the court should not dispose of matters of law that are not fully settled in the jurisprudence. The law in this case was not so clear that it was plain, obvious and beyond doubt that the actions could not succeed. Accordingly, the pleadings ought not to have been struck.

There is no general rule that requires a stay of civil cases merely because criminal charges relating to the same matter are pending. In fact, a court will normally deny a stay unless the applicant demonstrates that his or her case is an extraordinary or an exceptional one. This is a high threshold test, and even the potential disclosure of the accused's defence or of self-incriminating evidence is not necessarily exceptional. Here, it was not the accused seeking a stay, and it was for the defendants, like any other applicants, to meet the burden of proving extraordinary or exceptional circumstances warranting a stay. Exceptional circumstances were not established in the actions brought by the Nash appellants against the Crown or CIBC Trust. The circumstances, however, of the Falloncrest appellants' action against the Crown were different. The allegations were such that the Falloncrest appellants' claims would have little merit if the Crown's criminal prosecutions succeeded. The motivation of the civil action against the Crown was suspect, and it appeared that its objective was to interfere with the criminal process and have a pre-trial access to Crown witnesses beyond that afforded on the preliminary hearing. Thus, it was appropriate not to interfere with the motion judge's discretion to stay the civil proceedings until the conclusion of the prosecutions.

Cases referred to

Belanger v. Caughell (1995), 22 O.R. (3d) 741 (Gen. Div.); Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959, 74 D.L.R. (4th) 321, 49 B.C.L.R. (2d) 273, 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; R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 (C.A.); Seaway Trust Co. v. Kilderkin Investments Ltd. (1986), 55 O.R. (2d) 545, 29 D.L.R. (4th) 456, 11 C.P.C. (2d) 140 (H.C.J.); Stickney v. Trusz (1973), 2 O.R. (2d) 469, 45 D.L.R. (3d) 275, 25 C.R.N.S. 257, 16 C.C.C. (2d) 25 (H.C.J.), affd (1974), 3 O.R. (2d) 538, 46 D.L.R. (3d) 80, 28 C.R.N.S. 125, 17 C.C.C. (2d) 478 (Div. Ct.), affd (1974), 3 O.R. (2d) 538 at 539, 46 D.L.R. (3d) 80 at 82, 28 C.R.N.S. 125 at 126, 17 C.C.C. (2d) 478 at 480 (C.A.), leave to appeal to S.C.C. refused [1974] S.C.R. xii, 28 C.R.N.S. 127n; Toronto Dominion Bank v. Deloitte Haskins & Sells (1991), 5 O.R. (3d) 417, 8 C.C.L.T. (2d) 322 (Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6 Mortgage Brokers Act, R.S.O. 1990, c. M.39, s. 26(1)(a)

APPEAL from orders striking paragraphs from several statements of claim and staying three actions.

Alan J. Lenczner, Q.C., and Ronald G. Chapman, for all appellants except Falloncrest Financial Corp. and Peter Fallon, Sr.

Adrian Hill, for Peter Fallon, Sr.

Joan M. Haberman, for respondents, Attorney General of Ontario and Brian Cass.

Paul B. Schabas and Kathryn M.E. Podrebarac, for respondent, CIBC Trust Corp.

BY THE COURT: — These three appeals, Nash v. Ontario (C22206), Nash v. CIBC Trust Corp. (C22998) and Falloncrest Financial Corp. v. Ontario (C22185), were heard together. They are all from the orders of the Honourable Mr. Justice Ground, wherein he stayed all three actions and struck out portions of the statements of claim in Nash v. Ontario and Falloncrest v. Ontario. While the statements of claim plead three separate and distinct causes of action, the actions arise from the same failed investment in a shopping mall.

Facts

The appellants in the Nash actions ("Nash appellants") were investors in Mater's Management Limited ("Mater's"), a business property development company which raised funds by means of syndicated mortgages. The principal of Mater's was Alberto DoCouto. The appellants in the Falloncrest action ("Falloncrest appellants") are Falloncrest Financial Corp. and Falloncrest Properties Inc. ("Falloncrest Companies"), and Peter Fallon, Sr. and Peter Fallon, Jr. The two Fallons were the "directing minds" of the Falloncrest Companies, which acted as mortgage brokers for Mater's projects. The respondent in Nash v. CIBC Trust Corp. was, at material times, Morgan Trust Company of Canada ("Morgan Trust"), a trustee of funds to be invested in mortgages on properties owned or controlled by Mater's. The Nash appellants advanced moneys to Mater's through Morgan Trust.

On January 15, 18 and 23, 1990, the Director of the Consumer Protection Division of the Ministry of Consumer and Commercial Relations ("Director") made a series of directions under s. 26(1)(a) of the Mortgage Brokers Act, R.S.O. 1990, c. M.39 ("M.B.A."). The effect of these directions was to freeze the assets of Falloncrest Financial Corp., Peter Fallon, Jr. and Mater's. The Director also appointed Peat Marwick Thorne Inc. to investigate possible contraventions of the M.B.A. by Falloncrest Financial Corp., Peter Fallon, Jr. and Mater's, among others.

On January 19, 1990, Morgan Trust brought an application before the Ontario Court (General Division) seeking the appointment of a receiver and manager of Mater's assets. It is pleaded in the Nash actions that this application was instituted on the instructions of the Director. Later in 1990, Mater's was placed in bankruptcy.

On January 2, 1992 and at a later date, Peter Fallon, Sr., Peter Fallon, Jr. and Alberto DoCouto were each charged with 26 criminal offences including various counts of fraud, theft and conspiracy in relation to the operations of Falloncrest Financial Corp. These charges were laid following investigations by the Ministry of Financial Institutions under the M.B.A. and by the Ontario Provincial Police. The charges are still outstanding.

On September 27, 1994, the Falloncrest appellants commenced an action against the Crown alleging various forms of improper conduct on the part of the Crown. On November 9, 1994, the Nash appellants also commenced an action against the Crown making similar allegations. In the latter action, Dr. Lawrence Nash is acting in three capacities: on his own behalf as an investor in mortgages; as the representative plaintiff under the Class Proceedings Act, 1992, S.O. 1992, c. 6; and as an assignee,

pursuant to an order of the Registrar in Bankruptcy, of whatever claim was maintainable by Mater's. On December 14, 1994, the Nash appellants commenced a separate action against Morgan Trust, now CIBC Trust Corporation ("CIBC Trust"), for breach of duty as trustee and for breach of certain terms of the trust agreements.

On June 28, 1995, Ground J. struck various paragraphs from the statements of claim in Falloncrest v. Ontario and Nash v. Ontario, ordered particulars with respect to a few other paragraphs in those statements of claim, and stayed both civil actions pending the completion of criminal proceedings against the Fallons and DoCouto. On October 23, 1995, Ground J. also stayed the action Nash v. CIBC Trust Corp. The appellants appeal these rulings.

Issues on Appeal

The following issues were raised in this appeal:

1. in both actions against the Crown, whether Ground J. erred in striking claims for breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation;
2. in both actions against the Crown, whether Ground J. erred in striking claims for unlawful disclosure of confidential information;
3. in the Nash action against the Crown, whether Ground J. erred in striking claims based on the Crown's role and its effect with respect to Morgan Trust's motion for the appointment of a receiver; and
4. whether Ground J. erred in staying the Falloncrest action and the two Nash actions pending the completion of the criminal proceedings against Peter Fallon, Sr., Peter Fallon, Jr. and Alberto DoCouto.

The Falloncrest appellants raised other issues, but those are either not contested by the Crown, or were decided in the appellants' favour by Ground J. and are not cross-appealed. During the course of argument before this court, counsel for the Nash and Falloncrest appellants abandoned issue (2) relating to unlawful disclosure of confidential information.

With respect to all issues affecting the Nash appellants, the Crown submitted that, as an assignee of Mater's through the bankruptcy process, the Nash appellants' rights are no better than those of Mater's. The effect of this would be to tar the investor plaintiffs with whatever wrongdoing can be attributed to Mater's by reason of the alleged criminality of DoCouto, and also to restrict the plaintiffs to the same defences and arguments that Mater's could raise. Whatever merit this argument may have at trial when there is a factual underpinning to the activities of Mater's, it should not be given effect to at this stage of the proceedings. For our present purposes, we accept the allegations in the pleadings as true. This means that the Nash appellants are entitled to be treated as victims of Mater's and the Falloncrest companies. In any event, Dr. Lawrence Nash is also suing in his personal capacity and as a representative under the Class Proceedings Act, 1992, although the class has not yet been certified, and it is too early to deal with his status as a litigant.

We are all of the opinion that the appeals with respect to issues (1) and (3), both involving the striking of claims, should be allowed. The test for determining whether a pleading should be struck was stated by the Supreme Court of Canada in Hunt v. Carey Canada Inc., [1990] 2 S.C.R. 959 at p. 980, 74 D.L.R. (4th) 321 at p. 336:

[T]he test in Canada governing the application of provisions like Rule 19(24)(a) of the

> British Columbia Rules of Court is the same as the one that governs an application under R.S.C., O. 18, r. 19: assuming 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.

On a motion to strike out a pleading, the court must accept the facts alleged in the statement of claim as proven unless they are patently ridiculous or incapable of proof, and must read the statement of claim generously with allowance for inadequacies due to drafting deficiencies: Toronto-Dominion Bank v. Deloitte Haskins & Sells (1991), 5 O.R. (3d) 417 at p. 419, 8 C.C.L.T. (2d) 322 (Gen. Div.). Also, the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence: R.D. Belanger & Associates Ltd. v. Stadium Corp. of Ontario Ltd. (1991), 5 O.R. (3d) 778 at p. 782 (C.A.).

With respect to issue (1), the law relating to breach of statutory duty, negligent performance of a statutory duty or power, and negligent investigation is not so clear that we are prepared to say that these actions must fail. Even the Crown conceded that the law in this area is "muddy". Accordingly, the motions court judge erred in holding that "it is plain, obvious and beyond doubt" that these actions cannot succeed.

With respect to issue (3), accepting that the Crown directed Morgan Trust to apply for the appointment of a receiver and that the Crown knew or ought to have known that Mater's would suffer loss as a result, it is not plain and obvious that no reasonable cause of action can be grounded on these facts. The cause of action may or may not be a weak one, but that should be determined at trial. The Nash appellants' claim of improper Crown influence on Morgan Trust should proceed to trial, especially since other issues arising from the same facts will be litigated in any event: Belanger, supra, at p. 782.

As to issue (4), no general rule in this jurisdiction requires a stay of civil cases merely because criminal charges relating to the same matter are pending. In fact, a court will normally deny a stay unless the applicant demonstrates that his or her case is an extraordinary or an exceptional one: see Stickney v. Trusz (1973), 2 O.R. (2d) 469 at p. 471, 45 D.L.R. (3d) 275 (H.C.J.), affirmed (1974), 3 O.R. (2d) 538 at p. 538, 46 D.L.R. (3d) 80 (Div. Ct.), affirmed (1974), 3 O.R. (2d) 538 at 539, 46 D.L.R. (3d) 80 at 82 (C.A.), leave to appeal refused [1974] S.C.R. xii, 28 C.R.N.S. 127n.

Several reported cases have suggested that the rationale underlying a stay of a civil action pending the conclusion of a related criminal prosecution is the protection of the accused's right to a fair trial: see, for example, Seaway Trust Co. v. Kilderkin Investments Ltd. (1986), 55 O.R. (2d) 545, 29 D.L.R. (4th) 456 (H.C.J.); Belanger v. Caughell (1995), 22 O.R. (3d) 741 (Gen. Div.). In the present case, however, the party moving for the stay is the Crown, and the accused's rights are not at issue. The Crown must, then, show that other extraordinary or exceptional circumstances justify a stay.

The cases are clear that the threshold test to be met before a stay is granted is high. The mere fact that criminal proceedings are pending at the same time as civil proceedings is not sufficient ground for a stay of the latter: Stickney v. Trusz, supra. Even the potential disclosure through the civil proceedings of the nature of the accused's defence or of self-incriminating evidence is not necessarily exceptional: see Belanger v. Caughell, supra; Stickney v. Trusz, supra; Seaway Trust Co. v. Kilderkin Investments Ltd., supra. This high threshold test should not be relaxed merely became it is the Crown that requests the stay. An applicant, whether it is the Crown or the accused, must meet the same burden of proving

extraordinary or exceptional circumstances. The test is not on a balance of convenience for the Crown and something higher for the accused. To the extent that the motions court judge held that it is, he erred.

In our opinion, neither Nash v. Ontario nor Nash v. CIBC Trust Corp. involve circumstances so extraordinary or exceptional as to warrant the stays of these actions. The Nash appellants and CIBC Trust are not parties in the pending criminal proceedings and the issues involved in these two actions are quite distinct from those the criminal charges raise. Falloncrest Financial Corp. v. Ontario, on the other hand, is different. The Falloncrest appellants' allegations are such that their civil claims would have little merit if the Crown successfully convicts the Fallons and DoCouto. The civil action is the reciprocal of the criminal prosecution. Furthermore, the Falloncrest appellants' motivation for instituting their action against the Crown, shortly after their committal for trial, is suspect. The appearance is that their objective in maintaining the civil action is to interfere with the criminal process and to have pre-trial access to Crown witnesses beyond that afforded on the preliminary hearing. We would not interfere with the exercise of the trial judge's discretion in this instance where he stayed these civil proceedings until the conclusion of the prosecutions.

Conclusion

For the above reasons, we would dispose of the issues in this appeal as follows:

1. both of the Nash and Falloncrest appellants' appeals from the striking of their claims based on the Crown's breach of statutory duty, negligent performance of a statutory duty or power and negligent investigation are allowed;
2. the Nash appellants' appeal from the striking of their claim based on the Crown's role in Morgan Trust's motion for the appointment of a receiver is allowed;
3. the Nash appellants' appeals from the stays of their actions against the Crown and CIBC are allowed; and
4. the Falloncrest appellants' appeal from the stay of their action against the Crown is dismissed.

The various orders of Ground J. are varied in order to give effect to the above dispositions.

The Nash appellants shall receive their costs of appeals C22206 and C22998 in any event of the cause. No other party is entitled to costs.

Order accordingly.

Case Name:

Nunes v. Air Transat A.T. Inc.

PROCEEDING UNDER the Class Proceedings Act, 1992

Between
Josephine Nunes and Jorge Nunes, plaintiffs, and
Air Transat A.T. Inc., Airbus S.A.S., Airbus of North America Inc., Rolls-Royce PLC and Rolls-Royce Canada Limited and Airbus GIE, defendants

[2005] O.J. No. 2527
Court File No. 01-CV-217295 CP

Ontario Superior Court of Justice
M.C. Cullity J.

Heard: May 30, 2005.
Judgment: June 20, 2005.
(30 paras.)

Civil procedure — Parties — Class or representative actions — Settlements — Approval.

Motion by the plaintiffs, Nunes and Nunes, for approval of a settlement of the class action against Air Transat, Airbus and Rolls-Royce. The action was for damages suffered by passengers when an Air Transat flight ran out of fuel, lost power and made an emergency landing. The time for opting out had expired and 176 class members would share the settlement. The settlement provided for a $7,650,000 fund plus accrued interest to be distributed to class members after payment of counsel fees, disbursement and expenses. Class members would receive a maximum of $80,000 non-pecuniary damages for post-traumatic stress disorder or $100,000 if accompanied by a significant personal injury. Monetary limits also included $50,000 for loss of income, $5,000 for out-of-pocket expenses and $5,000 for future care expenses. Family Law Act claims would be limited to $5,000. Class members would make claims to class counsel who would give an assessment. Class members could accept the assessment or request review by an arbitrator. The settlement agreement did not allow class members to opt out. In negotiating the settlement, class counsel had obtained questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist and physician. Two class members informed the court that they objected to the settlement.

HELD: Motion allowed in part. Provisional approval was given to the settlement pending the decision on the fees of class counsel. The settlement was fair and reasonable. Class counsel's meticulous investigation concluded that almost all class members would claim to suffer post-traumatic stress disorder or other psychological harm. Given that the Warsaw Convention limited Air Transat's liability to damages for bodily injury, there was a significant risk that claims for post-traumatic stress disorder would not be successful at trial. Class counsel concluded that the case against Rolls-Royce was weak and that Airbus had tenable defences. The monetary limits on damages were carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. The most problematic limit was for loss of income, but there would likely be few claims for loss of income relative to claims for psychological harm. Only one member provided documentation in favour an

income loss in excess of the limit. The fairness and reasonableness of the settlement had to be judged in relation to the class as a whole. In choosing to impose monetary limits, class counsel properly considered the nature of damages likely to be claimed, the likely value of the claims, the possibility that one or a few very large claims for income losses would substantially deplete the amount available for other class members and the need to simplify the claims process to avoid delays.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 29(2)

Family Law Act,

Negligence Act, R.S.O. 1990, c. 1,

Warsaw Convention,

Counsel:

J.J. Camp Q.C., Glenn Grenier and Allan Dick -- for the Plaintiffs

B. Timothy Trembley -- for the Defendant, Air Transat A.T. Inc.

D. Bruce Garrow -- for the Defendants, Rolls-Royce PLC and Rolls-Royce Canada Limited

John Callaghan and Keith Geurts -- for the Defendants, Airbus of North America Inc., and Airbus GIE

REASONS FOR DECISION

¶ 1 **M.C. CULLITY J.**:— The plaintiffs moved for the court's approval of a settlement of this action pursuant to section 29(2) of the Class Proceedings Act 1992 S.O. 1992, c. 6 ("CPA"). There was also a motion for approval of the fees and disbursements of class counsel.

¶ 2 The proceedings involve claims against the defendants for damages suffered by passengers on Air Transat Flight 236 ("Flight 236") when, in August 2001, the aircraft, an Airbus A330, ran out of fuel, lost power in each of its engines and made an emergency landing in the Azores Islands. The defendant, Air Transat A.T. Inc., ("Air Transat") was the operator of the aircraft. Airbus S.A.S. and Airbus North America Inc., (together "Airbus") and Rolls-Royce PLC and Rolls-Royce Canada Limited (together "Rolls-Royce") were sued as responsible for the manufacture of the aircraft, and that of its engines, respectively. Claims were also made on behalf of family members of the passengers.

The Settlement

¶ 3 The proceedings were certified by order of this court on July 4, 2003. The time for opting out has expired and it has now been determined that, of the 291 passengers on board Flight 236, 115 have either opted out or entered into individual settlements with Air Transat - leaving 176 class members who would share in the benefits to be provided under the terms of the proposed settlement. These benefits can be summarised as follows:

1. A fund of $7,650,000, plus accrued interest, is to be paid to an administrator in exchange for a release of all claims of class members arising from the events of Flight 236.
2. The administrator is to invest the fund in income-earning accounts and, after payment of class counsel fees and disbursements and expenses of administration, the fund is to be distributed among class members subject to monetary limits for particular kinds of damages and, otherwise, in accordance with a claims procedure contained in the settlement agreement.
3. The monetary limits on different heads of damages claimed by any member are:

    (a) damages for non-pecuniary loss arising from post-traumatic stress disorder or similar psychological injury would not exceed $80,000 unless accompanied by evidence of other significant permanent personal injury - in which case the maximum amount of non-pecuniary damages would not exceed $100,000;
    (b) damages for past and future loss of income would not exceed $50,000;
    (c) damages for out-of-pocket expenses would not exceed $5000; and
    (d) damages in respect of future-care expenses would not exceed $5000.

4. Family member claimants would be limited to their rights of recovery under the Family Law Act (Ontario) and the claims asserted by all such members that are derivative of the claims of a particular passenger would not exceed $5000.

¶ 4 The settlement provides for class members to make claims, initially, to class counsel who are to provide the claimants with what counsel consider to be a fair and reasonable assessment of the value. Members then would have the option of accepting the assessment or of requesting a review by an arbitrator to be appointed by the court. In the latter event, the arbitrator would determine the value of the claim. Distributions would be made accordingly.

¶ 5 The claims process and the powers and procedures to be followed by class counsel, the administrator, a management committee of counsel - that is to work with the administrator and to make the initial assessment of claims for loss of income - and the arbitrator are set out in some detail in the settlement agreement and in a schedule to it. Caps would be placed on the fees payable to the administrator and to members of the management committee, and on an hourly rate to be charged by the arbitrator. Class counsel would not charge fees for their services in assessing the value of claims in addition to the lump-sum amount that the court is asked to approve in connection with their services to date, and the capped amounts that may be charged by members of the management committee.

The Law

¶ 6 The role of the court, and the standards to be applied, in determining whether a settlement should be approved has been discussed in several decisions of this court including Dabbs v. Sun Life Assurance Co of Canada (1998), 40 O.R. (3d) 429 (G.D.), at page 444, affirmed (1998), 41 O.R. (3d) 97 (C.A.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.), at paras. 77-80; Fraser v. Falconbridge Ltd, [2002] O.J. No. 2383 (S.C.J.), at paras. 13-14; and Vitapharm v. F. Hoffman - La Roche Ltd, [2005] O.J. No. 1118 (S.C.J.), at paras. 110-118.

¶ 7 In Vitapharm, Cumming J. distilled the following principles from the earlier authorities:

(a) to approve a settlement, the court must find that it is fair, reasonable, and in the best interests of the class;

(b) the resolution of complex litigation through the compromise of claims is encouraged by the courts and favoured by public policy;
(c) there is a strong initial presumption of fairness when a proposed class settlement, which was negotiated at arm's-length by counsel for the class, is presented for court approval;
(d) to reject the terms of the settlement and require the litigation to continue, a court must conclude that the settlement does not fall within a zone of reasonableness;
(e) a court must be assured that the settlement secures appropriate consideration for the class in return for the surrender of litigation rights against the defendants. However, the court must balance the need to scrutinise the settlement against the recognition that there may be a number of possible outcomes within a zone or range of reasonableness. 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 obligation.
(f) it is not the court's function to substitute its judgment for that of the parties or to attempt to renegotiate a proposed settlement. Nor is it the court's function to litigate the merits of the action or, on the other hand, to simply rubber-stamp a proposal;
(g) the burden of satisfying the court that a settlement should be approved is on the party seeking approval;
(h) in determining whether to approve a settlement, the court takes into account factors such as:

(i) the likelihood of recovery or likelihood of success;
(ii) the amount and nature of discovery, evidence or investigation;
(iii) the proposed settlement terms and conditions;
(iv) the recommendations and experience of counsel;
(v) the future expense and likely duration of litigation;
(vi) the recommendation of neutral parties, if any;
(vii) the number of objectors and nature of objections;
(viii) the presence of arm's-length bargaining and the absence of collusion;
(ix) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiations; and
(x) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation.

¶ 8 I believe the following statements of Winkler J. in Parsons and in Fraser are particularly apposite to the settlement under consideration in this case:

> It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscience and wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. (Parsons, at paragraph 79)
> Lengthy litigation would not be in the interests of the plaintiffs with its inherent risk and delay. The court must approve or reject the settlement in its entirety. It cannot substitute or alter it. ... The court does not, and cannot, seek perfection in every aspect, nor can it insist that every person be treated equally." (Fraser, at para. 13)

¶ 9 I note, however, that, unlike the position in the above cases, other than Fraser, class members who do not approve of the settlement have no right to opt out of the proceedings as the time in which this could be done has expired and, unlike what I think I was the position in Parsons, such a right is not conferred, or contemplated, by the settlement agreement. As notice of the terms of the settlement and of the approval hearing, and the right to object, that I considered to be reasonable and adequate was given to class members, and only two of them have informed the court that they have objections to the settlement, the potential significance of the inability to opt out at this stage might be considered to be limited to these objectors.

Discussion

¶ 10 Subject to the specific points made by, or on behalf of, the two objectors, I am satisfied that the factors set out above militate heavily in favour of the settlement. The proceedings were contentiously adversarial from the outset and the litigation risks for the plaintiffs were significant. Article 17 of the Warsaw Convention limits the liability of Air Transat to damages for bodily injury. Class counsel conducted a meticulous investigation and review of the likely claims of class members and concluded that virtually all of them will claim to have suffered post-traumatic stress disorder or other forms of mental or emotional harm. Although I found that, for the purposes of certification, the question whether such harm is to be considered to be bodily injury should be included in the common issues to be tried, counsel's research into the interpretation of Article 17 in this jurisdiction, and internationally, convinced them that there was a highly significant risk that the plaintiffs would not be successful on this issue at trial. After a lengthy examination of the evidence relating to the causes of the events on Flight 236, they concluded also that the case against Rolls-Royce was very weak and that Airbus had tenable defences that not only cast doubts on the prospects for establishing liability against it but made it inevitable that the litigation would be protracted and expensive. I see no reason to question the competence, diligence or judgment of class counsel on the assessment of litigation risks or, indeed, in the manner in which the proceedings were conducted and the settlement negotiated at arm's-length between the parties.

¶ 11 When negotiating the terms of the settlement, class counsel had obtained completed questionnaires from all but a few class members to enable their claims to be reviewed with the assistance of a clinical psychologist in Vancouver and a physician in Portugal. This information, and medical reports that were provided by class members, were independently reviewed by each of the firms acting as co-counsel for the purpose of arriving at an estimate of the total value of the claims of class members. All the information was then provided to counsel for Air Transat to enable them to make their own assessment and, after the negotiations that ensued, the settlement amount of $7,650,000 was arrived at. In class counsel's submission, this amount, less counsels' fees, expenses and administration costs should be considered to be fair and reasonable - as well as substantial - compensation for the claims of class members. In their estimate - made on the basis of their assessment of the claims of class members that have already been completed - it should provide each class member with a recovery of at least 70 per cent of the amount likely to be assessed as the value of such member's claim. This is, of course, only an estimate and, to some extent, it is based on assumptions - about, for example, the amounts that will be claimed for loss of income and the number of claims that will be referred to the arbitrator - that might, or might not, turn out to be unduly optimistic.

¶ 12 I am satisfied that the caps proposed to be placed on the recovery of particular heads of damages have been carefully considered and determined principally for the purpose of achieving fairness for the class as a whole. It appears likely that the claims for mental and emotional harm will be made by virtually all of the class members and will be far more common than claims for significant physical injuries or loss of income. The cap of $80,000 for psychological harm ($100,000 if accompanied by significant permanent other injury) was chosen after a review of recent awards in this jurisdiction and elsewhere for post-traumatic stress disorder and similar illnesses.

¶ 13 I should note at this point that, although the terms of the proposed settlement might be construed as limiting claims for physical injuries to those that are accompanied by claims for psychological harm, I understand the intention to be that claims for physical injuries alone - if there are any - are to be compensated subject to a cap of $100,000.

¶ 14 The most problematic of the monetary limits placed on the recovery of particular types of damages is that relating to loss of income. In conducting their preliminary assessment of the value of the claims of class members, class counsel had less information about the potential loss of income than they had relating to the other heads of damages. However, to the extent that they were able to judge, there would be few claims for loss of income relative to those for psychological harm and only one passenger had provided documentation in support of an income loss in excess of the cap of $50,000. That member, I presume was Mr. Manuel Ribeiro, one of the two members of the class who objected to the settlement. At the hearing, counsel indicated that their attention had been drawn to one other such potential claim that, on the basis of the information available to them, they considered to be of doubtful weight.

¶ 15 Through his counsel, Mr. Ribeiro successfully requested an adjournment of the original hearing date appointed for the motion for approval. At the continuation of the hearing, he was represented by Mr. Brian Brock Q.C. who, while disclaiming an intention to object to the settlement agreement in principle, requested that class counsel should be required to revisit it to address a number of issues that he raised in his written and oral submissions. In general terms, these issues relate to (a) whether class counsel gave sufficient significance to the fact that neither Airbus nor Rolls-Royce could claim the protection of Article 17 of the Warsaw Convention and the possibility that, as joint tortfeasors with Air Transat, damages that could not be recovered from it might be recoverable in full from either of them under section 1 of the Negligence Act R.S.O. 1990, c. 1 (as amended) even if only a very small degree of relative fault was apportioned to them; (b) whether the caps placed on non-pecuniary and pecuniary damages are fair and reasonable; and (c) whether the amount of legal fees requested by class counsel, and the manner in which they would be borne by class members, are fair and reasonable.

¶ 16 In an affidavit sworn for the purpose of the motion by Mr. Joe Fiorante - a partner of one of the firms acting as class counsel - he indicated that the arguments mentioned by Mr. Brock in connection with the first of the above issues had been considered by them and advanced in the negotiations for the settlement. I see no reason to reject this evidence or to conclude that the considerations to which Mr. Brock referred are sufficient to remove the terms of the settlement from the "zone of reasonableness".

¶ 17 Mr. Brock's submission that the caps were unfair was made in the context of his opinion that the value of Mr. Ribeiro's claims for non-pecuniary damages for post-traumatic stress disorder and loss of income will exceed the limits of $80,000 and $50,000 that would be imposed under the settlement.

¶ 18 Class counsel's response to the submission with respect to non-pecuniary damages was that already mentioned - namely, that, from their review of damages awarded in recent cases, other than those involving sexual assaults, the $80,000 cap was at the high end of the range and, notwithstanding the evidence that, since the events of Flight 236, Mr. Ribeiro has suffered, and will continue to suffer, psychological difficulties that will require psychiatric support and, probably, adjunct medication, they are not convinced that his claim would fall outside the likely range of damages. Based on their review of damages awards, I do not believe this conclusion is unreasonable although, as an experienced counsel in personal injury cases, Mr. Brock's opinion that a higher award could be obtained merits respect. The fairness and reasonableness of the settlement - including the cap of $80,000 for non-pecuniary damages - must, however, be judged in relation to the class as a whole and is not to be determined in respect of the claims of each member considered separately. The comments of Winkler J. that I have quoted from Parsons and Fraser are in point. On the basis of the record before me, I believe I am justified in deferring to the opinion of class counsel that the cap of $80,000 on non-pecuniary damages would not operate

unfairly in respect of Mr. Ribeiro, let alone in respect of the class as a whole.

¶ 19 Mr. Brock's criticism of the existence of the cap on the recovery for different heads of damages was not based exclusively on his opinion that his client's non-pecuniary damages would exceed $80,000. He made a similar objection with respect to the application of a $50,000 limit to Mr. Ribeiro's claim for loss of income. In his submission, such a limit would operate with obvious unfairness to Mr. Ribeiro in that his potential claim - calculated on the basis of a reduction in his income of $54,000 a year - would be approximately $670,000. Mr. Brock informed me that his client was prepared to testify that, since Flight 236, he has lost his motivation to conduct his landscaping business of 25 years, the number of his employees and his customers has diminished and the business is now confined to grass cutting. In support of his estimate of Mr. Ribeiro's loss of income, Mr. Brock provided unaudited income statements of the corporation that operates the business for 1998, 2000, 2002 and 2004. These show that, between April 2001 and April 2004, the gross income of the corporation declined by approximately $48,600. During that period, operating expenses fell by approximately $49,156. Of this amount, approximately $32,000 represented a reduction in wages paid to employees. Two employees were laid off in the period after Flight 236. No personal income tax returns, or other information, were provided that would indicate the wages, or other amounts, received by Mr. Ribeiro from the business in those years.

¶ 20 The income statements hardly support Mr. Brock's estimate that his client had suffered an income loss of approximately $54,000 a year and, on the basis of the limited information provided, class counsel concluded that they were unable to determine whether Mr. Ribeiro's total past and future income loss would exceed $50,000. I am in no better position. At the most, I can infer that Mr. Ribeiro claims to have suffered a loss of income that will exceed the cap by a significant amount. The question is whether the existence of this claim is, in itself, sufficient to justify a decision to withhold approval of the settlement. In Mr. Brock's submission it is, because it illustrates not merely that the cap is too low but, as well, the unfairness of placing any caps on heads of damages. As he stated in his brief or memorandum filed in the motion:

> If an individual plaintiff's claim falls within the cap it would appear that such person would make a full recovery. Those whose claims exceed the cap would recover only a proportionate share. No explanation is provided as to why those with serious claims should have their claims compromised in this way at the expense of those whose claims are not as serious.
> At a minimum one would expect that the recovery for each plaintiff would be on a pro-rata basis so that the percentage of recovery or loss of recovery would be equal.

¶ 21 Although I cannot amend the settlement, I do not think there is any doubt that I would have authority to refer this aspect of it back to the parties for their further consideration. After giving this matter careful thought, I am not disposed to do this.

¶ 22 As I have indicated, I do not intend to find that the total amount to be paid by Air Transat is less than that which would fall within a zone, or range, of reasonableness. The question that arises is how the net amount is to be distributed among class members if it is less than the total amount of their claims. The provision of caps is one method. Each of the possibilities suggested by Mr. Brock is another. In preferring the first method as being in the best interests of the class as a whole, counsel considered:

(a) the nature of the damages likely be claimed by the great majority of class members;
(b) the likely value of such claims;
(c) the possibility that the existence of one, or a few, very large claims for income

losses would substantially deplete the amount available for distribution to the other class members; and

(d) the need to simplify the claims process to avoid delays and to reduce expenses.

¶ 23 In my judgment each of these considerations was relevant, and properly considered by class counsel. The last of them underlines the necessity to consider the provisions of the settlement as a whole and not to place the focus on particular aspects of it in isolation. The objective of simplifying the claims process is relected in the caps placed on certain types of administrative expenses, the involvement of class counsel without further remuneration and the attempt to devise a process that members will find satisfactory without having recourse to arbitration. Each of these factors presupposes the existence of - and is designed to assist in effecting - an expeditious and economic method of allocating and distributing the net settlement funds among class members.

¶ 24 In my judgment, I would not be justified in finding that the existence, or the amounts, of the caps is so evidently unfair and unreasonable that approval of the settlement should be withheld. Nor do I believe that anything of value is likely to be gained by referring the matter back for further consideration by the parties. I am satisfied that the questions have been carefully considered by them. The qualifications and experience of class counsel were reviewed at some length in the carriage motion early in the proceedings. Nothing has occurred since then to dilute my confidence in the competence and diligence with which they would perform their responsibilities under the CPA. Their ability to identify each of the members of the class has enabled them to conduct an unusually thorough investigation and preliminary assessment of the claims of virtually all of them. Their decision that the imposition of the caps would be in the interests of the class as a whole is one which is entitled to be given considerable weight. I do not believe there is sufficient reason for impeding, or delaying, the implementation of the settlement by asking them to reconsider that decision.

¶ 25 The third of Mr. Brock's objections concerns the amount of the fees of class counsel and the manner in which they would be borne by class members. The appropriate amount of the fees will be considered in an endorsement that will follow the release of these reasons after Mr. Brock has had an opportunity to review the time dockets of class counsel. The extent to which approval is given to the payment of class counsel's fees before the final distribution - and any consequential changes to the terms of the claims process - will also be considered in the endorsement to follow.

¶ 26 The proposal that the fees, as then approved, should come off the top - rather than to be apportioned among class members in accordance with the value of the amounts ultimately distributed to each of them - is, I believe, appropriate in the circumstances of this case where a gross settlement amount would be paid up front by Air Transat and the further services of class counsel - other than those of the management committee - are to be provided for no further charge. Counsel have acted for the class as a whole and have negotiated a settlement on that basis. I see nothing unfair, or unreasonable, in awarding approved fees out of the settlement proceeds without regard to the proportions in which the proceeds will be shared by class members.

¶ 27 The other objection I received was made by Mr. Giancarlo Cristiano in an attachment to an email message to class counsel. In the message Mr. Cristiano thanked counsel for their diligence in dealing with the file and, subject to certain questions, concerns and objections to the terms of the settlement, he expressed his pleasure that it had been reached. In the attached letter he objected that the settlement contained no finding of liability for negligence on the part of Air Transat and no award of punitive damages. He also complained of the level of fees payable to class counsel and the administrator.

¶ 28 The first two of these objections misapprehend both the nature of the settlement as a

compromise between the parties and the powers of the court. The settlement contains no admission of liability, negligence, on the part of Air Transat because it has not agreed to make any such admission. This, of course, is very common in a settlement of litigation and I have no jurisdiction to insert such a provision in the settlement. All I could do would be to refuse approval of the settlement unless it contained an admission of liability. Mr. Cristiano did not ask me to do this and I would not consider such a decision to be in the best interests of class members. Similarly, and contrary to Mr. Cristiano's impression, I have no power to amend the settlement so as to insert a claim for punitive damages.

¶ 29 I will consider Mr. Cristiano's objection with respect to legal fees and expenses of administration in the endorsement that is to follow.

Disposition

¶ 30 Accordingly, pending the decision on the fees of class counsel, I will give provisional approval to the settlement as fair, reasonable and in the best interests of class members. This approval is subject to the terms of the endorsement that is to follow, any necessary adjustments to the times within which claims are to be made, any other acts to be performed and any other amendments counsel may consider to be required as a result of the delay in the release of these reasons. These changes, counsel's submissions with respect to the fees of independent counsel, a few drafting issues and the terms of any formal order can be considered following the release of the endorsement.

M.C. CULLITY J.

QL UPDATE: 20050622 cp/e/qlalc/qlkjg/qlrme/qlmjb

Ontario New Home Warranty Program et al. v. Chevron Chemical Company et al.*

[Indexed as: Ontario New Home Warranty Program v. Chevron Chemical Co.]

46 O.R. (3d) 130
[1999] O.J. No. 2245
Court File No. 22487/96

Ontario Superior Court of Justice
Winkler J.

June 17, 1999

*This judgment was recently brought to the attention of the editors.

Civil procedure — Class actions — Approval of settlement — Proposed settlement containing "bar order" — Bar order precluding claims for contribution and indemnity between settling defendants and non-settling defendants — Court having jurisdiction to approve settlement with bar order — Settlement fair and reasonable and in interests of class members — Settlement approved subject to terms that addressed procedural objections of non-settling defendants — Negligence Act, R.S.O. 1990, c. N.1, ss. 1, 3, 5 — Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 12, 13.

The Ontario New Home Warranty Program ("ONHWP") and two individuals commenced a proposed class proceeding under the Class Proceedings Act, 1992 to advance a product liability claim on behalf of a class of some 11,000 Ontario homeowners who had installed mid-efficiency furnaces with allegedly defective plastic venting pipes. As a consequence of a safety order issued by the Ministry of Consumer and Commercial Relations, the owners of the furnaces had been required to replace the defective piping. ONHWP's claim was a subrogated claim in place of homeowners whom it paid to replace the defective piping.

In early 1996, and thereafter, there were settlement discussions in the action and settlements were reached between the plaintiffs and some of the defendants, the "settling defendants". The plaintiff intended to discontinue the action against certain defendants but to continue the litigation against seven defendants, the "non-settling defendants". The plaintiffs moved for certification against the settling defendants and for approval of the settlement in accordance with s. 29(2) of the Act. The proposed settlement provided for compensation of $800 per unit, and the plaintiffs and the settling defendants agreed that the proportionate liability of the settling defendants was to be fixed at 65 per cent of $800 plus amounts for party and party costs, disbursements, interest, and claims administration. The settlement provided for a simple claims approval process. The settlement also contained a provision described as a "bar order" that would prevent non-settling defendants from making claims for contribution or indemnity. Under the bar order, the plaintiffs agreed to make only several claims against the non-settling defendants such that the plaintiffs shall be limited to the degree of liability proven against the non-settling defendants at trial, but in no event shall such liability be greater than 35 per cent of the total damages proven at trial as against each non-settling defendant.

The bar order precluded claims over in respect of the subject-matter of the class action by or against non-settling defendants or settling defendants.

The settling defendants supported the plaintiffs' motion as long as the judgment approved the entire settlement agreement. The non-settling defendants opposed only the bar order provision of the settlements. The non-settling defendants submitted that the bar order would prejudice them substantively by derogating from their rights under the Negligence Act and procedurally by depriving them of their ability to bear only their fair share of any liability to the plaintiffs. Specifically, they asserted that they would be precluded from conducting effective discovery and denied evidence necessary to establish the respective degrees of fault as between themselves and the settling defendants.

Held, the motion should be granted subject to terms.

The proceeding against the settling defendants met the requirements for certification as set out by s. 5 of the Class Proceedings Act. Subject to the legitimate concerns of the non-settling defendants, the settlement agreement taken as a whole was fair and reasonable and in the interests of the class members, and it brought a significant degree of resolution to a protracted proceeding. The concerns of the non-settling defendants could be addressed without rejecting the settlement.

Section 13 of the Class Proceedings Act, 1992, which provides that a court may stay any proceeding related to the class proceeding, provides a mechanism through which the objectives of a "bar order" could be achieved. This broad discretion was supported by s. 12 of the Act, which permits the court to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding. The court, however, did not have any jurisdiction under the Act to derogate from the substantive rights of the parties, but in the immediate case, there was no derogation of substantive rights nor substantive prejudice. When the bar order was considered in total, it was apparent that did not affect any claim of the non-settling defendants that could be successfully asserted against the settling defendants under the Negligence Act or otherwise. Under the settlement agreement, there would be no claim against the non-settling defendants for contribution and indemnity and since they would be required to pay damages in accordance with their own negligence and liability to the plaintiff, if any, they would have no claim for contribution and indemnity against the settling defendants or against third parties. Because of s. 3 of the Negligence Act, under which the court shall apportion liability, the non-settling defendants could not successfully assert a claim in damages against any party based upon their own negligence, no matter how the claim was characterized.

As to the non-settling defendants' objections based on procedural prejudice, these objections could be addressed without rejecting the settlement agreement because the court had the necessary power under the Act to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. The procedural concerns could be adequately addressed through the terms of approval for the settlement. Accordingly, judgment should be granted approving the settlement but subject to terms upon which the non-settling defendants could obtain documentary discovery, oral discovery, requests to admit and an undertaking to produce a representative to testify at trial.

Cases referred to

British Columbia Ferry Corp. v. T & N plc (1995), 16 B.C.L.R. (3d) 115, [1996] 4 W.W.R. 161, 27 C.C.L.T. (2d) 287 (C.A.); Canada v. Curragh, [1994] O.J. No. 1452 (Gen. Div.); Carom v. Bre-X Minerals Ltd. (1999), 43 O.R. (3d) 441, 30 C.P.C. (4th) 133, [1999] O.J. No. 281 (Gen. Div.); Chace v. Crane Canada Inc. (1997), 44 B.C.L.R. (3d) 264, 14 C.P.C. (4th) 197 (C.A.); Dabbs v. Sun Life Assurance Co. (No. 1), [1998] O.J. No. 1598 (Gen. Div.); Dabbs v. Sun Life Assurance Co. (No. 2) (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381, [1998] I.L.R. 1-3575 (Gen. Div.); Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225, 41 B.L.R. 22 (H.C.J.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 5, 12, 13, 29(2)
Negligence Act, R.S.O. 1990, c. N.1, ss. 1, 5

Rules and regulations referred to

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

Authorities referred to

Cheifetz, Apportionment of Fault in Tort (Aurora: Canada Law Book, 1981), p. 18
Newberg on Class Actions, 3rd ed. (Shepard's/McGraw Hill, 1992), ss. 11.45-46
Report of the Attorney General's Advisory Committee on Class Action Reform, p. 37

MOTION for certification and for approval of a settlement under the Class Proceedings Act, 1992, S.O. 1992, c. 6.

C. Scott Ritchie, Q.C., and Michael Eizenga, for plaintiffs.
Allan A. Farrer, for Chevron Chemical Company.
Robert B. Bell and Peter D. Ruby, for Hart & Cooley Inc.
Lawrence E. Thacker, for Selkirk Metalbestos.
Markus Koehnen and Kathryn Manning, for Underwriters' Laboratories of Canada.
Paul J. Martin, for Underwriters Laboratories Inc.
Marilyn Field-Marsham, Randy A. Pepper and Stephen Lamont, for Armstrong Air Conditioning Inc., Evcon Supply Inc., Inter-City Products Corporation (Canada), Inter-City Products Corporation (U.S.), RHEEM Manufacturing, York International Ltd. and Lennox Industries.
John E. Callaghan, for Consolidated Industries, Welbilt Industries and Nordyne Inc.
F. Paul Morrison and Frank J. McLaughlin, for General Electric Company.
J.A. Prestage, for Carrier Canada.
C. Stephen White and Ellen J. Bessner, for Goodman Manufacturing and Quietflex Manufacturing Company, L.P.
James G. Norton, for Wabco Trane Standard Inc.
John C. Cotter, for American Water Heater Group.
Dominic T. Clarke, for The Canadian Gas Association, Canadian Gas Research Institute, International Approval Services Canada Inc.
Jean C.H. Iu, for Her Majesty the Queen in Right of Ontario.
Cynthia R. Sefton and Murdoch R. Martin, for Consumers Gas Utilities Ltd.
Glenn F. Leslie, for Union Gas Ltd. and Centra Gas Ontario Inc.
No one appearing for CMIL Industries Inc., Superior Propane, Slant/Fin Ltd./Ltée and Weil-McLean division of Marley Canadian Inc.

WINKLER J.: —

The Nature of the Motion

[1] This is a motion to approve the settlement of this action between the plaintiffs and Chevron Chemical Company, Hart & Cooley, Inc., Eljer Manufacturing Inc. c.o.b. as Selkirk Metalbestos,

General Electric Company, Her Majesty the Queen in Right of Ontario, Goodman Manufacturing Co. Ltd., CMIL Industries Inc. c.o.b. as DMO Industries, Nordyne Inc., Wabco Standard Trane Inc., Carrier Canada Limited, Slant/Fin Ltd/ Ltée, Weil-McLean division of Marley Canadian Inc. and Underwriter's Laboratories Inc. (the "settling defendants").

[2] The plaintiffs also seek class certification pursuant to s. 5 of the Class Proceedings Act, 1992, S.O. 1992, c. 6 with respect to the settling defendants.

[3] The plaintiffs seek to discontinue the action against certain other defendants, namely Consumers Gas Utilities Inc., Union Gas Limited, Centra Gas Ontario Inc., Superior Propane Inc., the Canadian Gas Association, the Canadian Gas Research Institute and International Approval Services Canada Inc. This motion was adjourned at the hearing pending the disposition of the motions for certification and settlement approval.

[4] The plaintiffs propose to bring a subsequent motion for certification for litigation purposes with respect to the non-settling defendants which consists of a group of furnace manufacturers represented by one law firm and Underwriters' Laboratories of Canada ("ULC").

The Nature of the Claim

[5] This is a product liability claim concerning residential mid-efficiency gas or propane furnaces, boilers and hot water heaters with high temperature plastic vent ("HTPV") exhaust systems. The claim alleges negligent design, manufacture, negligent misrepresentation, breaches of warranty and misrepresentation, negligent approval, breach of fiduciary duty, and failure to warn.

[6] The action is a proposed class proceeding brought by the Ontario New Home Warranty Program ("ONHWP") and two individuals, as representative plaintiffs. The plaintiff class consists of some 11,000 Ontario homeowners who installed mid-efficiency furnaces with the allegedly defective plastic venting pipes.

[7] ONHWP makes a subrogated claim in place of many new homeowners whom it paid to repair or replace appliances and HTPV piping. The two individual representative plaintiffs were homeowners with heating systems using HTPV. The settling defendants include Chevron, Hart and GEC, three companies against which allegations have been made relating to HTPV. The non-settling defendants are primarily furnace manufacturers, namely, Armstrong Air Conditioning Inc., Evcon Supply Inc., Evcon Industry Inc., Inter-city Products Corporation (U.S.), Lennox Industries (Canada) Ltd., RHEEM Manufacturing Company and York International Ltd. In addition, the defendant Underwriters Laboratory is included in the non-settling group.

Background

[8] Prior to the 1980s, gas- or propane-heating appliances used chimneys or vertical metal vents to carry exhaust gases out of homes and other buildings. In the early 1980s, mid- and high-efficiency appliances were introduced into the marketplace. These appliances could be vented horizontally through the side walls of buildings. The exhaust gas of a mid-efficiency furnace is vented at a high temperature. With the horizontal vent pipes, there was a possibility that the exhaust gas would cool during the venting process, and that the by-products in the gas would form acidic condensates in the horizontal vent pipes. These acidic condensates were known to be corrosive to metal vent pipes.

[9] In response to this problem of corrosion, high temperature plastic venting ("HTPV") was

developed. As a result of the low cost and the corrosion resistance of HTPV, heating systems combining HTPV and mid-efficiency appliances came into wide-spread use.

[10] The plaintiffs allege that mid-efficiency gas or propane appliances, vented with HTPV, result in a defective product (the "heating system"). As a result of residual stresses incurred during manufacture, thermal expansion and contraction of the pipe, and a build-up of acidic condensate during in-service use, HTPV pipes in the heating system were prone to cracking or separating at the joints. This had the potential to release poisonous carbon monoxide gas into the building. Neither the appliances nor the venting pipes were designed with any type of safety device which would prevent defective operation.

[11] Prior to being marketed, these heating systems were submitted to the relevant regulatory bodies for product approval. The National Standards System, a Federation of independent organizations working towards the development of voluntary standardization in Canada is coordinated by the Standards Council of Canada ("SCC"). The SCC delegates the function of setting standards and approving testing procedures to various standards organizations which appoint key people from the relevant industry to develop standards in relation to particular products.

[12] Once a standard has been agreed upon by SCC delegated members, a final draft of the standard is published. This standard must be accepted by the Ministry of Consumer and Commercial Relations ("MCCR") in the Province of Ontario before a product can be marketed. After the standard is accepted by the MCCR, manufacturers submit their product to testing and certification agencies to test the product against the standard accepted by the MCCR, in order to certify that the product meets the relevant standard.

[13] In addition to the requirement for the certification of heating systems, each appliance manufacturer must approve and specify one or more vent products to be installed in combination with its appliances. No vent product other than those which are approved and specified by the appliance manufacturer is permitted to be installed in combination with the appliance.

[14] All of the HTPV products which are the subject of this proceeding went through the process set out above. However, in response to a series of complaints concerning defective heating systems, the MCCR compiled inspection reports and found a high failure rate in the HTPV. As a result, in March 1994 the MCCR issued a consumer alert warning about the possibility that vent pipes found in the heating systems might crack or separate at the joints allowing poisonous gases to escape into homes.

[15] On September 12, 1995, the Ontario Government, through the Ministry of Consumer and Commercial Relations, issued a Director's safety order in respect of heating systems with HTPV. The Director's safety order stated that certain brands of plastic heating vents had been found to be defective and required all homeowners whose furnaces incorporated those vents to replace them by August 31, 1996. Pursuant to the order, natural gas utilities and propane distributors were prohibited from supplying gas after August 31, 1996 to any building in which the vents had not been replaced. The Director's safety order states in relevant part:

Director's Safety Order

Heating Systems with High-Temperature Plastic Vents

> Mounting engineering and technical evidence in Ontario and elsewhere confirms that heating systems using high-temperature plastic vents are defective, that permanent failure

of the vents will take place and that the risk of failure increases with length of service. Specific heating systems using plastic vents bearing the name Plexvent, Sel-vent and Ultravent are affected. Over the past two years, four bulletins and a number of consumer advisories have been issued in Ontario as this evidence has been accumulating.
To eliminate the risk associated with these systems, owners are required to correct them with a fully approved heating system prior to August 31, 1996. The options for correction consist of: (a) an existing appliance with an approved alternate vent, if available, or (b) a replacement heating system consisting of vent and appliance. Temporary repairs made using improved plastic materials are not acceptable corrections after August 31, 1996.
After August 31, 1996, natural gas utilities and propane distributors will no longer be permitted to supply gas to these defective systems in Ontario.

[16] In consequence, all owners of such furnaces were required to replace the vents by the Director's deadline.

[17] In response to the Director's safety order relating to the defective heating systems, the ONHWP was required to establish a program to identify, administer and repair those heating systems covered by the ONHWP warranty program.

[18] Where there was an approved alternative vent product available, the predominant corrective measure involved the replacement of the HTPV with B-Vent and a side-wall power venter, although owners were given a choice of receiving a credit towards the installation of a high efficiency heating system as an alternative. In situations where there was no approved alternative venting product, ONHWP replaced the defective heating system with a high-efficiency heating system.

[19] Not all of the homeowners with defective heating systems had the benefit of ONHWP coverage. Nevertheless, these homeowners were also required to comply with the Director's safety order. In order to comply with the Director's safety order, repairs similar to those described above were effected by the non-covered homeowners at their own cost.

Settlement Discussions

[20] In early 1996, and continuing thereafter, settlement discussions have taken place in this action. To facilitate this process and to bring it to a conclusion, a mediation was conducted in July 1998 before a prominent American mediator, Mr. Kenneth Feinberg, who is experienced in resolving complex litigation proceedings. All defendants were invited to participate in this process but the non-settling defendants, other than Underwriters Laboratory, chose not to attend or make submissions.

[21] The mediation before Mr. Feinberg resulted in a settlement with the defendants GEC, Hart and Chevron. Subsequent to the execution of the settlement agreement by these defendants, the plaintiffs have settled their claims with the following additional defendants:

-- Eljer Manufacturing Inc., c.o.b. as Selkirk Metalbestos;

-- Her Majesty the Queen in Right of Ontario, represented by the Ministry of Consumer and Commercial Relations;

-- Nordyne Inc.;
-- Weil McLean division of Marley Canadian Inc.;
-- Wabco Standard Trane Inc.;

-- Slant/Fin Ltd./LtÚe;
-- American Water Heater;
-- Underwriter's Laboratories Inc.

[22] In addition to these settlements, the plaintiffs have reached an agreement with the defendant DMO Industries, within the context of the receivership affecting that corporation, for a $50,000 payment.

[23] The plaintiffs have also reached agreements with the defendants Goodman and Carrier, who have each conducted voluntary self-administered repair programs.

[24] The plaintiffs propose to discontinue the action against the following defendants:

(a) Canadian Gas Association;
(b) Canadian Gas Research Institute;
(c) International Approval Services Canada Inc.
(d) Consumers Gas Utilities Ltd.;
(e) Union Gas Ltd.;
(f) Centra Gas Ontario Inc.;
(g) Superior Propane Inc.; and
(h) Superior Propane Inc./Superieur Propane Inc.

[25] The plaintiffs intend to continue with the litigation against the following defendants:

(a) Underwriter's Laboratories of Canada
(b) Armstrong Air Conditioning
(c) Evcon Supply Inc./Evcon Industry Inc.
(d) Lennox Industries
(e) RHEEM Manufacturing
(f) Inter-City Corp.(Canada)/Inter-City Corp. (U.S.)
(g) York International Ltd.

The Settlement

[26] The plaintiffs now seek certification against the settling defendants, concurrently therewith approval of the settlement in accordance with s. 29(2) of the Class Proceedings Act, and judgment in accordance with the provisions of the settlement agreement achieved through the mediation process. The settlement provides compensation both to ONHWP and to those individual claimants who were not covered by ONHWP and were thus forced to replace the defective heating systems at their own cost.

[27] The compensatory amounts provided through the settlement are based upon ONHWP's costs to repair the defective systems. ONHWP's total repair costs averaged $1,160 per unit, plus internal administrative costs of $170 per unit. The mediated settlement figure is $800 per unit, exclusive of administration costs. This settlement figure takes into consideration litigation risk, the delays associated with this complex multi-party litigation, and the settling defendants' assertion that the replacement costs were unreasonably high.

[28] From the mediated amount of $800 per unit, the settling defendants and the plaintiffs agreed that the settling defendants proportionate liability was to be fixed at 65 per cent. Consequently, ONHWP's claim as against the settling defendants was settled on the basis of a lump sum payment for all such

claims on the 65 per cent proportionate share of the $800, plus amounts for party and party costs, disbursements, interest, and claims administration. The total ONHWP settlement figure amounts to $5,230,000.

[29] The non-ONHWP claims were also settled on this basis, that is, 65 per cent of the mediated $800 repair cost figure.

[30] In addition, the settling defendants will be responsible for payment of the costs of administering the claims approval process for non-ONHWP claims. The proposed claims administrator is Business Response Inc., a company located in St. Louis, Missouri ("BRI"). BRI is also the claims administrator in a similar action in the United States and is experienced in administering this type of settlement.

[31] Non-ONHWP claimants will be able to take advantage of a simple claims approval process in which they will be compensated upon producing a proof of repair. This process will reduce legal and administrative costs and will allow claims to be processed quickly without the need for individual claimants to engage a lawyer. The period for claims submission will be five months from the mailing of the notice of certification and settlement approval.

[32] A non-ONHWP class member may be excluded from the agreement by completing an opt-out form which may be obtained from the claims administrator. The opt-out deadline will be 60 days from the mailing of the notice of certification and settlement approval.

[33] By virtue of this settlement, class members will be eligible to receive payments within a few months of the notice of certification and settlement approval. Absent this agreement, in the face of complex multiparty proceedings, it could be a matter of years before any benefits are received by the class.

[34] The settling defendants support the plaintiff's motion for approval of the settlement, as long as the judgment approves the entire settlement agreement, especially those provisions which would prevent the non-settling defendants from making any further claims for contribution and indemnity against the settling defendants in respect of any damages award to the plaintiffs at trial.

[35] These clauses are the only aspects of the settlement agreement that are subject to opposition by the non-settling defendants in this proceeding. Under the contested provisions, the court would be issuing an order preventing the non-settling defendants from making any further claims against the settling defendants in relation to any damages suffered by the plaintiffs.

[36] The contentious provisions are contained in cl. 13 of the settlement agreement. They state, in pertinent part:

> . . . all claims for contribution, indemnity, subrogation or other claims over shall be barred in accordance with the following terms:
>
> . . . . .
>
> d) The plaintiffs shall not make joint and several claims against the Non-Settling Defendants or Joining Defendants but shall restrict their claims to several claims against the Non-Settling Defendants such that the plaintiffs shall be limited to the degree of liability proven against the Non-Settling Defendants at trial, but in no event shall such liability of the Non-Settling Defendants be greater than 35% of the total

damages proven at trial as against each Non-Settling Defendant.

e) All claims for contribution, indemnity, subrogation or other claims over, whether asserted or unasserted or asserted in a representative capacity, inclusive of interest, GST and costs, for or in respect of the subject matter of the Class Actions by or against any Non-Settling Defendants or any other person or party are barred by or against the Settling Defendants and Joining Defendants. CLARITY NOTE: The bar order deals only with claims over and is not intended to bar bona fide independent and direct claims and causes of action between settling and non-settling defendants for damages other than those claimed by the Representative Plaintiffs and the Plaintiff Class.

f) 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 persons and/or entities other than Settling Defendants and Joining Defendants.

g) Nothing in this Judgment affects any rights that the Non-Settling Defendants may have to move for leave for discovery and production of documents respecting the Settling Defendants and Joining Defendants pursuant to the Rules of Civil Procedure and, in particular, Rules 31.10 and 30.10.

[37] The plaintiffs and settling defendants contend that the settlement, taken as a whole, is fair and reasonable. They assert that the contested provisions contain adequate safeguards for the non-settling defendants. They point to the fact that the remaining claims of the plaintiffs have been converted from "joint and several" to several claims and that under this "several" approach, the liability of the non-settling defendants will be capped at 35 per cent of the total damages proven at trial. Indeed, the plaintiffs and the settling defendants state that the non-settling defendants can only benefit from this provision because it limits their maximum exposure to liability in damages to the plaintiffs regardless of the ultimate apportionment of the liability as determined by the trial judge.

[38] The plaintiffs and settling defendants characterize the prohibitive provisions as a "bar order". In support of their submissions urging the court to accept these provisions, they rely on "substantial U.S. Authority". The plaintiffs assert in their factum that "bar orders are a common mechanism used by the courts in the United States to assist in the management of complex litigation, and to encourage settlement and provide certainty to litigants while enabling them to reduce litigation costs."

[39] I am unable to accept these American authorities as being dispositive of the issue here. In many instances, the American cases turn on specific statutes providing for the issuance of "bar orders". Furthermore, even where such orders have been granted on a common law basis in the United States, the influence of the statutory regime cannot be ignored.

[40] I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the Class Proceedings Act provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 a court may "stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate". This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

[41] By including ss. 12 and 13 in the Act, the legislature has given the court a flexible tool for adapting procedures on a case specific basis. As stated in the Report of the Attorney General's Advisory Committee on Class Action Reform at p. 37:

[These sections describe] the general power of the Court to control its own process and to

develop procedures as needed from case to case.

(Emphasis added)

[42] In view of the fact that it is apparent that a court has the statutory discretion to issue the order asked for, on appropriate terms, I turn to the objections raised by the non-settling defendants. These defendants oppose the order sought on the grounds that the prohibitive provisions would prejudice them, substantively and procedurally, in presenting any defence that they might have. The non-settling defendants do not object to any other terms of the settlement.

[43] The plaintiffs and the settling defendants take the position that the settlement agreement must either be approved in toto or rejected by the court. Sharpe J., relying on Court of Appeal authority, enunciated this approach in Dabbs v. Sun Life Assurance Co. (No. 1), [1998] O.J. No. 1598 (Gen. Div.). He stated at para. 6:

> It has often been 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; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

[44] In respect of the contention of substantive prejudice, the non-settling defendants assert that they have certain rights under ss. 1 and 5 of the Negligence Act, R.S.O. 1990, c. N.1 to pursue claims against the settling defendants for contribution and indemnity. Thus, they state, this court has no jurisdiction to prohibit the Negligence Act claims because to do so would derogate from a substantive right. Derogation of substantive rights, it is argued, is beyond the power bestowed on the court by the provisions of the purely procedural Class Proceedings Act. In addition, they contend that they have independent claims founded in negligence and negligent misrepresentation against the settling defendants and that part of the damages claimed, based upon these causes of action, will include amounts they may be required to pay to the plaintiffs as a result of the trial.

[45] Moreover, the non-settling defendants claim that the prohibiting provisions contained in the settlement agreement are fundamentally unfair at a procedural level because the provisions deprive them of the ability to effectively ensure that they bear only their fair share of any liability to the plaintiffs. Specifically, they assert that they will be precluded from conducting effective discovery and denied evidence at trial necessary to establish the respective degrees of fault as between themselves and the settling defendants. This is especially prejudicial, they contend, in a context where the main issue at trial will be the nature of alleged defects in products manufactured by the settling defendants, rather than by the non-settling defendants.

[46] As a practical necessity, I will deal with the contested provisions of the settlement agreement prior to determining the other issues on this motion. If the provisions must be rejected on the basis of the objections raised by the non-settling defendants, then the other issues will be rendered moot.

Analysis

[47] The non-settling defendants contend that this court lacks jurisdiction to approve the settlement and issue a concomitant order containing the prohibitive provisions because of the substantive prejudice that will enure to them. The prejudice arises in part, they assert, because the contested provisions represent an abrogation of their rights under the ss. 1 and 5 of the Negligence Act.

[48] These sections provide:

1. Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, in the absence of any contract express or implied, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.

. . . . .

5. Wherever it appears that a person not already a party to an action is or may be wholly or partly responsible for the damages claimed, such person may be added as a party defendant to the action upon such terms as are considered just or may be made a third party to the action in the manner prescribed by the rules of court for adding third parties.

[49] I bear in mind the words of Farley J. in Canada v. Curragh, [1994] O.J. No. 1452 (Gen. Div.), in another context, as a starting point in the analysis of the jurisdictional objection raised by the non-settling defendants. He stated at para. 1:

> . . . jurisdiction cannot be conferred by agreement. Jurisdiction will only be assumed (i.e. undertaken) by this Court when the Court determines that it truly has jurisdiction based upon the legal principles applicable. It will not be taken by this Court merely because it will convenience the parties.

[50] Moreover, this court has noted on multiple occasions that there is no jurisdiction conferred by the Class Proceedings Act to supplement or derogate from the substantive rights of the parties. It is a procedural statute and, as such, neither its inherent objects nor its explicit provisions can be given effect in a manner which affects the substantive rights of either plaintiffs or defendants.

[51] While I have full regard to the preceding caveats, in my view, the non-settling defendants assertion that the Negligence Act affords them substantive rights which will be abrogated by the proposed settlement agreement is untenable. When the prohibitive provisions contained in the agreement are considered in total, it is apparent that they affect no claim of the non-settling defendants that could be successfully asserted against the settling defendants under the Negligence Act or otherwise.

[52] In essence, a claim for contribution and indemnity as between joint tortfeasors is a derivative claim. As stated by David Cheifetz in Apportionment of Fault in Tort (Aurora: Canada Law Book, 1981) at p. 18:

> The basis of the claim for contribution and indemnity is a breach of duty owed by the tortfeasor subject to the claim of the injured person not to the tortfeasor claiming contribution.

[53] Entitlement to the claim only flows from a finding of joint liability between tortfeasors, and a requirement to pay damages, to the plaintiff. In those cases, the trial judge apportions liability as between the defendants, but the plaintiff may obtain satisfaction of the entire judgment from either of them. In the absence of a contractual obligation for indemnification, each of the defendants, on the other hand, has a right to claim contribution and indemnity from the other in accordance with the apportionment of liability found at trial. However, neither defendant may recover from the other any amount attributable to its own negligence. The responsibility for the negligence of each defendant must

therefore be borne by that defendant.

[54] Here, the settling defendants have abandoned any claim for contribution and indemnity as against the non-settling defendants. In addition, the plaintiffs have chosen to seek damages only in the amount for which the non-settling defendants are "severally" liable.

[55] In the result, the rights provided to the non-settling defendants under s. 1 of the Negligence Act form part and parcel of the settlement agreement. There will be no claim for contribution and indemnity as against them by the settling defendants. On the other hand, since they will only be required to pay damages in accordance with their own negligece and liability to the plaintiff, if any, they will have no claim for contribution and indemnity against the settling defendants in respect of any such payment.

[56] The right provided under s. 5 of the Negligence Act is of a different nature in that it allows the non-settling defendants to join third parties who are not already party to the action. It is apparent, however, that the intent of this section is to permit a defendant to have the opportunity of limiting its liability to the plaintiff to that for which it is actually responsible. As such, there can be no concern that the rights under s. 5 will be abrogated in this case. The protections it affords have likewise been incorporated into the settlement agreement. The settling defendants have been party to the proceedings and are now attempting to settle their liability and extricate themselves. In so doing, they have accepted a proportion of the liability but, more so, by virtue of their agreement with the plaintiffs, there are clauses which prevent the plaintiffs from obtaining any damages from the non-settling defendants in excess of the non-settling defendants' actual liability to the plaintiffs.

[57] The non-settling defendants have not delivered a statement of defence to the plaintiffs' claim, nor a statement of claim against the settling defendants in these proceedings. In argument on this motion, counsel for the non-settling defendants gave an undertaking that it is their intention to commence an action against the settling defendants alleging causes of action in negligence and negligent misrepresentation as against them.

[58] The non-settling defendants assert that the settling defendants owed them a duty of care which was negligently breached. This negligence, it is stated, is the direct cause of any damages that the non-settling defendants may be required to pay to the plaintiffs. In consequence, the non-settling defendants contend that this negligence gives rise to an independent tort claim, separate and apart from a claim for contribution and indemnity against the settling defendants. It is the position of the plaintiffs and the settling defendants that such a claim would be nothing more than a claim for contribution and indemnity by another name and, therefore, would be prohibited by the clauses in the settlement agreement.

[59] I do not necessarily accept this characterization of the potential claim of the non-settling defendants. In my view, however, the thrust of the submissions of the plaintiffs and the settling defendants with respect to the effect of the provisions of the settlement agreement is correct. The non-settling defendants cannot successfully assert a claim in damages against any party based upon their own negligence, no matter how such a claim is characterized, because of s. 3 of the Negligence Act. It provides:

> 3. In any action for damages that is founded upon the fault or negligence of the defendant if fault or negligence is found on the part of the plaintiff that contributed to the damages, the court shall apportion the damages in proportion to the degree of fault or negligence found against the parties respectively.

In the result, in any claim against the settling defendants, any damages of the non-settling defendants

attributable to their own negligence cannot be recovered.

[60] On the other hand, damages which have been incurred by the non-settling defendants independent of any liability to the plaintiffs in a concurrent tort can be pursued and are not foreclosed by the contested provisions of the settlement agreement. The clarity note appended to cl. 13(e) of the agreement speaks to this.

[61] For these reasons, I do not find that there is any substantive prejudice caused to the non-settling defendants by the contested provisions, nor is there any deprivation of any protections conferred upon them by the Negligence Act.

[62] I turn next to the non-settling defendants' contention that the contested provisions will prejudice them on a procedural level. In support of this contention, the non-settling defendants rely on a decision of the British Columbia Court of Appeal in British Columbia Ferry Corp. v. T & N plc, [1996] 4 W.W.R. 161, 16 B.C.L.R. (3d) 115 (C.A.). Although they rely on this case in support of their assertion of procedural prejudice, I observe that the decision supports the above reasons in so far as the allegation of substantive prejudice is concerned.

[63] In the B.C. Ferry case, the plaintiffs had sued a group of asbestos manufacturers. The manufacturers sought to add the installers of the asbestos to the action by way of third party proceedings. The plaintiffs entered into agreements with several of the third parties, in which the plaintiffs agreed that they would not seek to recover from the manufacturers any portion of the damages which a court attributed to the fault of the third parties.

[64] The manufacturers sought contribution and indemnity from the third parties, and in addition, damages for the out of pocket expenses incurred in defending the plaintiffs' claim as well as a declaration as to the degree of fault, if any attributable to each third party. The third parties, in a series of proceedings, moved successfully for dismissal of all of the claims against them.

[65] On appeal the court upheld the dismissal of the claim in contribution and indemnity, on the basis that the agreement between the plaintiffs and the third parties saved the defendants "harmless from any damages caused or contributed to by the fault of the concurrent tortfeasor", thus eliminating any "basis upon which the right to contribution or indemnity . . . could be exercised." In addition, the dismissal of the claim in damages for out of pocket expenses for defending the plaintiffs' claim was upheld. The court found that the trial judge had correctly determined that there was no duty of care existing between the defendants and the third parties such that the claim could be asserted.

[66] However, the appeal in respect of the claim for declaratory relief was allowed because of considerations of fairness to the defendants. Wood J.A. stated at pp. 175-76:

> It would, in my view, 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 on which all parties had joined issue. But that is precisely what will occur here if the defendants are denied the declaratory relief they seek. . . . In those circumstances, I am of the view that the third party claims for declaratory relief should be allowed to proceed.

[67] In respect of submissions that declaratory relief could not issue because there was no lis between the parties, Wood J.A. stated at p. 175:

> While I am of the view that the general rule against sanctioning actions brought for purely procedural relief will always be an important consideration governing the exercise of the court's discretion to grant declaratory relief, I do not accept the proposition that it must be regarded as a controlling consideration in all cases. There will be instances, albeit rarely, where the declaratory relief should be granted notwithstanding the fact that it is needed only for such purpose.
> . . . . One has only to consider the importance to the process of proof of such procedures as the right of discovery, the notice to admit and the ability to call parties as adverse witnesses, to realize that there will be circumstances in which the need to resort to such procedures will meet the expanded definition given to the term "relief" by Lord Justice Bankes in the Guaranty Trust Company of New York case.

[68] The agreement at issue in the B.C. Ferry case was much the same in effect as the provisions of the agreement between the plaintiffs and the settling defendants at issue here. However, the Court of Appeal was able to address the issue of procedural prejudice, without negating the agreement, in such a manner so that the fairness to the defendants was not compromised. Although the decision is not binding on this court, it provides an enlightened guide in the current context.

[69] The procedural objection raised by the non-settling defendants brings to bear the requirement of balancing the interests of the plaintiff class, on the one hand and the defendants, on the other, in a complex class proceeding. The objects of the Class Proceedings Act must be met without prejudice to either the plaintiff class or the defendants.

[70] However, the settlement of complex litigation is encouraged by the courts and favoured by public policy. Indeed, according to Callaghan A.C.J.H.C. in Sparling v. Southam Inc. (1988), 66 O.R. (2d) 225 at pp. 230, 41 B.L.R. 22 (H.C.J.):

> . . . 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.

[71] In consideration of the interests which must be balanced, it is my view that the procedural objections raised by the non-settling defendants can be addressed without a wholesale rejection of the proposed settlement agreement.

[72] This court has pointed out in Carom v. Bre-X Minerals Ltd. (1999), 43 O.R. (3d) 441, [1999] O.J. No. 281 (Gen. Div.), in another context, that [at p. 451], "the CPA is a procedural statute replete with provisions guaranteeing order and fairness".

[73] The Class Proceedings Act is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.

[74] The settlement before this court meets the underlying objective of the Act. There is no objection to its terms, save for the prohibitive provisions. However, if these provisions are not approved, the entire settlement will fail. This will seriously prejudice the plaintiff class in terms of delay and costs of litigation and further, expose the plaintiffs to the risks of litigation. Conversely, to ignore the procedural concerns advanced by the non-settling defendants would unfairly prejudice those parties.

[75] The Class Proceedings Act is sui generis legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here, the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.

[76] Accordingly, I am prepared to grant judgment on the basis of the settlement agreement, subject to terms I set out below. The prohibitive provisions will be entered as a "stay of proceedings", as against the settling defendants under s. 13 of the Act, subject to compliance by the settling defendants with the following terms as they relate to the conduct of the remaining portions of the action.

[77] These terms, generally described, are that the non-settling defendants may, on motion to this court, obtain:

1. documentary discovery and an affidavit of documents in accordance with the Rules of Civil Procedure from each of the settling defendants;
2. oral discovery of a representative of each of the settling defendants, the transcript of which may be read in at trial;
3. leave to serve a request to admit on each settling defendant in respect of factual matters;
4. an undertaking to produce a representative to testify at trial, with such witness to be subject to cross-examination by counsel for the non-settling defendants.

[78] In addition, the fact of the settlement, but not the terms thereof, shall be disclosed to the trial judge at the commencement of trial.

[79] Furthermore, pursuant to its case management powers under the Act, this court shall maintain an ongoing supervisory role in this action. In the event that any settling defendant fails to comply with an order of this court made pursuant to the above terms, the court may, in addressing any such failure, lift the stay of proceedings in respect of that defendant.

Certification

[80] The next consideration is whether the proceeding against the settling defendants meets the requirements for certification as a class proceeding. The elements of the test for certification are set out in s. 5 of the Class Proceedings Act.

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.

(i) Cause of action

[81] The statement of claim discloses a cause of action. The plaintiffs claim damages against the settling defendants arising from, inter alia, their negligent design, manufacture, and failure to establish appropriate and safe standards relating to the heating systems, as well as breaches of statutory duties, warranties and representations, and negligent misrepresentations. The plaintiffs also claim that these defendants failed to warn the public of the potential safety hazard presented by the defective product; to report these defects to the Ministry of Consumer and Commercial Relations; and to recall the defective and dangerous product.

(ii) Identifiable class

[82] The plaintiffs propose that upon certification, the class be defined as

> ONHWP and all persons or entities in the Province of Ontario, Canada who have incurred or will incur remediation expenses as a result of owning a natural gas or propane fired appliance installed with high-temperature plastic venting under the trade names PLEXVENT, ULTRAVENT or SELVENT (manufactured or sold by Chevron, Hart&Cooley and Eljer Manufacturing respectively).

This class definition meets the second element of the test for certification.

(iii) Common issue

[83] The plaintiffs propose that the common issue for the class be defined as:

> What claims does the Settlement Class have arising from the Ministry of Consumer and Commercial Relations Director's Safety Order dated September 12, 1995.

The common issue proposed satisfies the third criterion of the certification requirements.

(iv) Preferable procedure

[84] A class proceeding is the preferable procedure for the resolution of the common issue as outlined above. The aggregate claims of the class are substantial but individually, these claims cannot be litigated economically. On a practical basis, should certification be denied, the result would be to deny access to the courts for many of the claims not covered by ONHWP. In addition to being expensive to litigate on an individual basis, the effect of multiple claims of this nature coming forward would place a heavy burden on judicial resources. In this case, a class proceeding is the preferable procedure for providing members of the class with access to an effective remedy.

(v) Representative plaintiff

[85] Kathy Adetuyi and Andrew Duke are individuals who purchased heating systems with HTPV installed in conjunction with mid-efficiency appliances. Kathy Adetuyi's home was not enrolled in the

ONHWP program and she bore the entire cost of complying with the Director's safety order. Andrew Duke's home was covered by ONHWP. As such, a portion of his cost to correct the defective heating system was borne by ONHWP.

[86] Kathy Adetuyi, Andrew Duke and ONHWP are all prepared to act as representative plaintiffs for the class. Collectively, their actions indicate that they have fairly represented the class and there is no evidence that they will not continue to do so. These proposed representative plaintiffs do not have interests which conflict with the interests of other class members and the settlement agreement provides a plan for the resolution of this proceeding. The proposed representative plaintiffs are acceptable to the court, thus meeting the final requirement for certification.

[87] Accordingly, all of the requirements of the Act regarding certification are met.

Settlement Approval

[88] Finally, I turn to the settlement. For a settlement to be approved it must be fair, reasonable and in the best interests of the class, and, as stated in Dabbs, will generally take into account factors such as:

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; and
8. the presence of arms-length bargaining and the absence of collusion.

[89] The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described by Sharpe J. in Dabbs v. Sun Life Assurance Co. (No. 2) (1998), 40 O.R. (3d) 429, 22 C.P.C. (4th) 381 (Gen. Div.) as follows at p. 440:

> . . . 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 interest of those affected by it when compared to the alternative of the risks and costs of litigation.

[90] Furthermore, the recommendation of class counsel is a factor to be considered, though the potential for conflict must also be noted. Sharpe J. stated at p. 440:

> 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.

[91] In Ontario, the courts have also recognized that the practical value of an expedited recovery is a significant factor for consideration. In Dabbs, Sharpe J. determined that in addition to the legal and factual risks, a practical concern favouring settlement includes the potential that the case would take

several years to reach trial and exhaust all appeals.

[92] Evidence sufficient to decide the merits of the issue is not required because compromise is necessary to achieve any settlement. However, the court must possess adequate information to elevate its decision above mere conjecture. This is imperative in order that the court might be satisfied that the settlement delivers adequate relief for the class in exchange for the surrender of litigation rights against the defendants: see Newberg on Class Actions, 3rd ed. (Shepard's/McGraw-Hill, 1992), ss. 11.45-46.

[93] In the case at bar, the settlement proposed provides compensation to class members through a settlement mechanism that allows partial recovery for the damages of the class. I am satisfied that significant research and investigation was conducted in this matter prior to issuance of the statement of claim. Settlement negotiations between the settling parties have been ongoing since early 1996. These negotiations have been adversarial and protracted. The plaintiffs have been guided in their settlement negotiations by an understanding of the risks associated with the litigation, the potential future expense and the recommendation and experience of their counsel. Further, the terms of the settlement were arrived at as a result of intensive mediation conducted by an experienced arbitrator with specific knowledge of the factual background. The settlement benefits to the plaintiff class are well within the range of reasonableness.

[94] In conclusion, I find that the settlement is fair and reasonable and in the best interests of the class as a whole.

Disposition

[95] This action represents the quintessential class proceeding. It involves a single purpose product which is alleged to be defective. This core element of commonality is such that a determination of liability to the representative plaintiffs would be determinative of liability to the entire class. As stated in Chace v. Crane Canada Inc. (1997), 14 C.P.C. (4th) 197 at p. 202, 44 B.C.L.R. (3d) 264 (C.A.):

> This court recently observed that in a product liability case a determination that the product in question is defective or dangerous as alleged will advance the claims to an appreciable extent. . . . I agree with the chambers judge that is the situation here. The respondents are alleging an inherent defect. . . . This seems exactly the type of question for which a class action is ideally suited and remarkably similar to that concerning faulty heart pacemaker leads that was certified by the Ontario Court (General Division) in Nantais v. Telectronics Proprietary (Canada) Ltd. (1995) 25 O.R. (3d) 331 (Ont. Gen. Div.).

(Citations omitted)

[96] This product liability claim involves thousands of relatively small, nearly identical claims. In the absence of certification as a class proceeding, they would not present viable individual lawsuits because of the costs of litigation. Cost barriers to litigation impact on both access to justice and behavioural modification, two of the goals of the Act. Taken together with the nature of the claim and the element of commonality, the case cries out for certification. The motion for certification against the settling defendants is granted.

[97] The settlement agreement taken as a whole is fair and reasonable and in the interests of the class members. It brings a significant degree of resolution to a protracted proceeding. Although the non-settling defendants have raised some legitimate concerns about the prohibitive provisions, in light of the procedural protections available through the Class Proceedings Act, the Rules of Civil Procedure,

R.R.O. 1990, Reg. 194 and the terms attached to the stay granted in these reasons, these procedural concerns can be addressed without rejecting the settlement. Accordingly, the settlement is approved in its entirety, subject to the terms set out above.

[98] The motion raises a novel point of law and the result is divided. There shall be no order as to costs. I may be spoken to in respect of any other matters arising out of these reasons.

Order accordingly.

Parsons et al. v. Canadian Red Cross Society et al.

Kreppner et al. v. Canadian Red Cross Society et al.

[Indexed as: Parsons v. Canadian Red Cross Society]

49 O.R. (3d) 281
[2000] O.J. No. 2374
Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice
Winkler J.

June 22, 2000

Civil procedure — Class proceedings — Counsel fee — Premium fee — Lump sum counsel fee — Whether fee fair and reasonable — Criteria for determining whether court should approve counsel fee in class proceedings — Class counsel applying for court approval of counsel fees after settlement of two class proceedings on behalf of individuals infected with Hepatitis C from Canadian blood supply — Lump sum counsel fees of $15 million and $5 million respectively approved — Class Proceedings Act, 1992, S.O. 1992, c. 6., ss. 32, 33.

Two class proceedings, the "transfused action" and the "hemophiliac action", under the Class Proceedings Act, 1992 ("CPA") were brought on behalf on all individuals in Canada, except for those in Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period January 1, 1986 to July 1, 1990. There were concurrent class proceedings in Quebec and British Columbia. All the actions were settled by a pan-Canadian settlement agreement that was approved by the courts in Ontario, Quebec and British Columbia and that involved the federal government, which was a defendant, and the provinces and territories, which intervened for the purposes of joining the settlement. The settlement provided for benefits to class members in a global amount of around $1.5 billion and for total class counsel fees of $52.5 million. Over 60 lawyers and legal staff were involved in bringing the proceedings to a conclusion. The class counsel groups in the transfused action applied for approval of a $15 million fee, and the class counsel groups in the hemophiliac action applied for approval of a $5 million fee respectively.

Held, the motion for approval should be granted.

The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA, under which the court may, amongst other things, approve a fee agreement or determine the fees. The CPA permits agreements for the payment of fees and disbursements only in the event of success in a class proceeding. Premium fees in a variety of forms, including a multiplier of a base fee or a lump sum fee, may be awarded to achieve the CPA objective of providing enhanced access to justice. The fairness and reasonableness of any fee awarded is to be determined by the degree of success achieved in light of the risk undertaken by the counsel in conducting the litigation.

In the instant litigation, class counsel produced the best possible result short of a trial. The features of the settlement that provided for individual claim administration and that provided for payments more advantageous to class members than the payment approach commonly applied to personal injury tort litigation enhanced the result and demonstrated the thoroughness of class counsel in fashioning a

satisfactory settlement.

As for the risk factor, in the context of the CPA, the fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters, and the instant case fell within this category. Although there were political overtones to the litigation because of the involvement of the governments, the risks attendant to litigation generally were present. More to the point, the evidence established that the settlement was driven by the threat of litigation and not by political considerations. The settlement negotiations were litigious as evidenced by the length of time and effort taken to reach a binding agreement. The negotiations were logistically difficult, intense, time-consuming, adversarial, and hard fought. The logistical complexity was overwhelming. The insistence of the government that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 governments, each with differing political agendas and policies, and the class counsel groups in the various actions had their own internal disputes and were by no means speaking in a unified voice at all times. At various times "deal breaking" issues surfaced and the success of the negotiations hung in the balance. And there was no merit in the argument that the risks diminished with time as the negotiations progressed. The expert report filed to support the argument of diminished risks was fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of a proceeding. Class proceedings by their nature introduce several features that bear on counsel's risk and that distinguish class proceedings from ordinary litigation. There is the risk that the court will not approve the settlement. There is the risk that the defendant may extend the negotiations and exhaust the resources of class counsel before a settlement can be approved. In the instant case, the evidence was that the risk was increasing as the negotiations continued up until the final judgment was entered. The risk in the instant case was at the high end of the scale of risk.

The fees sought in the two actions were fair and reasonable, and the defendants and intervenors did not put forward any principled or evidentiary basis for reducing the fees. While the fees being sought were substantial, the quantum, in and of itself, does not provide a basis for attacking the fee. The test is whether the fees are fair and reasonable in the circumstances. The policy of the CPA was not to limit the amount of fees but to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued.

The fairness and reasonableness of the fee can be assessed by a variety of corroborating tests. These involve, variously, testing the fee as a percentage against recovery, as a multiple of base fees, as against the retainer agreements and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. On the basis of these tests, the fees, although large, were reasonable. Additionally, the fees compared favourably with the fees awarded in other major class proceedings in Canada and the fees would not impair the sufficiency of the trust fund established to provide benefits for class members. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum contemplated in the retainer agreements were fair and reasonable and accordingly should be approved.

Cases referred to

Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186, 21 C.P.C. (4th) 272 (Gen. Div.); Doyer v. Dow Corning Corp., Que. S.C., Tingley J.S.C., September 1, 1999 (unreported); Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, 167 D.L.R. (4th) 325, 39 C.C.E.L. (2d) 253, 27 C.P.C. (4th) 114 (C.A.); Harrington v. Dow Corning Corp., [1999] B.C.J. No. 320 (S.C.); Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360 (Gen. Div.); Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470, 7 C.P.C. (4th) 189 (Gen. Div.); Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 (S.C.J.); Pelletier v. Baxter Health Care Corp., [1999] Q.J. No. 3038 (S.C.); Serwaczek v. Medical

Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.)

Statutes referred to

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 32, 33 Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Authorities referred to

Ontario, Report on Class Actions (Ontario Law Reform Commission, 1982), pp. 135-38
Ontario, Report of the Attorney General's Advisory Committee on Class Action Reform (February, 1990), p. 20

MOTION for the approval of counsel fees in class proceedings under the Class Proceedings, 1992, S.O. 1992, c. 6.

Harvey T. Strosberg, Q.C., Heather Rumble Peterson and Patricia A. Speight, for plaintiffs, Diana Louise Parsons et al.
Terrence J. O'Sullivan and Vanessa Jolles, for plaintiffs, James Kreppner et al.
Richard F. Horak and M. Michèle Smith, for defendant, The Queen in Right of Ontario.
Michel R. Lapierre, for defendant, Attorney General of Canada.
Beth Symes, for Thalassemia Foundation of Canada, friend of the court.
William P. Dermody, for intervenors, Hubert Fullarton and Tracey Goegan.
Janice E. Blackburn, for Canadian Hemophilia Society, friend of the court.

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[1] **WINKLER J.**: — This is a motion for approval of the counsel fees in two companion class proceedings, Parsons et al. v. The Canadian Red Cross Society et al. (the "transfused action") and Kreppner et al. v. The Canadian Red Cross Society et al. (the "hemophiliac action") commenced under the Class Proceedings Act, 1992, S.O. 1992, c. 6 ("CPA"). These actions were brought on behalf of all individuals in Canada, except for those in the provinces of Quebec and British Columbia, who were infected with Hepatitis C from the Canadian blood supply during the period of January 1, 1986 to July 1, 1990. There are concurrent class proceedings before the courts of Quebec and British Columbia for individuals in those provinces. The parties in all of the class proceedings across Canada have entered into a pan-Canadian settlement of the litigation. In reasons released on September 22, 1999, I approved the settlement as it applied to the national classes in the transfused action and the hemophiliac action. The settlement has also been approved by the courts in Quebec and British Columbia as it relates to the actions in those provinces.

[2] The settlement agreement was presented to the courts for approval by all of the parties to the litigation. It contemplated payment of total class counsel fees for all of the actions in the amount of $52.5 million. That figure was used in the actuarial calculations in order to permit the courts to assess the settlement and the sufficiency of the trust fund established for the payment of claims to the class members in the litigation. The Ontario class counsel groups in the transfused action and in the hemophiliac action now bring this motion for the approval of their fees specifically.

Background

[3] The defendants in the Ontario class actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario and the Attorney General of Canada. In addition, all other provinces and territories of Canada, with the exception of British Columbia and Quebec, intervened for the purposes of joining the settlement. Only the governments participated in the settlement, the proceedings against the CRCS having been stayed as a result of an order of Mr. Justice Blair in respect of ongoing proceedings concerning the CRCS under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36 ("CCAA").

[4] The transfused action and the hemophiliac action were commenced as a result of the contamination of the Canadian blood supply with the Hepatitis C virus ("HCV") during the 1980s. The classes in the actions, however, are described more narrowly as those persons infected by HCV from the blood supply between January 1, 1986 and July 1, 1990.

[5] The classes are confined to the 1986-90 time period because of the basis of the claims asserted in the actions. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The federal, provincial and territorial governments ("FPT governments") provided funding to the CRCS and staffed an overseer committee known as the Canadian Blood Committee ("CBC") which was composed of their representatives. The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after "surrogate" testing for HCV became available and had been put into widespread use in the United States. It was alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidents of HCV infection from contaminated blood and blood products would have been reduced by as much as 75 per cent during the class period. Consequently, the plaintiffs brought actions on behalf of the classes described above in which claims were asserted in negligence, breach of fiduciary duty and strict liability as against all of the defendants.

[6] As a result of the pan-Canadian settlement agreement, these claims have been settled, although without any admission of liability on the part of any of the defendants. Pursuant to the terms of the settlement agreement, the class counsel in each of the actions now seek court approval of their fees. This motion is in respect of the fees in the class actions commenced in Ontario on behalf of the national classes. Similar motions have been brought in the actions in British Columbia and Quebec.

[7] The motion was heard over a three-day period during which submissions were made by or on behalf of the class counsel in both actions, by counsel for the federal and Ontario governments and by counsel for certain intervenors and friends of the court. In addition, the parties filed affidavit evidence, transcripts of the cross-examinations on the affidavits and, in the case of the federal and Ontario governments, a document which was purported to be an expert's report in respect of fees. The author of this report was cross-examined and a transcript of the cross-examinations was included in the record.

[8] It was apparent at the conclusion of this extensive hearing that there is agreement among all of the participants with respect to certain facts. These are as follows:

1. The settlement agreement contemplates that total lawyers fees in the Ontario, Quebec and British Columbia actions may amount to $52.5 million. There will be no impact on the sufficiency of the fund to provide the benefits to the claimants set out in the agreement so long as the counsel fees do not exceed this amount.
2. All participants are of the view that class counsel conducted the litigation in a skilful and effective manner and achieved an excellent result for the class members through the negotiated settlement.
3. There is no issue with the total number of hours docketed by class counsel during the

proceedings, nor is there any issue with respect to the number of law firms or lawyers engaged in negotiating this settlement on the part of the plaintiffs.
4. The factual account of the conduct of the negotiations as set out in the affidavits of the class counsel group are accepted as being accurate.
5. All participants acknowledge that the class counsel are entitled to a fair and reasonable fee.

[9] Where the defendants and the intervenors part company with class counsel is in respect of the characterization of what, in principle and quantum, constitutes a "fair and reasonable fee".

Law

[10] The fixing of fees in a class proceeding is governed by ss. 32 and 33 of the CPA. These sections provide in pertinent part:

> 32(1) An agreement respecting fees and disbursements between a solicitor and a representative party shall be in writing and shall,
>
> (a) state the terms under which fees and disbursements shall be paid;
> (b) give an estimate of the expected fee, whether contingent on success in the class proceeding or not; and
> (c) state the method by which payment is to be made, whether by lump sum, salary or otherwise.
>
> (2) 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.
>
> . . . . .
>
> (4) If an agreement is not approved by the court, the court may,
>
> (a) determine the amount owing to the solicitor in respect of the fees and disbursements;
> (b) direct a reference under the rules of court to determine the amount owing; or
> (c) direct that the amount owing be determined in any other manner.
>
> 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 purpose 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.

[11] The leading Ontario case on the quantification of appropriate fees in class proceedings is Gagne v. Silcorp Ltd. (1998), 41 O.R. (3d) 417, 167 D.L.R. (4th) 325 (C.A.). Goudge J.A., writing for the court, addressed the purpose of awarding premium fees in respect of successful class proceedings. He stated at pp. 422-23:

> [A] fundamental objective [of the CPA] is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so 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.

(Emphasis added)

[12] Although the issue before the Court of Appeal in Gagne involved a premium fee in the form of a multiplier of a base fee, it has been held that this is not the only acceptable form of premium fee arrangement in class proceedings conducted under the CPA: see Nantais v. Telectronics Proprietary (Canada) Ltd. (1996), 28 O.R. (3d) 523, 134 D.L.R. (4th) 470 (Gen. Div.); Crown Bay Hotel Ltd. Partnership v. Zurich Indemnity Co. of Canada (1998), 40 O.R. (3d) 83, 160 D.L.R. (4th) 186 (Gen. Div.).

[13] Notwithstanding the different forms that a premium fee arrangement may take, the principle enunciated by Goudge J.A. regarding the purpose of awarding premium fees in a class proceeding has a general application. If the CPA is to achieve the legislative objective of providing enhanced access to justice then in large part it will be dependent upon the willingness of counsel to undertake litigation on the understanding that there is a risk that the expenses incurred in time and disbursements may never be recovered. It is in this context that a court, in approving a fee arrangement or in the exercise of fixing fees, must determine the fairness and reasonableness of the counsel fee. Accordingly, the case law that has developed in Ontario holds that the fairness and reasonableness of the fee awarded in respect of class proceedings is to be determined in light of the risk undertaken by the solicitor in conducting the litigation and the degree of success or result achieved: see Maxwell v. MLG Ventures Ltd. (1996), 30 O.R. (3d) 304, 3 C.P.C. (4th) 360 (Gen. Div.); Windisman v. Toronto College Park Ltd. (1996), 3 C.P.C. (4th) 369 (Ont. Gen. Div.); Serwaczek v. Medical Engineering Corp. (1996), 3 C.P.C. (4th) 386 (Ont. Gen. Div.). This approach was approved by Goudge J.A. in Gagne where he stated at p. 423:

> In my view, [it is correct to focus] 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.

Analysis

[14] In my view, there are a variety of methods that may be utilized under the CPA to determine an acceptable premium on fees. It is appropriate to utilize this flexibility in fixing the fees in class proceedings where necessary. Here, class counsel seek to have their fees fixed on a lump sum basis pursuant to the retainer agreements with the representative plaintiffs and the provision in the settlement agreement. While this is acceptable in form, in my view, the court must still adhere to the principles discussed in Gagne in assessing the fairness and reasonableness of the counsel fee, whether that fee is calculated on a lump sum basis or otherwise.

A. Result achieved in the litigation

[15] I will deal first with the success or result achieved in the instant litigation. I note in passing that one of the most striking aspects of the fee hearing was the number of issues upon which all participants

expressed agreement. As stated above, it was common ground that an excellent result was obtained for the class members through the negotiated settlement of the litigation.

[16] Nonetheless, the court, in fulfilling its role in the approval of fees, must form its own view of the success achieved. The characterization of the result by the parties and other participants is but one factor to be considered. The court's analysis must be objective. In this regard, I concluded in approving the settlement that class counsel have produced the best possible result short of trial: see Parsons v. Canadian Red Cross Society, [1999] O.J. No. 3572 at para. 91. Moreover, the settlement provides for payments according to the degree of harm suffered by the class members, as well as for progressive increases in those payments to class members should their condition worsen. This avoidance of the "once and for all" lump sum payment approach commonly applied in personal injury tort litigation entails an overriding advantage for class members and consequently must augur favourably for class counsel in any considered analysis of the result.

[17] From the perspective of the class members, however, the total compensation or nature of payment cannot be the only criterion on which to judge the result obtained through settlement. Significant weight must also be given to the relative ease or difficulty of access to the benefits achieved through the settlement by a class member: see also Gagne at p. 425. In this case, a procedure for claims administration has been wrought into the settlement that will see most class members able to obtain compensation without the need for further legal assistance or proceedings. This contrasts favourably with many class proceedings where, despite a global settlement, class members are still required to engage in extensive legal proceedings to obtain the benefits. The relative ease of access to compensation is an important feature. It provides some certainty as to the quantum of compensation that class members will receive at each level, but more so, it demonstrates the thoroughness of class counsel in fashi oning a satisfactory settlement.

B. Risk undertaken by class counsel

[18] I turn now to the risk factor. In the context of the CPA, the premium on fees for undertaking risk in litigation means that there should be a reward for taking on meritorious but difficult matters. Conversely, this does not mean that there should be a reward for bringing forward speculative cases of dubious merit. In my view, the instant matter falls squarely into the first category. Nonetheless, it was strongly contended by the defendants and intervenors that the extra-legal considerations at play in these actions mitigated the risk. The underlying premise for this submission was that this was not litigation in the ordinary sense because the government defendants were inclined to settle for policy and political reasons that had little or nothing to do with the merits of the litigation or the vigorous manner in which it was being pursued. Accordingly, the defendants and intervenors took the position that the risks attendant to litigation generally were not present here. I disagree.

[19] It was common ground among the parties that there were political overtones to the litigation. Nonetheless, to accept the proposition that any extra-legal influence reduced the risk of the litigation would be to engage in a purely speculative, after the fact interpretation of the events that transpired during the course of this litigation. But, more to the point, this proposition is contradicted by the evidence. It is clear that this settlement was driven by the threat of litigation and not by political considerations. This is demonstrated by the chronology of the events, set out in the chart below, leading up to the announcement by the federal, provincial and territorial governments ("FPT governments") on March 27, 1998 that a fund of $1.1 billion would be set aside to satisfy the claims of those persons infected by HCV from the blood supply:

DATE	EVENT

1.	June 21, 1996	Quebec transfused class action is filed.
2.	September 9 to 11, 1996	The FPT governments announced their decision declining compensation to blood victims.
3.	December 19, 1996	The British Columbia transfused class action is commenced.
4.	October 24, 1996	The FPT Health Ministers announce that they have decided against compensation.
5.	May 22, 1997	The British Columbia transfused class action is certified.
6.	July 7, 1997	There is an agreement on lead counsel for the Ontario HCV class action.
7.	September 16, 1997	Notice of the Ontario transfused class action is given to Ontario and the other provincial governments.
8.	November 26, 1997	The final report of the Krever Inquiry is released.
9.	February 10, 1998	The statement of claim in the Ontario transfused class action is issued on behalf of a national class.
10.	February 23, 1998	The Quebec transfused class action is certified.
11.	March 27, 1998	On behalf of the FPT Ministers of Health the Honourable Allan Rock announces a financial assistance package to persons infected with HCV between 1986 to 1990 of up to $1.1 billion.

[20] It can be seen from this sequence of events that the FPT governments did not make any overtures toward compensating defendants until class proceedings had been certified in British Columbia and Quebec and there was a potential for certification of a national class encompassing all those persons in the rest of Canada in the Ontario proceedings. It must also be noted that even though the announcement of March 27, 1998 could hardly be considered a formal binding offer of settlement, it was only intended to apply to those persons included in the class proceedings. The litigious nature of the settlement negotiations is further evidenced by the length of time and effort taken to reach a binding agreement. Even then, there were still numerous conditions attached because of the desire of the FPT governments to have one pan-Canadian settlement for all of the actions. Furthermore, there has never been any admission of liability by the defendants. Indeed the final settlement agreement contains a specific disclaimer of liability.

[21] The evidence of Douglas Elliot, a member of the class counsel group, is instructive. Mr. Elliot is a highly experienced lawyer in blood litigation in Canada. As a result of his involvement with the issues

surrounding the Hepatitis C litigation and his participation at the Krever Commission inquiry, he attempted to assemble a counsel group to prosecute a class proceeding on behalf of those infected with HCV from the blood supply.

[22] In his affidavit, Mr. Elliot chronicles three years of unsuccessful attempts to find counsel in Ontario willing to lead and participate in a class proceeding related to the HCV problems stemming from the contamination of the Canadian blood supply. He deposed that it was difficult to find any law firm, large or small, willing to take on the litigation, especially in the role of lead counsel. It is his evidence that none of the counsel he approached regarded the potential political considerations as altering the fundamentally litigious nature of these proceedings. Their rejections were based strictly on the legal problems which the case presented. He states in para. 41 of his affidavit:

> 41. I believe that there were few lawyers who were knowledgeable about the operation of the blood system in Canada to begin with, and many regarded tainted-blood cases on behalf of plaintiffs as unattractive owing to their complexity and their prohibitive costs. The trial in Pittman, which was by this time completed, had lasted almost one year. To put the matter simply and directly, the lawyers to whom I spoke well understood that, in relation to this class action and the complex issues of liability, there were simply much easier ways to earn a living. And so they declined to become involved.

His evidence in this respect was not challenged by the defendants or intervenors. In the result, I must conclude that any suggestion that the political implications of the issues made the litigation less risky, apart from being inaccurate, was not apparent to most of the lawyers in Ontario at the outset of the litigation.

[23] In consideration of the chronology of the events in this litigation and the uncontested evidence of Mr. Elliot, I am unable to accept the contention that political considerations operated to either transform this litigation or diminish the risk associated with it in any material way.

[24] This leads in turn to another argument that was advanced by the government defendants. They contended that, even if the proceedings were considered to be litigation in the ordinary sense, the inherent risks diminished with time as the negotiations progressed. In consequence, they submit that any premium on the fee should reflect this diminishing risk. In support of this proposition, these defendants filed the report of Michael Ross, a vice-president of the accounting film KPMG. Mr. Ross, in accordance with his instructions, attempted in his report to apply mathematical parameters, including a factor for changing risk, to the determination of an appropriate counsel fee in a class proceeding. However, this report was less than helpful, in part because of the flaws in the underlying premise that the risk factor in litigation can be ascertained with mathematical precision, and in part because of his fundamental misconception of the nature of a class proceeding and the CPA.

[25] That said, I realize that Mr. Ross was given an impossible task. His assignment was, in reality, to attempt to define a subject with more precision than the subject would bear. As Goudge J.A. stated in Gagne, the fixing of an appropriate fee in a class proceeding is "an art, not a science". As such, the court must be wary of attempts to measure appropriate fees by the application of pseudo-scientific or mathematical methods. Such an approach is inherently unreliable when a subject with as many variables as this litigation is considered.

[26] Mr. Ross based his evidence on the premise that the premium on a fee should be reflective of the "judgmental probability of success" in the litigation. In his opinion, the amount of the premium over the

ordinary fees should be a reciprocal of the risk of the litigation. As a theoretical example, this would ensure that counsel taking on litigation with an estimated 50 per cent probability of success would not suffer any economic prejudice if the fee earned in the successful actions was multiplied by a factor of two. For every two actions, one unsuccessful, one successful, that counsel undertake, the fees would balance out and there would be no loss.

[27] This mathematical approach is fundamentally flawed. The probability of success in any litigation cannot be fixed with mathematical precision at any stage of the proceeding. The vagaries of litigation simply do not permit it.

[28] Mr. Ross also propounded the theory that the risk of the litigation changed as it progressed and that, therefore, the premium should reflect the changing risk. While there may be some truth to the assertion that the risk of litigation changes over the course of the proceeding, it must be considered that changes can occur which both diminish and exacerbate risk at different points in the litigation. There is no more prospect of assigning a precise mathematical value to the risk on a segmented, progressive basis than there is at the outset of the litigation.

[29] Moreover, class action litigation introduces additional complications. Complex class actions subsume the productive time of counsel. The risk undertaken by counsel is not merely a function of the probability of winning or losing. Some consideration must also be given to the commitment of resources made by the class counsel and the impact that this will have in the event the litigation is unsuccessful. Winning one of two class actions may be a reasonable hallmark of success. However, for the lawyer who's first action turns out to be a loser, the complete exhaustion of resources may leave him or her unable to conduct another action. Thus the real risk undertaken by class counsel is not merely a simple reciprocal of the "judgmental probability of success" in the action, even if that calculation could be made with any degree of certitude. There is a point in complex class action litigation where, degree of risk notwithstanding, class counsel may truly be, as Mr. Strosberg put it in his submissions, "betting his or her law firm". This must be considered in assessing the "risk" factor in regard of the appropriate fee for counsel.

[30] Equally troubling is the fact that Mr. Ross did not consider the unique features of the CPA in formulating his theory regarding the "judgmental probability of success". This was apparent from the transcript of his cross-examination. For example, it was clear that Mr. Ross did not appreciate the risk induced into class action litigation by the additional element of the requirement to attain certification. In the result, the probability of success or failure on the certification motion was not a factor that Mr. Ross considered. This is a significant omission if his fee theory is to be applied to class proceedings. More importantly, it is illustrative of the inherent unreliability of this evidence and, further, is indicative that Mr. Ross is offering an opinion to the court that is clearly outside his area of expertise.

[31] In the result, I conclude that the report of Mr. Ross is of no value in determining either the risk assumed by class counsel or the reasonableness of the fee in these actions.

[32] The government defendants chose to rely heavily on this report and did not offer any other evidence on the assessment of the risk involved in the litigation. They did not file affidavits from any member of the counsel group that were involved in the negotiations on behalf of the governments, nor did they provide any evidence from any person at a senior administrative level in the governmental departments responsible for the litigation. Instead, the government defendants conceded that the accounts of the negotiations proffered by the affiants deposed on behalf of the class counsel group were accurate. Interestingly in this regard, the government defendants chose to file as part of their evidence the affidavits of class counsel in the British Columbia and Quebec actions.

[33] A picture emerges from the affidavits proferred by class counsel and the government defendants of negotiations that were logistically difficult, intense and time-consuming, adversarial and hard fought. There were obvious points at which potential "deal-breaking" issues surfaced and the success of the negotiations hung in the balance. The various affiants cite examples.

[34] Bonnie Tough, the lead counsel for the hemophiliac action, states in her affidavit:

> 107. There was throughout the negotiations and even following the Framework Agreement in December of 1998 the risk that one or more governments would not approve the settlement. It was never clear to me the extent to which the various provinces and territories were represented at the negotiating table. It was clear that to the extent they were represented by one or more lawyers, those lawyers were without authority to conclude a deal.
> 108. Even within the governments, it was not clear who was instructing the lawyers, i.e. Attorneys' General, Department of Justice, Ministries of Health, Cabinet, Treasury Boards, etc. I was concerned that the successful conclusion of any deal depended upon the attitudes and conduct of a phantom group with whom I was not directly speaking. I did not know the extent to which political differences might influence the acceptance or rejection of any settlement. Changes in governments throughout the time only exacerbated this concern.

[35] Heather Peterson, a member of the class counsel group in the transfused action, states in her affidavit:

> 78. During [the] last stages of negotiations additional issues arose, some of which also threatened to undermine the negotiations. Two of the most serious examples come to mind:
> (a) The Framework Agreement provides . . . that the [Settlement] Fund would generate interest as if the amount had been notionally invested at the interest rate paid "from time to time on Long Term Government of Canada Bonds from April 1, 1998 for the duration of the Plan." However during negotiations, the federal government took the position that only the T-bill rate should be paid. Class Action Counsel took the position that maintenance of this position by the FPT governments would be a "deal breaker".
> (b) On or about May 9 and 10, 1999, at a negotiation meeting in Vancouver, the FPT Governments raised the prospect of including in the settlement persons who had contracted HCV from immune globulins. The Framework Agreement and all of the ensuing negotiations until that date had not included any reference at all to this group.
>
> . . . [the Ontario government] took the position that [it] wished to be finished with all HCV blood litigation and thus wanted persons who contracted HCV from immune globulins in the Class Period included in the settlement. Strosberg's response was that there was simply no basis to include these persons in the plaintiffs' class. The end of these discussions came on May 13, 1999 at the Toronto offices of McCarthy Tetrault . . . [when] Strosberg told counsel to the FPT Governments that their insistence upon including recipients of immune globulins in the class was a "deal breaker," that it was their choice, but under no circumstances would he accept this group in the class. Strosberg intended to break off negotiations if the FPT Governments did not yield on the issue. Strosberg and I left that session uncertain as to whether negotiations had broken down. Thankfully, the FPT Governments eventually relented.

[36] It is apparent from the record that even though this litigation was conducted from the middle of 1998 forward as a negotiation toward a settlement, the risks assumed by class counsel were no less real at any point than if that time had been devoted to a disposition through a trial process.

[37] In addition, the legislation enabling class proceedings introduces several features that distinguish these actions from ordinary litigation. One aspect that bears on the risk inherent in class actions is the requirement of court approval of any settlement reached. Protracted negotiations involve a commitment of the time and resources of counsel and the litigants. However, in a class proceeding, a court will not approve a settlement that it does not regard as being in the best interests of the class, regardless of whether class counsel take a different view. Thus, class counsel may find themselves in the position of having committed time and resources to the negotiation of a settlement, that they believe is in the best interests of the class, only to find that the court will not approve the settlement achieved. While this creates a risk simpliciter, it also creates an advantage for a defendant who can successfully extend the negotiations to the point that class counsel's resources are exhauste d before making a "final settlement offer" that may not ultimately receive court approval. In those cases, class counsel may have exhausted their resources attempting to obtain a reasonable settlement only to find themselves, as a consequence, unable to pursue the litigation. Accordingly, the risk in a class proceeding is not merely a function of whether or not litigation is anticipated and whether or not that litigation will be successful. Rather, there are risks inherent in the adoption of, and commitment to, any particular strategy for achieving a resolution.

[38] In view of the foregoing, I am unable to accept the contention that there was less risk in this proceeding merely because the parties chose to proceed down a negotiation route. Moreover, contrary to the submissions made by certain of the intervenors, it is apparent that the time and resources committed to the negotiations by the class counsel meant that the risk was increasing rather than decreasing as the negotiations continued. As the parties moved toward a settlement, the negotiations became more difficult as the issues narrowed with the result that the risk of an insurmountable impasse increased rather than diminished. This made the negotiations more perilous as they progressed. In that respect, one need look no further than to the actual settlement approval process which required a review of the settlement by this court. In order to obtain the approval of this court, modifications were required to the settlement agreement. Although the court took the view that these modifications were "non-material" as that term was set out in the agreement, the federal government took a different view, as related in the affidavit of Ms. Peterson. She deposed as follows:

> 92. After Mr. Justice Winkler's [sic] delivered his reasons on December 22, 1999 counsel for the federal government and counsel for Ontario asserted orally that the modifications he had suggested and the reasons were indeed "material differences".
> 93. After delivery of Mr. Justice Winkler's reasons, counsel for the federal government urged class action counsel to join with him in attempting to persuade Mr. Justice Winkler that his suggested modification relating to the surplus should be abandoned. He told us that if we did not agree he would recommend to the federal government to take issue at Mr. Justice Winkler's suggested modification. He said that, in his opinion, the modification was a "material difference" and that, therefore, there was not court approval of the settlement agreement. He urged class action counsel to make those fundamental choices before the telephone conference he was having with the FPT Deputy Ministers of Health to be held on October 14, 1999. Strosberg believed strongly that the FPT governments would ultimately accept the three modifications proposed by Mr. Justice Winkler. Class action counsel deferred to Strosberg's political judgement and did not agree with counsel for the federal government, and ultimately the FPT govern ments consented to the three modifications. Even after the delivery of Mr. Justice Winkler's reasons, then,

> fundamental tactical decisions were required and considerable uncertainty remained over whether or not there was actually a settlement.

(Emphasis added)

Clearly the risk continued up until the final judgment was entered.

[39] There was an additional submission by one of the intervenors that despite the fact that there may have been risk associated with the negotiations, there was a general cooperative tenor to the negotiations that lessened the risk. I cannot accede to this submission for several reasons. First, it is contrary to the evidence. J.J. Camp, lead counsel for the class in the British Columbia action, whose affidavit was filed on this motion by the federal government, deposed:

> 95. On July 9, 1998 I had an extensive telephone conference with [government counsel] during which they proposed a new counter offer. The tenor of the discussion at times became quite acrimonious with both sides alleging how disappointed they were with the position of the other . . .

This is echoed in the affidavit of Bonnie Tough, lead counsel for the class in the hemophiliac action. She states:

> 79. Finally, in November of 1998, there was a meeting in Ottawa with Transfused Class Counsel, Hemophilia Class Counsel and counsel for the governments. The meeting was acrimonious and ended with all parties walking from the table in frustration.

[40] But, in any event, risk is not synonymous with acrimony in a negotiation process. Even if the tenor of the negotiations changed somewhat for the better after certain points of contention were resolved, there is nothing in the record which would indicate that these negotiations were anything less than hard fought to the end. As such, they were capable of being derailed at any point, regardless of the level of acrimony between the participants. Indeed, the federal government chose to characterize the negotiations in exactly this manner in its submissions to the court on the settlement approval motion. As stated in the factum filed on that motion by counsel for the federal government:

> 106. It is common ground between the parties that the agreement was reached only after an excess of a year of hard fought negotiations between the Parties.
>
> . . . . .
>
> 108. The March 1998 announcement expressly contemplated that:
>
> "details of assistance will be determined through a negotiation process submitted to the courts for approval. This should ensure fairness. Victims and their legal representatives will be part of this process."
> Apart from this direction, however, Ministers [sic] merely outlined certain "principles" and "suggestions" for what the final negotiated arrangement would look like . . .
>
> . . . . .
>
> 111. Further negotiations and an extensive drafting exercise took place subsequent to the Agreement in Principle which resulted in the Agreement before the court today.

> There can be no dispute but that the Agreement is the product of intense negotiations between counsel for the plaintiffs and FPT governments.

(Emphasis added)

[41] Further evidence of the tone of the negotiations, or at least the position taken by the parties, can be found in the affidavit of Ms. Peterson. She stated:

> 79. During the negotiations, counsel for the federal government occasionally observed that the option always remained for the FPT governments, or one or some of them, to legislate a program in place of a court-approved negotiation settlement within the framework of the class actions. This option was always a real and substantial risk for class action counsel and our counsel group.
>
> . . . . .
>
> 81. Settlement was always dependant upon formal cabinet approval by all 14 FPT governments. During the negotiations, tensions were palpable among the FPT governments. Counsel for the various FPT governments at times asserted differing, disconsolate positions; so also did class action counsel. Through it all, it became clear to me that, from the FPT government side of the negotiating table, political considerations were as important as legal issues. The concerns about political ramifications was a constant risk, because there were numerous provincial elections and changes in provincial governments (including the creation of a new territory) in the course of the negotiations from April 1998 to October 1999.

[42] While I do not equate acrimony with risk, complexity, on the other hand, breeds risk in any proceeding. In this case, the logistical complexity was overwhelming. The insistence of governments that there be one pan-Canadian settlement of all of the actions meant that any settlement attained required approval of 14 FPT governments, each with differing political agendas and policies. Although obtaining approval from this group alone was daunting enough, the class counsel groups in the various actions on the other side of the bargaining table were by no means speaking in a unified voice at all times. In the transfused and hemophiliac actions in Ontario, the combined class counsel groups were comprised of over 60 lawyers and supporting legal personnel. In addition, the negotiations were played out against the backdrop of changes in the provincial and territorial governments, changes in the Ministers of Health for all of the governments, and political activism directed at attaining a universal settlement for all persons infected with HCV by blood in Canada, regardless of the date of infection. The expenditures of class counsel in terms of time and money were at risk of loss if any politician in authority decided as a matter of expediency or policy not to settle the class proceedings or decided to unilaterally institute a no-fault compensation program and thereby bypass class counsel and the litigation. There was always the inherent danger that the pan-Canadian settlement would be impossible to achieve, either because of a reluctance on the part of a particular government or a class in a particular action to approve an agreement.

[43] The evidence is compelling. This litigation, notwithstanding the fact that it was conducted as a protracted negotiation, was redolent with risk. Moreover, in so far as it is appropriate to assess the risk assumed by class counsel on a sliding scale or range depending on the nature of the action in comparison to other actions, I am satisfied that the risk enuring to class counsel in these actions should be considered to be at the high end of any such scale.

C. Fair and reasonable fee

[44] A fair and reasonable fee must be reflective of the risk undertaken by class counsel and the result attained for the class in the action. My analysis of those factors is set out in the foregoing. The next step is to determine, through their application, whether the fees being sought by the class counsel groups, $15 million in the transfused action and $5 million in the hemophiliac action, constitute fair and reasonable fees in the circumstances.

[45] In considering this, I cannot accede to the submissions of the various intervenors with respect to the fees. Taking their submissions as a group, the intervenors submitted that fees ranging between approximately $6 million and $11 million should be awarded in the transfused action. In the hemophiliac action, the range of the intervenors' submissions was from approximately $2 million and $3 million. Although the intervenors did not seriously question the allocation of lawyers and legal staff, they did attack the hourly rates of certain counsel. This attack lacked any evidentiary basis, however, and thus must be rejected. The second, and main, submission of the intervenors was that there was a diminution of risk either because of the political considerations or the fact that these proceedings were conducted as a negotiation rather than as a completely adversarial trial process. Since I have rejected these underlying propositions as being unsupported by the evidence, it follows that the submission founded on them must be rejected as well.

[46] I have considerable difficulty with the submission of the government defendants on different grounds. While I have rejected the intervenors' submissions as founded on erroneous assumptions, there was, to their credit, an implicit acknowledgement, and application, within those submissions of the dual factors of result and risk to be considered in determining a fair and reasonable fee. In contrast, the government defendants submitted figures in respect of the fees that represented less than the monetary value of the docketed time of the class counsel groups. This submission was made despite the acknowledgement by the government defendants of the "high degree of competence of the class counsel" and the recognition of the satisfactory result attained for the classes. Further they took no issue with the hours expended by the class counsel groups, the number of counsel within those groups, or the class counsel evidence with respect to the difficulty of the negotiations. The fee proposed by the governments wa s arrived at by combining an arbitrary reduction of the hourly rates of the class counsel group and an addition of a premium of approximately 10 per cent of the reduced amount. If accepted, the net effect of the governments' submission would be to deprive class counsel of any premium, multiplier or reward of any nature reflecting risk or result.

[47] The position taken by the government defendants is untenable. Considered in the context of these proceedings, the fees they propose are not reflective of either the result obtained or the risk undertaken even if just one of those factors were to be considered in isolation. More so however, the fees proposed by the government defendants are at variance with the apparent underlying policy of the CPA and the interpretation of that policy by the Court of Appeal in Gagne.

[48] It was suggested by Mr. O'Sullivan, who appeared on behalf of the class counsel group in the hemophiliac action, that it was obvious that the government defendants' position was driven by political expediency rather than by a sincere effort to assist the court in determining an appropriate fee. In support of this analysis, he provided several press clippings, including some culled from newspaper editions published during the three days of this hearing, that were critical of the fees being sought by the class counsel group. He suggested that the government position, when compared to the positions taken by class counsel and the intervenors, was so far outside the range of reasonableness that it could only be inferred that political, rather than legal considerations must be at play.

[49] Notwithstanding these submissions, it is not within the purview of the court's role on this motion to impute ulterior motives to any party and I make no finding in respect of the submissions of Mr. O'Sullivan. As I stated in my reasons regarding the settlement approval, "extra-legal concerns, even

though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review . . .".

[50] Nonetheless, the concern expressed over extra-legal considerations may well be symptomatic of a general lack of understanding of the legal framework in which these proceedings evolved. The court was invited to address this issue in these reasons by Mr. Dermody, counsel for the intervenors. He expressed a concern that there was a general misunderstanding regarding the nature of these proceedings that had the potential to create animosity between the class members, their counsel and the FPT governments which might, in turn, erode the salutary benefits of the settlement and reflect negatively on the fair compensation of counsel. This point is well taken.

[51] In addressing the issue, the starting point must be an understanding that the proceedings were litigious in nature and that the settlement offered by the FPT governments was driven by the prospect of an unfavourable determination, however probable or improbable, if the litigation proceeded to a conclusion. There is no evidence to support any assertion to the contrary. In the result, there was nothing untoward in the way that the government defendants or the class counsel groups conducted themselves in resolving the litigation. Hard bargaining is a fact of life in any high stakes negotiation. Outright capitulation from either side of the table is not a realistic expectation. There were arguable defences and a legitimate question as to the ultimate liability of the governments. While recognizing that the victims had suffered a tragedy, the governments, as litigants, always had to bear in mind that they were the representatives of all of the people and the keeper of the public purse. The tension created b y these two concerns obviously complicated matters for the FPT governments and for the class counsel groups. Despite these complexities, the parties persevered through arduous negotiations and reached an agreement to settle the outstanding litigation within a legal framework.

[52] In recognition of the legal framework within which the settlement was negotiated, the agreement crafted speaks directly to the question of class counsel fees in that it stipulates a limit on those fees. All counsel agreed that the fees sought would not exceed $52.5 million in total. The details of the background negotiations that led to this provision are contained in the affidavits of the British Columbia and Quebec class counsel. The government elicited an agreement from the class counsel groups that they would not seek fees on the basis of a percentage of the total settlement and further, that the counsel group would agree to a cap on the total mount of fees. In addition to the other concessions extracted by the governments, counsel were required to surrender any fee agreements that they may have executed with individual class members. Mr. Camp deposes to this at para. 148:

> 148. Under my fee agreement, [the class counsel group] were entitled to charge up to one-third of the settlement amount attributed to the British Columbia class action. Quebec class counsel also had a percentage contingency fee agreement with their representative plaintiff. Class Counsel in both the Framework Agreement and the Settlement Agreement have waived their rights to seek recovery of class counsel fees based on a percentage of the settlement amount. Without doubt, in my opinion, the compromise by class counsel of their right to claim class counsel fees on the basis of percentage of any settlement or judgment, which in my case amounted to up to one-third, was a significant concession which assisted the parties in coming to an agreement.

Mr. Lavigne similarly stated in his affidavit:

> 145. It should be noted that 166 of the 450 victims who are on the M.M.M.F. lists have agreed, by giving a written mandate, a copy of which is attached hereto, to pay a sum amounting to 20% of any amount that was obtained by a judicial process or

negotiation process or by government compensation;

146. The client's expectations in this respect have been clearly established since 1995 and have always comprised a clear, plain and precise working basis for all of the people who came into contact with our firm;
147. This percentage agreement, which is entirely proper and legal in Quebec, has been set aside as regards a claim of 20% in the total amount of the settlement;
148. In the final quibbling during the negotiations that led to the Agreement of June 15, 1999, the applicant solicitors agreed to this additional concession, which was demanded by the governments, and particularly by the federal government, so that the Agreement could be concluded;
149. However, consideration for this was provided: that an agreement would be negotiated and concluded after the Agreement was signed to avoid any question of conflict of interest. Those negotiations have never taken place, and so it is impossible for us to take a position jointly with the respondents regarding the amount of the fees;

[53] A final agreement regarding fees was never negotiated. Nevertheless, in consideration of the negotiated surrender of the individual contingency fee agreements, the undertaking by class counsel not to seek a fee on a percentage basis and the express cap of $52.5 million on total fees, there is no other reasonable conclusion than that there was a tacit understanding between class counsel and the governments that this amount represented a fair and reasonable fee for counsel in the circumstances.

[54] To put this in its proper context, it must be remembered that over 400 of the then identified class members in British Columbia and Quebec had negotiated individual contingency fee arrangements whereby they would have paid between 20 per cent and 33 per cent of any compensation received. This arrangement would produce a counsel fee of over $220 million, at a minimum, if extrapolated against the total settlement and the estimated class size as a whole. In comparison, the cap on fees negotiated by the governments is very favourable indeed.

[55] However, while this tacit agreement between the parties regarding fees is instructive, it is not in itself determinative. In order to arrive at the appropriate premium fee, "all the relevant factors must be weighed".

[56] The fees being sought are substantial. However, the quantum of a counsel fee, in and of itself, does not provide a valid basis for attacking the fee. The test in law, as set out in Gagne, is whether the fees are fair and reasonable in the circumstances. The legislature has not seen fit to limit the amount of fees awarded in a class proceeding incorporating a restrictive provision in the CPA. On the contrary, the policy of the CPA, as stated in Gagne, is to provide an incentive to counsel to pursue class proceedings where absent such an incentive the rights of victims would not be pursued. It has long been recognized that substantial counsel fees may accompany a class proceeding. To this effect, the authors of the Ontario Law Reform Commission's Report on Class Actions (1982) stated at pp. 135-38:

> Critics of class actions often compare the total amount of administrative costs and lawyer's fees with the amount of each class member's claim, and then suggest that these costs and fees have the effect of depriving class members of any significant recovery. However, a comparison of total costs and fees with an individual class member's claim gives a rather myopic view of the issue. A better sense of whether the costs and fees of a class action are reasonable can be achieved by determining the percentage of the class recovery consumed by such costs and fees.
>
> Empirical data also has been collected concerning the percentage of class recoveries consumed by lawyers' fees alone. [In the United States] the data collected . . . indicates that, in slightly more than fifty percent of the cases for which such information was

> available, lawyers' fees represented twenty-five percent or less of the recovery, while in only 10.7 percent of the cases did such costs exceed fifty percent of the recovery.
> These percentages of class action awards consumed by lawyers' fees and administrative costs do not appear particularly unreasonable, given the complexity of class suits. Moreover, the figures revealed by the empirical studies do not appear to be out of line with the proportion of individual recoveries consumed by lawyers fees and disbursements in individual litigation in Ontario, if the Law Society of Upper Canada was correct in suggesting that Ontario clients tend to receive a "net recovery" reduced by fifteen to twenty-five percent.
> In evaluating the fairness of lawyers' fees documented by the empirical studies, it is important to remember that, at least in the case of individually non-recoverable claims, any attempt to assert the claim through an individual suit would, by definition, consume 100 percent of the claim. Measured by this standard, the proportion of an individual class member's recovery consumed by class lawyers' fees in the United States does not appear inherently unreasonable. Moreover, in some cases, the costs of individual litigation may consume a substantial proportion of even those claims that are individually recoverable and, in such situations, the class action will also result in cost savings, even if the share consumed by lawyers fees remains substantial.

[57] The OLRC Report has been widely acknowledged to be the most sophisticated and extensive analysis of class actions undertaken in the world: see the Report of the Attorney General's Advisory Committee on Class Action Reform (Ontario, February 1990) at p. 20. The pragmatic approach it displays towards counsel fees in class actions was based on careful study and analysis. It is significant that the authors of the report did not consider counsel fees representing 25 per cent of the total recovery "inherently unreasonable".

[58] However, the appropriateness of a premium fee, whether as a lump sum, as a percentage of the recovery or as a multiplier of a base fee must be assessed against the facts of each case. The adoption of any standard multiplier or percentage fee would undoubtedly result in fee awards that have little relation to the risk undertaken or the result achieved. This was recognized by Goudge J.A. in Gagne. To use these proceedings as an example, notwithstanding the OLRC Report and the typical awards in class proceedings, a fee based on 20 per cent or more of the recovery would be clearly excessive and represent a windfall for the counsel groups.

Disposition

[59] Class counsel in the transfused action and the hemophiliac action seek court approval of "lump sum fees" in the amounts of $15 million and $5 million respectively, and ask that the fees be fixed in those amounts, pursuant to written retainer agreements with the representative plaintiffs. This lump sum method of payment is expressly contemplated by s. 32(1)(c) of the CPA and by the settlement agreement, which provides at para. 13.03:

> 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.

(Emphasis added)

[60] Moreover, it has been held that the contingency fee provisions of the CPA are not limited to a

base fee and multiplier arrangement, but instead permit of fee arrangements of various types, including lump sums and as percentages of recovery. In Nantais v. Telectronics Proprietary (Canada) Ltd., supra, Brockenshire J., in approving a lump sum fee, stated at p. 528:

> . . . the special provisions relating to "multipliers" for hourly rates [do not prevent], in any way, other arrangements as specifically authorized under s. 32(1)(c). I view s. 33(1) and (2) as permitting, despite other statutes, all kinds of fee arrangements contingent upon success, and not just hourly rate multipliers.

[61] In Crown Bay Hotel v. Zurich Indemnity Co. of Canada, supra, this court stated at p. 88:

> A contingency fee arrangement limited to the notion of a multiple of the time spent may, depending upon the circumstances, have the effect of encouraging counsel to prolong the proceeding unnecessarily and of hindering settlement, especially in those cases where the chance of some recovery at trial seems fairly certain. On the other hand, where a percentage fee, or some other arrangement such as that in Nantais, is in place, such a fee arrangement encourages rather than discourages settlement. . . . Fee arrangements which reward efficiency and results should not be discouraged.

[62] However, regardless of the manner in which a premium fee is awarded in a class proceeding, whether by lump sum or otherwise, to adopt the words of Goudge J.A. in Gagne, the premium must be one that "results in fair and reasonable compensation to the solicitors" having regard for the risk undertaken and the result achieved.

[63] In Gagne, Goudge J.A. set out a series of useful corroborating tests for analyzing the fairness and reasonableness of the fee. These involve, variously, testing the fee as a percentage against recovery, as a multiple of base fees, as against the retainer agreement and whether, in the circumstances, the fee will provide sufficient incentive for counsel to take on difficult cases in the future. As he stated at p. 425:

> In the end, [these considerations must result] 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 will 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.

[64] The first of the corroborating factors is a test of the fee as a percentage of the class recovery. I note that the settlement agreement expressly prohibits class counsel from asking that their fees be fixed as a percentage of the settlement amount. Nevertheless, it remains a valid basis for comparison purposes. The fees sought in the transfused action represent 2.36 per cent of the portion of the settlement apportionable to the Ontario national class victims. The work in the hemophiliac action was for the benefit of all hemophiliacs. The fees sought in the hemophiliac action equate to 3.33 per cent of the total amount of the settlement apportionable to the hemophiliac class members. On this basis, the fees, although large, are more than reasonable.

[65] Second, the fee should be tested as a multiple of the base fees docketed by class counsel. On this

basis, the fees sought are consistent with the suggested range set out in Gagne for "the most deserving case". I note that the calculation is made more complex by the fact that class counsel continued to do work necessary to ensure the implementation of the settlement after the date of the expiry of the period for appeal of the approval. The settlement agreement contemplates that additional fees will be paid to counsel for certain administrative work, over and above the class counsel fee, at an hourly rate. However, as stated above, an important consideration in measuring the result achieved is whether or not the job is complete. Accordingly, it is my view that the work that has been performed to date was properly required of class counsel to ensure that the settlement was implemented. Counsel have valued the additional work at approximately $675,000 for counsel in the transfused action and $148,000 for counsel in the hemophiliac action from the end of the appeal period on January 22, 2000 to May 14, 2000. They have made a written submission to the court that their work as class counsel was completed on May 14, 2000. I cannot accede to this submission. While the administration is functional and claims are now being received, processed and paid, some details must still be completed. Thus, there will be no further compensation to counsel for any additional time spent in attending to these matters. The premium fee being sought in these actions is being sought on the basis of a "job well done". The court will not approve an additional fee for this work, or any additional work remaining to be done in order to complete the implementation of the settlement and its administration.

[66] Without considering the value of the "additional work", the lump sum fees constitute a multiplier of 3.57 in the transfused action and 4.29 in the hemophiliac action. When the fees for this additional work are included however, the multipliers are 3.07 and 3.80 respectively. For the hemophiliac action, the base fee and multiplier approach yields a figure at the high end of the range set out in Gagne, but the result obtained for the Hemophiliac class members justifies such an award. The qualifying threshold negotiated by class counsel eliminates a potentially insurmountable burden of proof that those class members would otherwise have faced.

[67] Third, the fees may also be measured by the expectation of the representative plaintiff as evidenced by the retainer agreement. Here, unlike the usual case, the specific amount of the fees were agreed to by reasonably informed representative plaintiffs. Moreover, the retainer agreements executed by the representative plaintiffs are a marked improvement over the individual fee agreements signed by the class members in Quebec and British Columbia.

[68] The fee must also provide a sufficient economic incentive to attract counsel to cases of a similar nature in the future. The words of Goudge J.A. bear repeating. As he stated in Gagne at pp. 422-23:

> 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.

(Emphasis added)

In the present circumstances, given the difficulty in securing counsel for the classes, let alone the experienced counsel that were ultimately retained, the incentive of a reasonable premium was necessary to ensure that these victims had counsel of the highest calibre without the benefit of whom this settlement could not have been achieved. The lump sum fees set out in the retainer agreements meet this test.

[69] Additionally, the fees compare favourably with the fees awarded in other major class proceedings in Canada as shown by the following chart:

Action	Total Class Recovery	Class Counsel Fees	Percentage of Recovery	Further Legal Fees Anticipated to be Incurred by Class Members
Harrington v. Dow Corning Corp. [1999] B.C.J. No. 320 (S.C.) (Quicklaw)	$40,000,000	$6,000,000	15%	Yes
Doyer v. Dow Corning Corp. (Sept. 1, 1999), 500-06-000013-384 Sup. Ct. of Que. Tingley J.S.C.	$52,000,000	$10,4000,000	20%	Yes
Nantais v. Teletroncis Proprietary (Canada) Ltd. (1996) 28 O.R. (3d) 523 (Gen. Div.)	$23,140,000	$6,000,000	26%	Yes
Pelletier v. Baxter Health Care Corp.,* [1999] Q.J. No. 3038 (S.C.) (Quicklaw) *combined with Jones v. Baxter Health Care Corp. in Ontario	$21,525,000	$3,648,000	16.9%	Yes

[70] Finally, the fees, as set out in the retainer agreements, if approved, will not impair the sufficiency of the trust fund established to provide the benefits to the class members. The actuarial report prepared by Eckler and Partners specifically addresses this issue.

[71] These class proceedings have been described throughout as the largest personal injury case in Canadian legal history. The global settlement amounts to over $1.5 billion dollars when all benefits are included. The settlement is pan-Canadian in scope. The defendants include all of the federal, provincial and territorial governments in Canada. The prime defendant, CRCS, is under court protection pursuant to the CCAA. The benefits are to be paid out of a trust fund established for the class members rather than out of the general revenue accounts of the governments. The nature of the benefits provided through the settlement is imaginative and incorporates some of the innovative measures regarding compensation in personal injury lawsuits that courts have been advocating for over 20 years.

[72] The logistics of the litigation must also be considered. It took almost three years to find lawyers willing to undertake the case because of the size and complexity. The investment required of class counsel, and the inherent risk of non-recovery, were daunting. Over 60 lawyers and legal staff were involved in bringing this litigation to a successful conclusion. Neither the governments nor the intervenors challenged the number of people or the hours required of those people to finalize the settlement.

[73] The evidence of class counsel regarding the negotiations was accepted. Indeed, the government defendants echoed the evidence of class counsel in their own submissions on the earlier motion for settlement approval. It common ground that class counsel did an excellent job. There was unanimity as to the quality of the settlement. Further, in so far as there were arbitrary points of contention raised on this motion, the evidence of class counsel on those points stands unchallenged and uncontradicted. Simply put, neither the intervenors nor the government defendants have put forward any principled or evidentiary basis for reducing the proposed counsel fees. Accordingly, I cannot accept their submissions that the fees specified in the retainer agreements should be reduced.

[74] To look back with the clarity of hindsight and re-evaluate the relevant factors in light of subsequent events when fixing fees is unfair. A court must, as best as it is able, consider the elements of the litigation as they would have appeared to the parties at the material times. To do otherwise would be inconsistent with the underlying policy of the CPA. Here, the fees sought as agreed to by the representative plaintiffs are large but so were the lawsuits and the settlement. The settlement agreement evidences that the size of the fee was anticipated by the governments who now object. As Goudge J.A. stated, the opportunity for class counsel to receive a premium for taking on difficult litigation and doing it well must not be "a false hope". It is an essential ingredient of the CPA that counsel be provided with a significant incentive to take on meritorious class proceedings. This means that premium fee awards must reflect the reality of the risk and the success of the efforts of class counsel in a meaningful way. Without this, injured parties will be denied the services of the most experienced counsel.

[75] This litigation was of the most difficult kind on a number of fronts. It epitomized risk as that term is used in the context of fee awards under the CPA. It is questionable whether any single member of the class would have had the financial resources to prosecute a lawsuit to a successful conclusion in consideration of the scope, the factual complexity of such a case, the myriad of legal issues that would have arisen and the countless years that such litigation would consume. In contrast, this settlement provides class members with access to immediate benefits without any further legal impediments to their claims. Given the risk undertaken and result achieved by class counsel in this litigation, the lump sum fees contemplated in the retainer agreements are "fair and reasonable".

[76] Accordingly, the retainer agreements in the transfused and the hemophiliac actions are approved. The lump sum fees set out therein are also approved and fixed. Counsel may attend before me to address the matter of disbursements. The final order will address the outstanding work to be done by class counsel.

[77] In light of the magnitude of these actions, and the issues involved, the court permitted and, indeed, encouraged submissions from persons with a stake, in one form or another, in the litigation. The fees submitted by counsel for these stakeholders, identified variously as intervenors and friends of the court, are also approved.

Order accordingly.

Indexed as:

Parsons v. Canadian Red Cross Society

PROCEEDING UNDER the Class Proceedings Act, 1992

Between
Dianna Louise Parsons, Michael Herbert Cruickshanks, David Tull, Martin Henry Griffen, Anna Kardish, Elsie Kotyk, Executrix of the Estate of Harry Kotyk, deceased and Elsie Kotyk, personally, plaintiffs, and
The Canadian Red Cross Society, Her Majesty the Queen in Right of Ontario and the Attorney General of Canada, defendants
And between
James Kreppner, Barry Isaac, Norman Landry, as Executor of the Estate of the late Serge Landry, Peter Felsing, Donald Milligan, Allan Gruhlke, Jim Love and Pauline Fournier, as Executrix of the Estate of the late Pierre Fournier, plaintiffs, and
The Canadian Red Cross Society, the Attorney General of Canada and Her Majesty the Queen in Right of Ontario, defendants

[1999] O.J. No. 3572
Court File Nos. 98-CV-141369 and 98-CV-146405

Ontario Superior Court of Justice
Winkler J.

Heard: August 19-21, 1999.
Judgment: September 22, 1999.
(133 paras.)

Practice — Class proceedings — Settlements — Court approval.

Motion by various parties for approval of a settlement in two companion class proceedings commenced under the Class Proceedings Act. One plaintiff class was persons who were infected with hepatitis C from blood transfusions between January 1, 1986 and July 1, 1990. The other plaintiff class was persons infected with hepatitis C from the taking of blood or blood products during the same time period. In both proceedings, there was also a family class consisting of family members of persons in the other main classes. The defendants in the two actions were the Canadian Red Cross Society, the Queen in Right of Ontario, and the Attorney General of Canada. The plaintiff classes were national in scope. As such, the other provincial and territorial governments except Quebec and British Columbia also moved to be included in the two actions as defendants, but only if the settlement was approved. The claims in these actions were founded on the decision by the CRCS and its government's overseers not to conduct testing of blood donations to the Canadian blood supply after a test for the hepatitis C virus became available and had been put into widespread use in the U.S. On this motion, the parties presented a comprehensive settlement package to the court. It consisted of a settlement agreement, a funding agreement, and plans for distribution of the settlement funds in the two

actions. However, there were over 80 written objections to the settlement proposal from individuals afflicted with hepatitis C. The objections related to a number of issues, specifically, the adequacy of the total value of the settlement amount, the extent of compensation provided through the settlement, the sufficiency of the settlement fund to provide the proposed compensation, the reversion of any surplus, and the costs of administering the plans.

HELD: Motion dismissed. The settlement proposal was within the range of reasonableness having regard to the risks inherent in carrying the matter through to trial. The level of benefits ascribed within the settlement were acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighed any deficiencies which might have existed in the levels of benefits. However, there were two areas which required modification in order for the settlement to receive court approval. The first area related to access to the fund by opt-out claimants, specifically, the benefits provided from the fund for an opt-out claimant could not exceed those available to a similarly injured class member who remained in the class. The second area related to the surplus provisions of the settlement proposal.

Statutes, Regulations and Rules Cited:

Class Proceedings Act 1992, S.O. 1992, c. 6, ss. 5(2), 8(3), 29(2).

Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36.

Counsel:

Harvey Strosberg, Q.C., Heather Rumble Peterson and Patricia Speight, for the plaintiffs.
Wendy Matheson and Jane Bailey, for the Canadian Red Cross Society.
Michèle Smith and R.F. Horak, for Her Majesty the Queen in Right of Ontario.
Ivan G. Whitehall, Q.C., Catherine Moore and J.C. Spencer, for the Attorney General of Canada.
Wilson McTavish, Q.C., Linda Waxman and Marian Jacko, for the Office of the Children's Lawyer.
Laurie Redden, for the Office of the Public Guardian and Trustee.
Beth Symes, for the Thalassemia Foundation of Canada, Friend of the Court.
William P. Dermody, for the Intervenors, Hubert Fullarton and Tracey Goegan.
L. Craig Brown, for the Hepatitis C Society of Canada, Friend of the Court.
Pierre R. Lavigne, for Dominique Honhon, Friend of the Court.
Bruce Lemer, for Anita Endean, Friend of the Court.
Elizabeth M. Stewart, for the Provinces and Territories other than British Columbia and Quebec.
Bonnie A. Tough and David Robins, for the plaintiffs.
Janice E. Blackburn and James P. Thomson, for the Canadian Hemophilia Society, Friend of the Court.

WINKLER J.:—

Nature of the Motion

¶ 1 This is a motion for approval of a settlement in two companion class proceedings commenced

under the Class Proceedings Act 1992, S.O. 1992, c. 6, the "Transfused Action" and the "Hemophiliac Action", brought on behalf of persons infected by Hepatitis-C from the Canadian blood supply. The Transfused Action was certified as a class proceeding by order of this court on June 25, 1998, as later amended on May 11, 1999. On the latter date, an order was also issued certifying the Hemophiliac Action. There are concurrent class proceedings in respect of the same issues before the courts in Quebec and British Columbia. The Ontario proceedings apply to all persons in Canada who are within the class definition with the exception of any person who is included in the proceedings in Quebec and British Columbia. The motion before this court concerns a Pan-Canadian agreement intended to effect a national settlement, thus bringing to an end this aspect to the blood tragedy. Settlement approval motions similar to the instant proceeding have been contemporaneously heard by courts in Quebec and British Columbia with a view to bringing finality to the court proceedings across the country.

The Parties

¶ 2 The plaintiff class in the Transfused Action are persons who were infected with Hepatitis C from blood transfusions between January 1, 1986 to July 1, 1990. The plaintiff class in the Hemophiliac Action are persons infected with Hepatitis C from the taking of blood or blood products during the same time period.

¶ 3 The defendants in the Ontario actions are the Canadian Red Cross Society ("CRCS"), Her Majesty the Queen in Right of Ontario, and the Attorney General of Canada. The Ontario classes are national in scope. Therefore, the other Provincial and Territorial Governments of Canada, with the exception of Quebec and British Columbia, have moved to be included in the Ontario actions as defendants but only if the settlement is approved.

¶ 4 The court has granted intervenor status to a number of individuals, organizations and public bodies, namely, Hubert Fullarton and Tracy Goegan, the Canadian Hemophilia Society, the Thalassemia Foundation of Canada, the Hepatitis C Society of Canada, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee of Ontario.

¶ 5 Pursuant to an order of this court, Pricewaterhouse Coopers received and presented to the court over 80 written objections to the settlement from individuals afflicted with Hepatitis-C. In addition, 11 of the objectors appeared at the hearing of the motion to proffer evidence as to their reasons for objecting to the settlement.

¶ 6 The approval of the settlement before the court is supported by class counsel and the Ontario and Federal Crown defendants. In addition to these parties, the Provincial and Territorial governments who seek to be included if the settlement is approved, and the intervenors, the Canadian Hemophilia Society, the Office of the Children's Lawyer and the Office of the Public Guardian and Trustee made submissions in support of approval of the settlement. The Canadian Red Cross Society ("CRCS") appeared, but did not participate, all actions against it having been stayed by order of Mr. Justice Blair dated July 28, 1999, pursuant to a proceeding under the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36. The other intervenors and individual objectors voiced concerns about the settlement and variously requested that the court either reject the settlement or vary some of its terms in the interest of fairness.

Background

¶ 7 Both actions were commenced as a result of the contamination of the Canadian blood supply with infectious viruses during the 1980s. The background facts are set out in the pleadings and the numerous

affidavits forming the record on this motion. The following is a brief summary.

¶ 8 The national blood supply system in Canada was developed during World War II by the CRCS. Following WWII, the CRCS was asked to carry on with the operation of this national system, and did so as part of its voluntary activities without significant financial support from any government. As a result of its experience and stewardship of system, the CRCS had a virtual monopoly on the collection and distribution of blood and blood products in Canada.

¶ 9 Over time the demand for blood grew and Canada turned to a universal health care system. Because of these developments, the CRCS requested financial assistance from the provincial and territorial governments. The governments, in turn, demanded greater oversight over expenditures. This led to the formation of the Canadian Blood Committee which was composed of representatives of the federal, provincial and territorial governments. The CBC became operational in the summer of 1982. Other than this overseer committee, there was no direct governmental regulation of the blood supply in Canada.

¶ 10 The 1970s and 80s were characterized medically by a number of viral infection related problems stemming from contaminated blood supplies. These included hepatitis and AIDS. The defined classes in these two class actions, however, are circumscribed by the time period beginning January 1, 1986 and ending July 1, 1990. During the class periods, the CRCS was the sole supplier and distributor of whole blood and blood products in Canada. The viral infection at the center of these proceedings is now known as Hepatitis C.

¶ 11 Hepatitis is an inflammation of the liver that can be caused by various infectious agents, including contaminated blood and blood products. The inflammation consists of certain types of cells that infiltrate the tissue and produce by-products called cytokines or, alternatively, produce antibodies which damage liver cells and ultimately cause them to die.

¶ 12 One method of transmission of hepatitis is through blood transfusions. Indeed, it was common to contract hepatitis through blood transfusions. However, due to the limited knowledge of the effects of contracting hepatitis, the risk was considered acceptable in view of the alternative of no transfusion which would be, in many cases, death.

¶ 13 As knowledge of the disease evolved, it was discovered that there were different strains of hepatitis. The strains identified as Hepatitis A ("HAV") and Hepatitis B ("HBV") were known to the medical community for some time. HAV is spread through the oral-fecal route and is rarely fatal. HBV is blood-borne and may also be sexually transmitted. It can produce violent illness for a prolonged period in its acute phase and may result in death. However, most people infected with HBV eliminate the virus from their system, although they continue to produce antibodies for the rest of their lives.

¶ 14 During the late 1960s, an antigen associated with HBV was identified. This discovery led to the development of a test to identify donated blood contaminated with HBV. In 1972, the CRCS implemented this test to screen blood donations. It soon became apparent that post-transfusion hepatitis continued to occur, although much less frequently. In 1974, the existence of a third form of viral hepatitis, later referred to as Non-A Non-B Hepatitis ("NANBH") was postulated.

¶ 15 This third viral form of hepatitis became identified as Hepatitis C ("HCV") in 1988. Its particular features are as follows:

(a) transmission through the blood supply if HCV infected donors are unaware of

their infected condition and if there is no, or no effective, donor screening;
(b) an incubation period of 15 to 150 days;
(c) a long latency period during which a person infected may transmit the virus to others through blood and blood products, or sexually, or from mother to fetus; and
(d) no known cure.

¶ 16 The claims in these actions are founded on the decision by the CRCS, and its overseers the CBC, not to conduct testing of blood donations to the Canadian blood supply after a "surrogate" test for HCV became available and had been put into widespread use in the United States.

¶ 17 In a surrogate test a donor blood sample is tested for the presence of substances which are associated with the disease. The surrogate test is an indirect method of identifying in a blood sample the likelihood of an infection that cannot be identified directly because no specific test exists. During the class period, there were two surrogate tests capable of being used to identify the blood donors suspected of being infected with HCV, namely, a test to measure the ALT enzyme in a donor's blood and a test to detect the anti-HBc, a marker of HBV, in the blood.

¶ 18 The ALT enzyme test was useful because it highlights inflammation of the liver. There is an increased level of ALT enzymes in the blood when a liver is inflamed. The test is not specific for any one liver disease but rather indicates inflammation from any cause. Elevated ALT enzymes are a marker of liver dysfunction which is often associated with HCV.

¶ 19 The anti-HBc test detects exposure to HBV and is relevant to the detection of HCV because of the assumption that a person exposed to HBV is more likely than normal to have been exposed to HCV, since both viruses are blood-borne and because the populations with higher rates of seroprevalence were believed to be similar.

¶ 20 The surrogate tests were subjected to various studies in the United States. Among other aspects, the studies analyzed the efficacy of each test in preventing NANBH post-transfusion infection and the extent to which the rejection of blood donations would be increased. The early results of the studies did not persuade the agencies responsible for blood banks in the U.S. to implement surrogate testing as a matter of course. However, certain individuals, including Dr. Harvey Alter, a leading U.S. expert on HCV, began a campaign to have the U.S. blood agencies change their policies. In consequence, in April 1986 the largest U.S. blood agency decided that both surrogate tests should be implemented, and further, that the use of the tests would become a requirement of the agency's standard accreditation program in the future. This effectively made surrogate testing the national standard in the U.S. and by August 1, 1986, all or virtually all volunteer blood banks in the U.S. screened blood donors by using the ALT and anti-HBc tests.

¶ 21 This course was not followed in Canada. Although there was some debate amongst the doctors involved with the CRCS, surrogate testing was not adopted. Rather, in 1984 a meeting was held at the CRCS during which a multi-centre study was proposed. The purpose of the study was to determine the incidence of NANBH in Canada. The CRCS blood centres proposed to take part in the study were those in Toronto, Montreal, Ottawa, Edmonton and Vancouver.

¶ 22 Prior to the 1984 meeting however, Dr. Victor Feinman of Mount Sinai Hospital had already begun a study to determine the incidence of NANBH in those who had received blood transfusions. This study had a significant limitation in that it did not measure the effectiveness of surrogate testing. Although the limitation was known to the CRCS, the medical directors agreed at their

meeting on March 29-30, 1984 to review Dr. Feinman's research to determine whether the proposed CRCS multi-centre study was still required. Ultimately, the CRCS did not conduct the multi-centre study.

¶ 23 The CRCS was aware of the American decision to implement surrogate testing in 1986 but opted instead to await a full assessment of the results of the Dr. Feinman study and the impact of testing for the Human-Immunodeficiency Virus ("HIV") and "self-designation" as possible surrogates to screen for NANBH.

¶ 24 This decision was criticized by Dr. Alter. In an article published in the Medical Post in February 1988, Dr. Alter was quoted as stating that:

> "while the use of surrogate markers is far from ideal, the lack of any specific test to identify [NANBH], coupled with the serious chronic consequences of the disease, makes the need for these surrogate tests essential."

¶ 25 The CRCS never implemented surrogate testing. In late 1988, HCV was isolated. The Chiron Corporation developed a test for anti-HCV for use by blood banks. In March 1990, the CRCS blood centres began implementing the anti-HCV test, and by June 30, 1990, all centres had implemented the test. Hence the class definitions stipulated in the two certification orders before this court, covers the period between January 1, 1986 and July 1, 1990, which corresponds to the interval between the widespread use of surrogate testing in the U.S. and the universal adoption of the Chiron HCV test in Canada. The classes are described fully below.

The Claims

¶ 26 It is alleged by the plaintiffs in both actions that had the defendants taken steps to implement the surrogate testing, the incidence of HCV infection from contaminated blood would have been reduced by as much as 75% during the class period. Consequently, they bring the actions on behalf of classes described as the Ontario Transfused Class and the Ontario Hemophiliac Class. The plaintiffs assert claims based in negligence, breach of fiduciary duty and strict liability in tort as against all of the defendants.

The Classes

¶ 27 The Ontario Transfused Class is described as:

> (a) all persons who received blood collected by the CRCS contaminated with HCV during the Class Period and who are or were infected for the first time with HCV and who are:
>
> (i) presently or formerly resident in Ontario and receive blood in Ontario and who are or were infected with post-transfusion HCV;
> (ii) resident in Ontario and received blood in any other Province or Territory of Canada other than Quebec and who are or were infected with post-transfusion HCV;
> (iii) resident elsewhere in Canada and received blood in Canada, other than in the Provinces of British Columbia and Quebec, and who are or were infected with post-transfusion HCV;
> (iv) resident outside Canada and received blood in any Province or Territory

of Canada, other than in the Province of Quebec, and who are or were infected with post-transfusion HCV; and

(v) resident anywhere and received blood in Canada and who are or were infected with post-transfusion HCV and who are not included as class members in the British Columbia Transfused Class Action or the Quebec Transfused Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to in subparagraph (a) or (b) who is or was infected with HCV by such person.

¶ 28 The Ontario Hemophiliac Class is described as:

(a) all persons who have or, had a congenital clotting factor defect or deficiency, including a defect or deficiency in Factors V, VII, VIII, IX, XI, XII, XIII or von Willebrand factor, and who received or took Blood (as defined in Section 1.01 of the Hemophiliac HCV Plan) during the Class Period and who are:

(i) presently or formerly a resident in Ontario and received or took Blood in Ontario and who are or were infected with HCV;
(ii) resident in Ontario and received or took Blood in any other Province or Territory of Canada other than Quebec and who are or were infected with HCV;
(iii) resident elsewhere in Canada and received or took Blood in Canada other than in the Provinces of British Columbia and Quebec and who are or were infected with HCV;
(iv) resident outside Canada and received or took Blood in any Province or Territory in Canada, other than in the Province of Quebec, and who are or were infected with HCV; and
(v) resident anywhere and received or took Blood in Canada and who are not included as class members in the British Columbia Hemophiliac Class Action or the Quebec Hemophiliac Class Action;

(b) the Spouse of a person referred to in subparagraph (a) who is or was infected with HCV by such person; and

(c) the child of a person referred to subparagraph (a) or (b) who is or was infected with HCV by such person.

¶ 29 In addition in each of the actions, there is a "Family" class described, in the Ontario Transfused Class, as follows:

(a) the Spouse, child, grandchild, parent, grandparent or sibling of an Ontario Transfused Class Member;
(b) the spouse of a child, grandchild, parent or grandparent of an Ontario Transfused Class Member;
(c) a former Spouse of an Ontario Transfused Class Member;
(d) a child or other lineal descendant of a grandchild of an Ontario Transfused Class Member;

(e) a person of the opposite sex to an Ontario Transfused Class Member who cohabitated for a period of at least one year with that Class Member immediately before his or her death;
(f) a person of the opposite sex to an Ontario Transfused Class Member who was cohabitating with that Class Member at the date of his or her death and to whom that Class Member was providing support or was under a legal obligation to provide support on the date of his or her death; and
(g) any other person to whom an Ontario Transfused Class Member was providing support for a period of at least three years immediately prior to his or her death.

There is a similarly described Family Class in the Hemophiliac Action.

The Proposed Settlement

¶ 30 The parties have presented a comprehensive package to the court. Not only does it pertain to these actions, but it is also intended to be a Pan-Canadian agreement to settle the simultaneous class proceedings before the courts in Quebec and British Columbia. The settlement will not become final and binding until it is approved by courts in all three provinces. It consists of a Settlement Agreement, a Funding Agreement and Plans for distribution of the settlement funds in the Transfused Action and the Hemophiliac Action.

¶ 31 The Settlement Agreement creates the following two Plans:

(1) the Transfused HCV Plan to compensate persons who are or were infected with HCV through a blood transfusion received in Canada in the Class Period, their secondarily-infected Spouses and children and their other family members; and
(2) the Hemophiliac HCV Plan to compensate hemophiliacs who received or took blood or blood products in Canada in the Class Period and who are or were infected with HCV, their secondarily-infected Spouses and children and their other family members.

¶ 32 To fund the Agreement, the federal, provincial and territorial governments have promised to pay the settlement amount of $1,118,000,000 plus interest accruing from April 1, 1998. This will total approximately $1,207,000,000 as of September 30, 1999.

¶ 33 The Funding Agreement contemplates the creation of a Trust Fund on the following basis:

(i) a payment by the Federal Government to the Trust Fund, on the date when the last judgment or order approving the settlement of the Class Actions becomes final, of 8/11ths of the settlement amount, being the sum of approximately $877,818,181, subject to adjustments plus interest accruing after September 30, 1999 to the date of payment; and
(ii) a promise by each Provincial and Territorial Government to pay a portion of its share of the 3/11ths of the unpaid balance of the settlement amount as may be requested from time to time until the outstanding unpaid balance of the settlement amount together with interest accruing has been paid in full.

¶ 34 The Governments have agreed that no income taxes will be payable on the income earned by the Trust, thereby adding, according to the calculations submitted to the court, a present value of about $357,000,000 to the settlement amount.

¶ 35 The Agreement provides that the following claims and expenses will be paid from the Trust Fund:

(a) persons who qualify in accordance with the provisions of the Transfused HCV Plan;
(b) persons who qualify in accordance with the provisions of the Hemophiliac HCV Plan;
(c) spouses and children secondarily-infected with HIV to a maximum of 240 who qualify pursuant to the Program established by the Governments (which is not subject to Court approval);
(d) final judgments or Court approved settlements payable by any FPT Government to a Class Member or Family Class Member who opts out of one of the Class Actions or is not bound by the provisions of the Agreement or a person who claims over or brings a third-party claim in respect of the Class Member's receiving or taking of blood or blood products in Canada in the Class Period and his or her infection with HCV, plus one-third of Court-approved defence costs;
(e) subject to the Courts' approval, the costs of administering the Plans, including the costs of the persons hereafter enumerated to be appointed to perform various functions under the Agreement;
(f) subject to the Courts' approval, the costs of administering the HIV Program, which Program administration costs, in the aggregate, may not exceed $2,000,000; and
(g) subject to Court approval, fees, disbursements, costs, GST and other applicable taxes of Class Action Counsel.

Class Members Surviving as of January 1, 1999

¶ 36 Other than the payments to the HIV sufferers, which I will deal with in greater detail below, the plans contemplate that compensation to the class members who were alive as of January 1, 1999, will be paid according to the severity of the medical condition of each class member. All class members who qualify as HCV infected persons are entitled to a fixed payment as compensation for pain and suffering and loss of amenities of life based upon the stage of his or her medical condition at the time of qualification under the Plan. However, the class member will be subsequently entitled to additional compensation if and when his or her medical condition deteriorates to a medical condition described at a higher compensation level. This compensation ranges from a single payment of $10,000, for a person who has cleared the disease and only carries the HCV antibody, to payments totaling $225,000 for a person who has decompensation of the liver or a similar medical condition.

¶ 37 The compensation ranges are described in the Agreement as "Levels". In addition to the payments for loss of amenities, class members with conditions described as being at compensation Level 3 or a higher compensation Level (4 or above), and whose HCV caused loss of income or inability to perform his or her household duties, will be entitled to compensation for loss of income or loss of services in the home.

¶ 38 The levels, and attendant compensation, for class members are described as follows:

(i) Level 1

Qualification	Compensation
A blood test demonstrates	A lump sum payment of

that the HCV antibody is present in the blood of a class member.	$10,000 plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(ii) Level 2

Qualification	Compensation
A polymerase chain reaction test (PCR) demonstrates that HCV is present in the blood of a class member.	Cumulative compensation of $30,000 which comprises the the $10,000 payment at level 1, plus a payment of $15,000 immediately and another $5000 when the court determines that the Fund is sufficient to do so, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(iii) Level 3

Qualification	Compensation
If a class member develops non-bridging fibrosis, or receives compensable drug therapy (i.e. Interferon or Ribavirin), or meets a protocol for HCV compensable treatment regardless of whether the treatment is taken, then the class member qualifies for Level 3 benefits.	Option 1 - $60,000 comprised of the level 1 and 2 payments plus an additional $30,000 Option 2 - $30,000 from the Level 1 and 2 benefits, and if the additional $30,000 from Option 1 is waived, compensation for loss of income or loss of income or loss of services in the home, subject to a threshold qualification. In addition, at this level, the class member is entitled to an additional $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(iv) Level 4

Qualification	Compensation
If a class member develops bridging fibrosis, he or she qualifies as a Level 4	There is no further fixed payment beyond that of Level 3 at this level.

claimant	In addition to those previously defined benefits, the claimant is entitled to compensation for loss of income or loss of services in the home, $1000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reiumbursement for out-of-pocket expenses.

(v) Level 5

Qualification	Compensation
A class member who develops (a) cirrhosis; (b) unresponsive porphyria cutanea tarda which is causing significant disfigurement and disability; (c) unresponsive thrombocytopenia (low platelets) which result in certain other conditions; or (d) glomerulonephritis not requiring dialysis, he or she qualifies as a Level 5 claimant.	$125,000 which consists of the prior $60,000, if the claimant elected Option 1 at Level 3, plus an additional $65,0000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses.

(vi) Level 6

Qualification	Compensation
If a class member receives a liver transplant, or develops: (a) decompensation of the liver; (b) hepatocellular cancer; (c) B-cell lymphoma; (d) symptomatic mixed cryoglobullinemia; (e) glomerulonephritis requiring dialysis; or (f) renal failure, he or she qualifies as a Level 6 claimant.	$225,000 which consists of the $125,000 available at at the prior levels plus an additional $100,000 plus the claimant is entitled to compensation for loss of income or loss of services in the home, $1,000 per month for each month of completed drug therapy, plus reimbursement of uninsured treatment and medication costs and reimbursement for out-of-pocket expenses. The claimant is also entitled to reiumbursement for costs of care up to $50,000 per year.

¶ 39 There are some significant "holdbacks" of compensation at certain levels. As set out in the table above, a claimant who is entitled to the $20,000 compensation payment at level 2 will initially be paid $15,000 while $5,000 will be held back in the Fund. If satisfied that there is sufficient money in the

Fund, the Courts may then declare that the holdback shall be removed in accordance with Section 10.01 (1)(i) of the Agreement and Section 7.03 of the Plans. Claimants with monies held back will then receive the holdback amount with interest at the prime rate from the date they first became entitled to the payment at Level 2. In addition, any claimant that qualifies for income replacement at Level 4 or higher will be subjected to a holdback of 30% of the compensation amount. This holdback may be removed, and the compensation restored, on the same terms as the Level 2 payment holdback.

¶ 40 There is a further limitation with respect to income, namely, that the maximum amount subject to replacement has been set at $75,000 annually. Again this limitation is subject to the court's review. The court may increase the limit on income, after the holdbacks have been removed, and the held benefits restored, if the Fund contains sufficient assets to do so.

¶ 41 Payment of loss of income is made on a net basis after deductions for income tax that would have been payable on earned income and after deduction of all collateral benefits received by the Class Member. Loss of income payments cease upon a Class Member reaching age 65. A claim for the loss of services in the home may be made for the lifetime of the Class Member.

Class Members Dying Before January 1, 1999

¶ 42 If a Class Member who died before January 1, 1999, would have qualified as a HCV infected person but for the death, and if his or her death was caused by HCV, compensation will be paid on the following terms:

(a) the estate will be entitled to receive reimbursement for uninsured funeral expenses to a maximum of $5,000 and a fixed payment of $50,000, while approved family members will be entitled to compensation for loss of the deceased's guidance, care and companionship on the scale set out in the chart at paragraph 82 below and approved dependants may be entitled to compensation for their loss of support from the deceased or for the loss of the deceased's services in the home ("Option 1"); or

(b) at the joint election of the estate and the approved family members and dependants of the deceased, the estate will be entitled to reimbursement for uninsured funeral expenses to a maximum of $5,000, and the estate and the approved family members and dependants will be jointly entitled to compensation of $120,000 in full settlement of all of their claims ("Option 2").

¶ 43 Under the Plans when a deceased HCV infected person's death is caused by HCV, the approved dependants may be entitled to claim for loss of support until such time as the deceased would have reached age 65 but for his death.

¶ 44 Payments for loss of support are made on a net basis after deduction of 30% for the personal living expenses of the deceased and after deduction of any pension benefits from CPP received by the dependants.

¶ 45 The same or similar holdbacks or limits will initially be imposed on the claim by dependants for loss of support under the Plans as are imposed on a loss of income claim. The $75,000 cap on pre-claim gross income will be applied in the calculation of support and only 70% of the annual loss of support will be paid. If the courts determine that the Trust Fund is sufficient and vary or remove the holdbacks or limits, the dependants will receive the holdbacks, or the portion the courts direct, with interest from the time when loss of support was calculated subject to the limit.

¶ 46 Failing agreement among the approved dependants on the allocation of loss of support between them, the Administrator will allocate loss of support based on the extent of support received by each of the dependants prior to the death of the HCV infected person.

Class Members Cross-Infected with HIV.

¶ 47 Notwithstanding any of the provisions of the Hemophiliac HCV Plan, a primarily infected hemophiliac who is also infected with HIV may elect to be paid $50,000 in full satisfaction of all of his or her claims and those of his or her family members and dependants.

¶ 48 Persons infected with HCV and secondarily-infected with HIV who qualify under a Plan (or, where the person is deceased, the estate and his or her approved family members and dependants) may not receive compensation under the Plan until entitlement exceeds the $240,000 entitlement under the Program after which they will be entitled to receive any compensation payable under the Plan in excess of $240,000.

¶ 49 Under the Hemophiliac HCV Plan, the estate, family members and dependants of a primarily-infected hemophiliac who was cross-infected with HIV and who died before January 1, 1999 may elect to receive a payment of $72,000 in full satisfaction of their claims.

The Family Class Claimants

¶ 50 Each approved family class member of a qualified HCV infected person whose death was caused by HCV is entitled to be paid the amount set out below for loss of the deceased's guidance, care and companionship:

Relationship	Compensation
Spouse	$25,000
Child under 21 at time of death of class member	$15,000
Child over 21 at time of death of class member	$5,000
Parent or sibling	$5,000
Grandparent or Grandchild	$500

¶ 51 If a loss of support claim is not payable in respect of the death of a HCV infected person whose death was caused by, his or her infection with HCV, but the approved dependants resided with that person at the time of the death, then these dependants are entitled to be compensated for the loss of any, services that the HCV infected person provided in the home at the rate of $12 per hour to a maximum of 20 hours per week.

¶ 52 The Agreement and/or the Plans also provide that:

(a) all compensation payments to claimants who live in Canada will be tax free;
(b) compensation payments will be indexed annually to protect against inflation;

(c) compensation payments other than payments for loss of income will not affect social benefits currently being received by claimants;
(d) life insurance payments received by or on behalf of claimants will not be taken into account for any purposes whatsoever under the Plans; and
(e) no subrogation payments will be paid directly or indirectly.

The Funding Calculations

¶ 53 Typically in settlements in personal injury cases, where payments are to be made on a periodic basis over an extended period of time, lump sum amounts are set aside to fund the extended liabilities. The amount set aside is based on a calculation which determines the "present value" of the liability. The present value is the amount needed immediately to produce payments in the agreed value over the agreed time. This calculation requires factoring in the effects of inflation, the return on the investment of the lump sum amount and any income or other taxes which might have to be paid on the award or the income it generates. Dealing with this issue in a single victim case may be relatively straightforward. Making an accurate determination in a class proceeding with a multitude of claimants suffering a broad range of damages is a complex matter.

¶ 54 Class counsel retained the actuarial firm of Eckler Partners Ltd. to calculate the present value of the liabilities for the benefits set out in the settlement. The calculations performed by Eckler were based on a natural history model of HCV constructed by the Canadian Association for the Study of the Liver ("CASL") at the request of the parties. As stated in the Eckler report at p. 3, "the results from the [CASL] study form the basis of our assumptions regarding the development of the various medical outcomes." However, the Eckler report also notes that in instances where the study was lacking in information, certain extensions to some of the probabilities were supplied by Dr. Murray Krahn who led the study. In certain other situations, additional or alternative assumptions were provided by class counsel.

¶ 55 The class in the Transfused Action is comprised of those persons who received blood transfusions during the class period and are either still surviving or have died from a HCV related cause. The CASL study indicates that the probable number of persons infected with HCV through blood transfusion in the class period, the "cohort" as it is referred to in the study, is 15,707 persons. The study also estimates the rates of survival of each infected person. From these estimates, Eckler projects that the cohort as of January 1, 1999 is 8,104 persons. Of those who have died in the intervening time, 76 are projected to be HCV related deaths and thus eligible for the death benefits under the settlement.

¶ 56 In the case of the Hemophiliac class, the added factor of cross-infection with HIV, and the provisions in the plan dealing with this factor, require some additional considerations. Eckler was asked to make the following assumptions based primarily on the evidence of Dr. Irwin Walker:

(a) the Hemophiliac cohort size is approximately 1645 persons
(b) 15 singularly infected and 340 co-infected members of this cohort have died prior to January 1, 1999; the 15 singularly infected and 15 of those co-infected will establish HCV as the cause of death and claim under the regular death provisions (but there is no $120,000 option in this plan); the remaining 325 co-infected will take the $72,000 option.
(c) a further 300 co-infected members are alive at January 1, 1999; of these, 80%, i.e. 240, will take the $50,000 option;
(d) 990 singularly infected hemophiliacs are alive at January 1, 1999
(e) the remaining 60 co-infected and the 990 singularly infected hemophiliacs will claim under the regular provisions and should be modeled in the same way as

> the transfused persons, i.e. apply the same age and sex profiles, and the same medical, mortality and other assumptions as for the transfused group, except that the 60 coinfected claimants will not have any losses in respect of income.

¶ 57 Because of the structure of this agreement, Eckler was not required to consider the impact of income or other taxes on the investment returns available from the Fund. With respect to the rate of growth of the Fund, Eckler states at p. 10 that:

> A precise present value calculation would require a formula incorporating the gross rate of interest and the rate of inflation as separate parameters. However, virtually the same result will flow from a simpler formula where the future payments are discounted at a net rate equal to the excess of the gross rate of interest over the assumed rate of inflation. Eckler calculates the annual rate of growth of the Fund will be 3.4% per year on this basis. This is referred to as the "net discount rate".

¶ 58 There is one other calculation that is worthy of particular note. In determining the requirements to fund the income replacement benefits set out in the settlement, Eckler used the average industrial aggregate earnings rate in Canada estimated for 1999. From this figure, income taxes and other ordinary deductions were made to arrive at a "pre-claim net income". Then an assumption is made that the class members claiming income compensation will have other earnings post-claim that will average 40% of the pre-claim amount. The 60% remaining loss, in dollars expressed as $14,500, multiplied by the number of expected claimants, is the amount for which funding is required. Eckler points out candidly at p. 20 that:

> [in regard to the assumed average of Post-claim Net Income] ... we should bring to your attention that without any real choice, the foregoing assumed level of 40% was still based to a large extent on anecdotal input and our intuitive judgement on this matter rather than on rigourous scientific studies which are simply not available at this time. There are other assumptions and estimates which will be dealt with in greater detail below.

¶ 59 The Eckler conclusion is that if the settlement benefits, including holdbacks, and the other liabilities were to be paid out of the Fund, there is a present value deficit of $58,533,000. Prior to the payment of holdbacks, the Fund would have a surplus of $34,173,000.

The Thalassemia Victims

¶ 60 Prior to analyzing the settlement, I turn to the concerns advanced by The Thalassemia Foundation of Canada. The organization raises the objection that the plan contains a fundamental unfairness as it relates to claims requirements for members of the class who suffer from Thalassemia.

¶ 61 Thalassemia, also known as Mediterranean Anemia or Cooley's Anemia, is an inherited form of anemia in which affected individuals are unable to make normal hemoglobin, the oxygen carrying protein of the red blood cell. Mutations of the hemoglobin genes are inherited. Persons with a thalassemia mutation in one gene are known as carriers or are said to have thalassemia minor. The severe form of thalassemia, thalassemia major, occurs when a child inherits two mutated genes, one from each parent. Children born with thalassemia major usually develop the symptoms of severe anemia within the first year of life. Lacking the ability to produce normal adult hemoglobin, children with thalassemia major are chronically fatigued; they fail to thrive; sexual maturation is delayed and they do not grow normally. Prolonged anemia causes bone deformities and eventually will lead to death,

usually by their fifth birthday.

¶ 62 The only treatment to combat thalassemia major is regular transfusions of red blood cells. Persons with thalassemia major receive 15 cubic centimeters of washed red blood cells per kilogram of weight every 21 to 42 days for their lifetime. That is, a thalassemia major person weighing 60 kilograms (132 pounds) may receive 900 cubic centimeters of washed red blood cells each and every transfusion. Such a transfusion corresponds to four units of blood. Persons with thalassemia major have not been treated with pooled blood. Therefore, in each transfusion a thalassemia major person would receive blood from four different donors and over the course of a year would receive 70 units of blood from potentially 70 different donors. Over the course of the Class Period, a class member with thalassemia major might have received 315 units of blood from potentially 315 different donors.

¶ 63 Over the past three decades, advances in scientific research have allowed persons with thalassemia major in Canada to live relatively normal lives. Life expectancy has been extended beyond the fourth decade of life, often with minimal physical symptoms. In Canada approximately 300 persons live with thalassemia major.

¶ 64 Of the 147 transfused dependent thalassemia major patients currently being treated in the Haemoglobinopathy Program at the Hospital for Sick Children and Toronto General Hospital, 48 have tested positive using HCV antibody tests. Fifty-one percent of the population at TGH have tested positive; only 14% of the population of HSC have tested positive. The youngest of these persons was born in 1988; 9 of them are 13 years of age or older but less than 18 years of age; the balance are adults. Nine thalassemia major patients in the Haemoglobinopathy Program have died since HCV testing was available in 1991. Seven of these persons were HCV positive. The Foundation estimates that there are approximately 100 thalassemia major patients across Canada who are HCV positive.

¶ 65 The unfairness pointed to by the Thalassemia Foundation is that class members suffering from thalassemia are included in the Transfused Class, and therefore must follow the procedures for that class in establishing entitlement. It is contended that this is fundamentally unfair to thalassemia victims because of the number of potential donors from whom each would have received blood or blood products. It is said that by analogy to the hemophiliac class, and the lesser burden of proof placed on members of that class, a similar accommodation is justified. I agree.

¶ 66 This is a situation where it is appropriate to create a sub-class of thalassemia victims from the Transfused Class. Sub-classes are provided for in s. 5(2) of the CPA and the power to amend the certification order is contained in s. 8(3) of the Act. The settlement should be amended to apply the entitlement provisions in the Hemophiliac Plan mutatis mutandis to the Thalassemia sub-class.

Law and Analysis

¶ 67 Section 29(2) of the CPA provides that:

> A settlement of a class proceeding is not binding unless approved by the court.

¶ 68 While the approval of the court is required to effect a settlement, there is no explicit provision in the CPA dealing with criteria to be applied by the court on a motion for approval. The test to be applied was, however, stated by Sharpe J. in Dabbs v. Sun Life Assurance, [1998] O.J. No. 1598 (Gen. Div.) (Dabbs No. 1) at para. 9:

> ... the court must find that in all the circumstances the settlement is fair, reasonable and

in the best interests of those affected by it.

¶ 69 In the context of a class proceeding, this requires the court to determine whether the settlement is fair, reasonable and in the best interests of the class as a whole, not whether it meets the demands of a particular member. As this court stated in Ontario New Home Warranty Program v. Chevron Chemical Co., [1999] O.J. No. 2245 (Sup. Ct.) at para. 89:

> The exercise of settlement approval does not lead the court to a dissection of the settlement with an eye to perfection in every aspect. Rather, the settlement must fall within a zone or range of reasonableness.

¶ 70 Sharpe J. stated in Dabbs v. Sun Life Assurance (1998), 40 O.R. (3d) 429 (Gen. Div.), aff'd 41 O.R. (3d) 97 (C.A.). leave to appeal to S.C.C. dismissed October 22, 1998, (Dabbs No. 2) at 440, that "reasonableness allows for a range of possible resolutions." I agree. The court must remain flexible when presented with settlement proposals for approval. However, the reasonableness of any settlement depends on the factual matrix of the proceeding. Hence, the "range of reasonableness" is not a static valuation with an arbitrary application to every class proceeding, but rather it is an objective standard which allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

¶ 71 Generally. in determining whether a settlement is "fair, reasonable and in the best interests of the class as a whole", courts in Ontario and British Columbia have reviewed proposed class proceeding settlements on the basis of the following factors:

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; and
8. The presence of good faith and the absence of collusion.

See Dabbs No. 1 at para. 13, Haney Iron Works Ltd v. Manufacturers Life Insurance Co. (1998), 169 D.L.R. (4th) 565 (B.C.S.C.) at 571, See also Conte, Newberg on Class Actions, (3rd ed) (West Publishing) at para. 11.43.

¶ 72 In addition to the foregoing, it seems to me that there are two other factors which might be considered in the settlement approval process: i) the degree and nature of communications by counsel and the representative plaintiff with class members during the litigation; and ii) information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation. These two additional factors go hand-in-glove and provide the court with insight into whether the bargaining was interest-based, that is reflective of the needs of the class members, and whether the parties were bargaining at equal or comparable strength. A reviewing court, in exercising its supervisory jurisdiction is, in this way, assisted in appreciating fully whether the concerns of the class have been adequately addressed by the settlement.

¶ 73 However, the settlement approval exercise is not merely a mechanical seriatim application of each of the factors listed above. These factors are, and should be, a guide in the process and no more. Indeed, in a particular case, it is likely that one or more of the factors will have greater

significance than others and should accordingly be attributed greater weight in the overall approval process.

¶ 74 Moreover, the court must take care to subject the settlement of a class proceeding to the proper level of scrutiny. As Sharpe J. stated in Dabbs No. 2 at 439-440:

> 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.

¶ 75 The preceding admonition is especially apt in the present circumstances. Class counsel described the agreement before the court as "the largest settlement in a personal injury action in Canadian history." The settlement is Pan-Canadian in scope, affects thousands of people, some of whom are thus far unaware that they are claimants, and is intended to be administered for over 80 years. It cannot be seriously contended that the tragedy at the core of these actions does not have a present and lasting impact on the class members and their families. While the resolution of the litigation is a noteworthy aim, an improvident settlement would have repercussions well into the future.

¶ 76 Consequently, this is a case where the proposed settlement must receive the highest degree of court scrutiny. As stated in the Manual for Complex Litigation, 3rd Ed. (Federal Judicial Centre: West Publishing, 1995) at 238:

> Although settlement is favoured, court review must not be perfunctory; the dynamics of class action settlement may lead the negotiating parties - even those with the best intentions - to give insufficient weight to the interests of at least some class members. The court's responsibility is particularly weighty when reviewing a settlement involving a non-opt-out class or future claimants. (Emphasis added.)

¶ 77 The court has been assisted in scrutinizing the proposed settlement by the submissions of several intervenors and objectors. I note that some of the submissions, as acknowledged by counsel for the objectors, raised social and political concerns about the settlement. Without in any way detracting from the importance of these objections, it must be remembered that these matters have come before the court framed as class action lawsuits. The parties have chosen to settle the issues on a legal basis and the agreement before the court is part of that legal process. The court is therefore constrained by its jurisdiction, that is, to determine whether the settlement is fair and reasonable and in the best interests of the classes as a whole in the context of the legal issues. Consequently, extra-legal concerns even though they may be valid in a social or political context, remain extra-legal and outside the ambit of the court's review of the settlement.

¶ 78 However, although there may have been social or political undertones to many of the objections, legal issues raised by those objections, either directly or peripherally, are properly considered by the court in reviewing the settlement. Counsel for the objectors described the legal issues raised, in broad terms, as objections to:

(a) the adequacy of the total value of the settlement amount;
(b) the extent of compensation provided through the settlement;
(c) the sufficiency of the settlement Fund to provide the proposed compensation;
(d) the reversion of any surplus;
(e) the costs of administering the Plans; and
(f) the claims process applicable to Thalassemia victims.

I have dealt with the objection regarding the Thalassemia victims above. The balance of these objections will be addressed in the reasons which follow.

¶ 79 It is well established that settlements need not achieve a standard of perfection. Indeed, in this litigation, crafting a perfect settlement would require an omniscient wisdom to which neither this court nor the parties have ready recourse. The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The CPA mandates that class members retain, for a certain time, the right to opt out of a class proceeding. This ensures an element of control by allowing a claimant to proceed individually with a view to obtaining a settlement or judgment that is tailored more to the individual's circumstances. In this case, there is the added advantage in that a class member will have the choice to opt out while in full knowledge of the compensation otherwise available by remaining a member of the, class.

¶ 80 This settlement must be reviewed on an objective standard, taking into account the need to provide compensation for all of the class members while at the same time recognizing the inherent difficulty in crafting a universally satisfactory settlement for a disparate group. In other words, the question is does the settlement provide a reasonable alternative for those Class Members who do not wish to proceed to trial?

¶ 81 Counsel for the class and the Crown defendants urged this court to consider the question on the basis of each class member's likely recovery in individual personal injury tort litigation. They contend that the benefits provided at each level are similar to the awards class members who are suffering physical manifestations of HCV infection approximating those set out in the different levels of the structure of this settlement would receive in individual litigation. In my view, this approach is flawed in the present case.

¶ 82 An award of damages in personal injury tort litigation is idiosyncratic and dependent on the individual plaintiff before the court. Here, although the settlement is structured to account for Class Members with differing medical Conditions by establishing benefits on an ascending classification scheme, no allowances are made for the spectrum of damages which individual class members within each level of the structure may suffer. The settlement provides for compensation on a "one-size fits all" basis to all Class Members who are grouped at each level. However, it is apparent from the evidence before the court on this motion that the damages suffered as a result of HCV infection are not uniform, regardless of the degree of progression.

¶ 83 The evidence of Dr. Frank Anderson, a leading practitioner working with HCV patients in Vancouver, describes in detail the uncertain prognosis that accompanies HCV and the often debilitating, but unevenly distributed, symptomology that can occur in connection with infection. He states:

> Once infected with HCV, a person will either clear HCV after an acute stage of develop chronic HCV infection. At present, the medical literature establishes that approximately 20-25% of all persons infected clear HCV within approximately one year of infection. Those persons will still test positive for the antibody and will probably do so

for the rest of their lives, but will not test positive on a PCR test, nor will they experience any progressive liver disease due to HCV.
Persons who do not clear the virus after the acute stage of the illness have chronic HCV. They may or may not develop progressive liver disease due to HCV, depending on the course HCV takes in their body and whether treatment subsequently achieves a sustained remission. A sustained remission means that the virus is not detectable in the blood 6 months after treatment, the liver enzymes are normal, and that on a liver biopsy, if one were done, there would be no inflammation. Fibrosis in the liver is scar tissue caused by chronic inflammation, and as such is not reversible, and will remain even after therapy. It is also possible to spontaneously clear the virus after the acute phase of the illness but when this happens and why is not well understood. The number of patients spontaneously clearing the virus is small.
HCV causes inflammation of the liver cells. The level of inflammation varies among HCV patients. ... the inflammation may vary in intensity from time to time.
...
Inflammation and necrosis of liver cells results in scarring of liver tissue (fibrosis). Fibrosis also appears in various patterns in HCV patients .... Fibrosis can stay the same or increase over time, but does not decrease, because although the liver can regenerate cells, it cannot reverse scarring. On average it takes approximately 20 years from point of infection with Hepatitis C until cirrhosis develops, and so on a scale of 1 to 4 units the best estimate is that the rate of fibrosis progression is 0. 133 units per year.
...
Once a patient is cirrhotic, they are either a compensated cirrhotic, or a decompensated cirrhotic, depending on their liver function. In other words, the liver function may, still be normal even though there is fibrosis since there may, be enough viable liver cells remaining to maintain function. These persons would have compensated cirrhosis. If liver function fails the person would then have decompensated cirrhosis. The liver has very many functions and liver failure may involve some or many of these functions. Thus decompensation may present in a number of ways with a number of different signs and symptoms.
A compensated cirrhotic person has generally more than one third of the liver which is still free from fibrosis and whose liver can still function on a daily basis. They may have some of the symptoms discussed below, but they may also be asymptomatic.
Decompensated cirrhosis occurs when approximately 2/3 of the liver is compromised (functioning liver cells destroyed) and the liver is no longer able to perform one or more of its essential functions. It is diagnosed by the presence of one or more conditions which alone or in combination is life threatening without a transplant. This clinical stage of affairs is also referred to as liver failure or end stage liver disease. The manifestations of decompensation are discussed below. Once a person develops decompensation, life expectancy is short and they will generally die within approximately 2-3 years unless he or she receives a liver transplant.
Patients who progress to cirrhosis but not to decompensated cirrhosis may develop hepatocellular cancer ("HCC"). This is a cancer, which originates from liver cells, but the exact mechanism is uncertain. The simple occurrence of cirrhosis may predispose to HCC, but the virus itself may also stimulate the occurrence of liver cell cancer. Life expectancy after this stage is approximately 1-2 years.
...
The symptoms of chronic HCV infection, prior to the disease progressing to cirrhosis or HCC include: fatigue, weight loss, upper right abdominal pain, mood disturbance, and tension and anxiety ...

> Of those symptoms, fatigue is the most common, the most subjective and the most difficult to assess .... There is also general consensus that the level of fatigue experienced by an individual infected with HCV does not correlate with liver enzyme levels, the viral level in the blood, or the degree of inflammation or fibrosis on biopsy. It is common for the degree of fatigue to fluctuate from time to time.

Dr. Anderson identifies some of the symptoms associated with cirrhosis which can include skin lesions, swelling of the legs, testicular atrophy in men, enlarged spleen and internal hemorrhaging. Decompensated cirrhosis symptomatic effects, he states, can include jaundice, hepatic encephalopathy, protein malnutrition, subacute bacterial peritonitis and circulatory and pulmonary changes. Dr. Anderson also states, in respect of his own patients, that "at least 50% of my HCV infected patients who have not progressed to decompensated cirrhosis or HCC are clinically asymptomatic."

¶ 84 It is apparent, in light of Dr. Anderson's evidence, that in the absence of evidence of the individual damages sustained by class members, past precedents of damage awards in personal injury actions cannot be applied to this case to assess the reasonableness of the settlement for the class.

¶ 85 This fact alone is not a fatal flaw. There have long been calls for reform of the "once and for all" lump sum awards that are usually provided in personal injury actions. As stated by Dickson J, in Andrews v. Grand & Toy Alberta Ltd, [1978] 2 S.C.R. 229 at 236:

> The subject of damages for personal injury is an area of the law which cries out for legislative reform. The expenditure of time and money in the determination of fault and of damage is prodigal. The disparity resulting from lack of provision for victims who cannot establish fault must be disturbing. When it is determined that compensation is to be made, it is highly irrational to be tied to a lump sum system and a once-and-for-all award.
>
> The lump sum award presents problems of great importance. It is subject to inflation, it is subject to fluctuation on investment, income from it is subject to tax. After judgment new needs of the plaintiff arise and present needs are extinguished; yet, our law of damages knows nothing of periodic payment. The difficulties are greatest where there is a continuing need for intensive and expensive care and a long-term loss of earning capacity. It should be possible to devise some system whereby payments would be subject to periodic review and variation in the light of the continuing needs of the injured person and the cost of meeting those needs.

¶ 86 The "once-and-for-all" lump sum award is the common form of compensation for damages in tort litigation. Although the award may be used to purchase annuities to provide a "structured" settlement, the successful claimant receives one sum of money that is determined to be proper compensation for all past and future losses. Of necessity, there is a great deal of speculation involved in determining the future losses. There is also the danger that the claimant's future losses will prove to be much greater than are contemplated by the award of damages received because of unforeseen problems or an inaccurate calculation of the probability of future contingent events. Thus even though the claimant is successful at trial, in effect he or she bears the risk that there may be long term losses in excess of those anticipated. This risk is especially pronounced when dealing with a disease or medical condition with an uncertain prognosis or where the scientific knowledge is incomplete.

¶ 87 The present settlement is imaginative in its provision for periodic subsequent claims should the class member's condition worsen. The underlying philosophy upon which the settlement structure is based is set forth in the factum of the plaintiffs in the Transfused Action. They state at para. 10 that:

> The Agreement departs from the common law requirement of a single, once-and-for-all lump sum assessment and instead establishes a system of periodic payments to Class Members and Family Class Members depending on the evolving severity of their medical condition and their needs.

¶ 88 This forward-looking provision addresses the concern expressed by Dickson J. with respect to the uncertainty and unfairness of a once and for all settlement. Indeed, the objectors and intervenors acknowledge this in that they do not take issue with the benefit distribution structure of the settlement as much as they challenge the benefits provided at the levels within the structure.

¶ 89 These objections mirror the submissions in support of the settlement, in that they are largely based on an analogy to a tort model compensation scheme. For the reasons already stated, this analogy is not appropriate because the proper application of the tort model of damages compensation would require an examination of each individual case. In the absence of an individualized examination, the reasonableness, or adequacy, of the settlement cannot be determined by a comparison to damages that would be obtained under the tort model. Rather the only basis on which the court can proceed in a review of this settlement is to consider whether the total amount of compensation available represents a reasonable settlement, and further, whether those monies are distributed fairly and reasonably among the class members.

¶ 90 The total value of the Pan-Canadian settlement is estimated to be $1.564 billion dollars. This is calculated as payment or obligation to pay by the federal, provincial and territorial governments in the an amount of $1.207 billion on September 30, 1999, plus the tax relief of $357 million over the expected administrative term of the settlement. This amount is intended to settle the class proceedings in Ontario, British Columbia and Quebec. The Ontario proceeding, as stated above, covers all of those class members in Canada other than those included in the actions in British Columbia and Quebec.

¶ 91 Counsel for the plaintiffs and for the settling defendants made submissions to the court with respect the length and intensity of the negotiations leading up to the settlement. There was no challenge by any party as to the availability of any additional compensation. I am satisfied on the evidence that the negotiations achieved the maximum total funding that could be obtained short of trial.

¶ 92 In applying the relevant factors set out above to the global settlement figure proposed, I am of the view that the most significant consideration is the substantial litigation risk of continuing to trial with these actions. The CRCS is the primary defendant. It is now involved in protracted insolvency proceedings. Even if the court-ordered stay of litigation proceedings against it were to be lifted, it is unlikely that there would be any meaningful assets available to satisfy a judgment. Secondly, there is a real question as to the liability of the Crown defendants. Counsel for the plaintiffs candidly admit that there is a probability, which they estimate at 35%, that the Crown defendants would not be found liable at trial. Counsel for the federal government places the odds on the Crown successfully defending the actions somewhat higher at 50%. I note that none of the opposing intervenors or objectors challenge these estimates. In addition to the high risk of failure at trial, given the plethora of complex legal issues involved in the proceedings, there can be no question that the litigation would be lengthy, protracted and expensive, with a final result, after all appeals are exhausted, unlikely until years into the future.

¶ 93 Moving to the remaining factors, although there have been no examinations for discovery, the extensive proceedings before the Krever Commission serve a similar purpose. The settlement is supported by the recommendation of experienced counsel as well as many of the intervenors. There is no suggestion of bad faith or collusion tainting the settlement. The support of the intervenors, particularly the Canadian Hemophilia Society which made submissions regarding the meetings held with class members, is indicative of communication between class counsel and the class members.

Although, there were some objectors who raised concerns about the degree of communication with the Transfused Class members, these complaints were not strenuously pursued. Perhaps the most compelling evidence of the adequacy of the communications with the class members regarding the settlement is the relatively low number of objections presented to the court considering the size of the classes. Finally, counsel for all parties made submissions, which I accept, regarding the rigourous negotiations that resulted in the final settlement.

¶ 94 In conclusion, I find that the global settlement represents a reasonable settlement when the significant and very real risks of litigation are taken into account.

¶ 95 The next step in the analysis is to determine whether the monies available are allocated in such a way as to provide for a fair and reasonable distribution among the class members. In my view, as the settlement agreement is presently constituted, they are not. My concern lies with the provision dealing with opt out claimants. Under the agreement, if opt out claimants are successful in individual litigation, any award such a claimant receives will be satisfied out of the settlement Fund. While this has the potential of depleting the Fund to the detriment of the class members, thus rendering the settlement uncertain, the far greater concern is the risk of inequity that this creates in the settlement distribution. The Manual for Complex Litigation states at 239 that whether "claimants who are not members of the class are treated significantly differently" than members of the class is a factor that may "be taken into account in the determination of the settlement's fairness, adequacy and reasonableness ...".

¶ 96 In principle, there is nothing egregious about the payment of settlement funds to non-class members. Section 26(6) of the CPA provides the court with the discretion to sanction or direct payments to non-class members. In effect, the opt out provision reflects the intention of the defendants to settle all present and future litigation. This objective is not contrary to the scheme of the CPA per se. See, for example, the reasons of Brenner J. in Sawatzky v. Societe Chirurgiale Instrumentarium Inc. [1999] B.C.J. No. 1814 (S.C.), adopted by this court in Bisignano v. La Corporation Instrumentarium Inc. (September 1, 1999, Court File No. 22404/96, unreported.)

¶ 97 However, given that the settlement must be "fair, reasonable and in the best interests of the class", the court cannot sanction a provision which gives opt out claimants the potential for preferential treatment in respect of access to the Fund. The opt out provision as presently written has this potential effect where an opt out claimant either receives an award or settlement in excess of the benefits that he or she would have received had they not opted out and which must be satisfied out of the Fund. Alternatively, the preferential treatment could also occur where the opt out claimant receives an award similar to their entitlement under the settlement in quantum but without regard for the time phased payment structure of the settlement.

¶ 98 In my view, where a defendant wishes to settle a class proceeding by providing a single Fund to deal with both the claims of the class members and the claims of individuals opting out of the settlement, the payments out of the Fund must be made on an equitable basis amongst all of the claimants. Fairness does not require that each claimant receive equal amounts but what cannot be countenanced is a situation where an opt out claimant who is similarly situated to a class member receives a preferential payment.

¶ 99 The federal government argues that fairness ensues, even in the face of the different treatment, because the opt out claimant assumes the risk of individual litigation. I disagree. Because the defendants intend that all claims shall be satisfied from a single fund, individual litigation by a claimant opting out of the class pits that claimant against the members of the class. The opt out claimant stands to benefit from success because he or she may achieve an award in excess of the benefits provided under the settlement. This works to the detriment of the class members by the reducing the total amount of the

settlement. More importantly however, the benefits to the class members will not increase as a result of unsuccessful opt out claimants.

¶ 100 In the instant case, fairness requires a modification to the opt out claimant provision of the settlement. The present opt out provision must be deleted and replaced with a provision that in the event of successful litigation by an opt out claimant, the defendants are entitled to indemnification from the Fund only to the extent that the claimant would have been entitled to claim from the Fund had he or she remained in the class. This must of necessity include the time phasing factor. Such a provision ensures fairness in that there is no prospect of preferential distribution from the Fund, nor will the class suffer any detrimental effect as a result of the outcome of the individual litigation. The change also provides a complete answer to the complaint that the current opt out provision renders the settlement uncertain. Similarly, the modification renders the provision for defence costs to be paid out of the Fund unnecessary and thus it must be deleted.

¶ 101 Accordingly, the opt out provision of the settlement would not bean impediment to court approval with the modifications set out above.

¶ 102 In my view, the remainder of distribution scheme is fair and reasonable with this alteration to the opt out provision. It is beyond dispute that the compensation at any level will not be perfect, nor will it be tailored to individual cases but perfection is not the standard to be applied. The benefit levels are fair. More pointedly, fairness permeates the settlement structure in that each and every class member is provided an opportunity to make subsequent claims if his or her condition deteriorates. An added advantage is that there is a pre-determined, objective qualifying scheme so that class members will be able to readily assess their eligibility for additional benefits. Thus, while a claimant may not be perfectly compensated at any particular level, the edge to be gained by a scheme which terminates the litigation while avoiding the pitfalls of an imperfect, one-time-only lump sum settlement is compelling.

¶ 103 In any, event, the settlement structure also provides a reasonable basis for the distribution of the funds available. Class counsel described the distribution method as a "need not greed" system, where compensation is meant, within limits, to parallel the extent of the damages. There were few concerns raised about the compensation provided at the upper levels of the scheme. Rather, the majority of the objections centred on the benefits provided at Levels 1, 2 and 3. The damages suffered by those whose conditions fall within these Levels are clearly the most difficult to assess. This is particularly true in respect of those considered to be at Level 2. However, in order to provide for the subsequent claims, compromises must be made and in this case, I am of the view that the one chosen is reasonable.

¶ 104 Regardless of the submissions made with respect to comparable awards under the tort model, it is clear from the record that the compensatory, benefits assigned to claimants at different levels were largely influenced by the total of the monies available for allocation. As stated in the CASL study at p. 3:

> At the request of the Federal government of Canada, provincial governments, and Hepatitis C claimants, i.e. individuals infected with hepatitis C virus during the period of 1986 to 1990, an impartial group, the Canadian Association for the Study of the Liver (CASL) was asked to construct a natural history model of Hepatitis C. The intent of this effort was to generate a model that would be used by all parties, as guide to disbursing funds set aside to compensate patients infected with hepatitis C virus through blood transfusion.

¶ 105 Of necessity, the settlement cannot, within each broad category, deal with individual

differences between victims. Rather it must be general in nature. In my view, the allocation of the monies available under the settlement is "fair, reasonable and in the best interests of the class as a whole."

¶ 106 In making this determination, I have not ignored the submissions made by certain objectors and intervenors regarding the sufficiency of the Fund. They asserted that the apparent main advantage of this settlement, the ability to "claim time and time again" is largely illusory because the Fund may well be depleted by the time that the youngest members of the class make claims against it.

¶ 107 I cannot accede to this submission. The Eckler report states that with the contemplated holdbacks of the lump sum at Level 2 and the income replacement at Level 4 and above, the Fund will have a surplus of $334,173,000. Admittedly, Eckler currently projects a deficit of $58,533,000 if the holdbacks are released.

¶ 108 However, the Eckler report contains numerous caveats regarding the various assumptions that have been made as a matter of necessity, including the following, which is stated in section 12.2:

> A considerable number of assumptions have been made in order to calculate the liabilities in this report. Where we have made the assumptions, we used our best efforts based on our understanding of the plan benefits; in general, where we have made simplifying assumptions or approximations, we have tried to err on the conservative side, i.e. increasing costs and liabilities. In many instances we have relied on counsel for the assumptions and understand that they, have used their best efforts in making these. Nevertheless, the medical outcomes are very unclear - e.g. the CASL report indicates very wide ranges in its confidence intervals for the various probabilities it developed. There is substantial room for variation in the results. The differences will emerge in the ensuing years as more experience is obtained on the actual cohort size and characteristics of the infected claimants. These differences and the related actuarial assumptions will be re-examined at each periodic assessment of the Fund.

¶ 109 Unfortunately, but not unexpectedly, the limitations of the underlying medical studies upon which Eckler has based its report require the use of assumptions. For example. the report prepared by Dr. Remis, dated July 6, 1999, states at p. 642:

> There are important limitations to the analyses presented here and, in particular, with the precision of the estimates of the number of HCV-infected recipients who are likely to qualify for benefits under the Class Action Settlement ...
> The proportion of transfusion recipients who will ultimately be diagnosed is particularly important in this regard and has substantial impact on the final estimate. We used an estimate of 70% as the best case estimate for this proportion based on the BC experience but the actual proportion could be substantially different from this, depending on the type, extent and success of targeted notification activities that will be undertaken, especially, in Ontario and Quebec. This could alter the ultimate number who eventually qualify for benefits by as much as 1,500 in either direction.

¶ 110 The report of the CASL study states at. 22:

> Our attempt to project the natural history of the 1986-1990 post transfusion HCV infected cohort has limitations. Perhaps foremost among these is our lack of understanding of the long-term prognosis of the disease. For periods beyond 25 years,

projections remain particularly uncertain. The wide confidence intervals surrounding long-term projections highlight this uncertainty.
Other key, limitations are lack of applicability of these projections to children and special groups.

¶ 111 The size of the cohort and the percentage of the cohort which will make claims against the Fund are critical assumptions. Significant errors in either assumption will have a dramatic impact on the sufficiency of the Fund. Recognizing this, Eckler has chosen to use the most conservative estimates from the information available. The cohort size has been estimated from the CASL study rather than other studies which estimate approximately 20% less surviving members. Furthermore, Eckler has calculated liabilities on the basis that 100% of the estimated cohort will make claims against the Fund.

¶ 112 Class counsel urged the court to consider the empirical evidence of the "take-up rate" demonstrated in the completed class proceeding, Nantais v. Telectronics Proprietary (Canada) Ltd. (1995), 25 O.R. (3d) 331 (Gen. Div.), leave to appeal dismissed (1995), 129 D.L.R. (4th) 110 (Ont. Div. Ct.), to support a conclusion that the Fund is sufficient. In Nantais, all of the class members were known and accordingly received actual notice of the settlement. Seventy-two percent of the class chose to make claims, or "take-up" the settlement. It was contended that this amounted to strong evidence that less than one hundred per cent of the classes in these proceedings would take up this settlement. I cannot accept the analogy. While I agree that it is unlikely that the entire estimated cohort will take up the settlement, it is apparent from the caveats expressed in the reports provided to the court that the estimate of the cohort size may be understated by a significant number. Accordingly, for practical purposes, a less than one hundred per cent take up rate could well be counter-balanced by a concurrent miscalculation of the cohort size.

¶ 113 Although I cannot accept the Nantais experience as applicable on this particular point, the Eckler report stands alone as the only and best evidence before the court from which to determine the sufficiency of the Fund. Eckler has recognized the deficiencies inherent in the information available by using the most conservative estimates throughout. This provides the court with a measure of added comfort. Not to be overlooked as well, the distribution of the Fund will be monitored by this court and the courts in Quebec and British Columbia, guided by periodically, revised actuarial projections. In my view, the risk that the Fund will be completely depleted for latter claimants is minimal.

¶ 114 Consequently, given the empirical evidence proffered by Dr. Anderson as to the asymptomatic potential of HCV infection, the conservative approach taken by Eckler in determining the likely claims against the Fund and the role of the courts in monitoring the ongoing distributions, I am of the view that the projected shortfall of $58,000.000 considered in the context of the size of the overall settlement, is within acceptable limits. I find on the evidence before me, that the Fund is sufficient to provide the benefits and, thus, in this respect, the settlement is reasonable.

¶ 115 I turn now to the area of concern raised by counsel for the intervenor the Hepatitis C Society of Canada (the "Society"), namely the provision that mandates reversion of the surplus of the Plans to the defendants. The Society contends that this provision simpliciter is repugnant to the basis on which this settlement is constructed. It argues that the benefit levels were established on the basis of the total monies available, rather than a negotiation of benefit levels per se. Thus, it states there is a risk that the Fund will not be sufficient to provide the stated benefits and further, that this risk lies entirely with the class members because the defendants have no obligation to supplement the Fund if it proves to be deficient for the intended purpose. Moreover, the Society argues that the use of conservative estimates in defining the benefit levels, although an attempt at ensuring sufficiency, has the ancillary negative effect of minimizing the benefits payable to each class member under the settlement. Therefore, the Society contends that a surplus, if any develops in the ongoing administration of the Fund, should be

used to augment the benefits for the class members.

¶ 116 The issue here is whether a reversion clause is appropriate in a settlement agreement in this class proceeding, and by extension, whether the inclusion of this clause is such that it would render the overall settlement unacceptable.

¶ 117 It is important to frame the submission of the Society in the proper context. This is not a case where the question of entitlement to an existing surplus is presented. Indeed, given the deficit projected by the Eckler report, it is conjectural at this stage whether the Fund will ever generate a surplus. If the Fund accumulates assets over and above the current Eckler projections, they must first be directed toward eliminating the deficit so that the holdbacks may be released.

¶ 118 The plan also provides that after the release of the holdbacks, the administrator may make an application to raise the $75,000 annual cap on income replacement if the Fund has sufficient assets to do so. It is only after these two areas of concern have been fully addressed that a surplus could be deemed to exist.

¶ 119 The clause in issue does not, according to the interpretation given to the court by class counsel, permit the withdrawal by the defendants of any actuarial surplus that may be identified in the ongoing administration of the Fund. Rather, they state that it is intended that the remainder of the Fund, if any, revert to the defendants only after the Plans have been fully administered in the year 2080.

¶ 120 Remainder provisions in trusts are not unusual. Further, I reiterate that it is, at this juncture, complete speculation as to whether a surplus, either ongoing or in a remainder amount, will exist in the Fund. However, accepting the submission of class counsel at face value, the reversion provision is anomalous in that it is neither in the best interests of the plaintiff classes nor in the interests of defendants. The period of administration of the Fund is 80 years. No party took issue with class counsel's submission that the defendants are not entitled under the current language to withdraw any surplus in the Fund until this period expires. Likewise, there is no basis within the settlement agreement upon which the class members could assert any entitlement to access any surplus during the term of the agreement. Thus, any surplus would remain tied up, benefitting neither party during the entire 80 year term of the settlement.

¶ 121 Quite apart from the question of tying up the surplus for this unreasonable period of time, there is the underlying question of whether in the context of this settlement, it is appropriate for the surplus to revert in its entirety to the defendants.

¶ 122 The court is asked to approve the settlement even though the benefits are subject to fluctuation and regardless that the defendants are not required to make up any shortfall should the Fund prove deficient. This is so notwithstanding that the benefit levels are not perfect. It is therefore in keeping with the nature of the settlement and in the interests of consistency and fairness that some portion of a surplus may be applied to benefit class members.

¶ 123 This is not to say that it is necessary, as the Society suggests, that in order to be in the best interests of the class members, any surplus must only be used to augment the benefits within the settlement agreement. There are a range of possible uses to which any surplus may be put so as to benefit the class as a whole without focusing on any particular class member or group of class members. This is in keeping with the CPA which provides in s. 26(4) that surplus funds may "be applied in any manner that may reasonably be expected to benefit class members, even though the order does not provide for monetary relief to individual class members ...". On the other hand, in the proper

circumstances, it may not be beyond the realm of reasonableness to allow the defendants access to a surplus within the Fund prior to the expiration of the 80 year period.

¶ 124 To attempt to determine the range of reasonable solutions at present, when the prospect of a surplus is uncertain at best, would be to pile speculation upon speculation. In the circumstances therefore, the only appropriate course, in my opinion, is to leave the question of the proper application of any surplus to the administrator of the Fund. The administrator may recommend to the court from time to time, based on facts, experience with the Fund and future considerations, that all or a portion of the surplus be applied for the benefit of the class members or that all or a portion be released to the defendants. In the alternative, the surplus may be retained within the Fund if the administrator determines that this is appropriate. Any option recommended by the administrator would, of course, be subject to requisite court approval. This approach is in the best interests of the class and creates no conflicts between class members. Moreover, it resolves the anomaly created by freezing any surplus for the duration of the administration of the settlement. If the present surplus reversion clause is altered to conform with the foregoing reasons, it would meet with the court's approval.

¶ 125 There was an expressed concern as to the potential for depletion of the Fund through excessive administrative costs. The court shares this concern. However, the need for efficient access to the plan benefits for the class members and the associated costs that this entails must also be recognized. This requires an ongoing balancing so as to keep administrative costs in line while at the same time providing a user friendly claims administration. The courts, in their supervisory role, will be vigilant in ensuring that the best interests of the class will be the predominant criterion.

Disposition

¶ 126 In ordinary circumstances, the court must either approve or reject a settlement in its entirety. As stated by Sharpe J. in Dabbs No. 1 at para. 10:

> It has often been 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; Poulin v. Nadon, [1950] O.R. 219 (C.A.) at 222-3.

¶ 127 These proceedings, emanating from the blood tragedy, are novel and unusually complex. The parties have adverted to this in the settlement agreement which contemplates the necessity for changes of a non-material nature in Clause 12.01:

> This Agreement will not be effective unless and until it is approved by the Court in each of the Class Actions, and if such approvals are not granted without any material differences therein, this Agreement will be thereupon terminated and none of the Parties will be liable to any other Parties hereunder. (Emphasis added.)

¶ 128 The global settlement submitted to the court for approval is within the range of reasonableness having regard for the risk inherent in carrying this matter through to trial. Moreover, the levels of benefits ascribed within the settlement are acceptable having regard for the accessibility of the plan to successive claims in the event of a worsening of a class member's condition. This progressive approach outweighs any deficiencies which might exist in the levels of benefits.

¶ 129 I am satisfied based on the Eckler report that the Fund is sufficient, within acceptable tolerances to provide the benefits stipulated. There are three areas which require modification, however, in order for the settlement to receive court approval. First, regarding access to the Fund by opt out

claimants, the benefits provided from the Fund for an opt out claimant cannot exceed those available to a similarly injured class member who remains in the class. This modification is necessary for fairness and the certainty of the settlement. Secondly, the surplus provision must be altered so as to accord with these reasons. Thirdly, in the interests of fairness, a sub-class must be created for the thalassemia victims to take into account their special circumstances.

¶ 130 The defendants have expressed their intention to be bound by the settlement if it receives court approval absent any material change. As stated, this reflects their acknowledgment of the complexity of the case, the scientific uncertainty surrounding the infections and the fact this settlement is crafted with a degree of improvisation.

¶ 131 The changes to the settlement required to obtain the approval of this court are not material in nature when viewed from the perspective of the defendants. Accepting the assumed value of $10,000,000 attributed to the opt outs by class counsel, a figure strongly supported by counsel for the defendants, the variation indicated is de minimis in the context of a $1.564 billion dollar settlement. The change required in respect of the surplus provision resolves the anomaly of tying up any surplus for the entire 80 year period of the administration of the settlement. In any event, given the projected $58,000,000 deficit, the question of a surplus is highly conjectural. The creation of the sub-class of thalassemia victims, in the context of the cohort size is equally de minimis. I am prepared to approve the settlement with these changes.

¶ 132 However, should the parties to the agreement not share the view that these changes are not material in nature, they may consider the proposed changes as an indication of "areas of concern" within the meaning the words of Sharpe J. in Dabbs No. 1 at para. 10:

> As a practical matter, it is within the power of the court to indicate areas of concern and afford the parties the opportunity to answer and address those concerns with changes to the settlement ...

¶ 133 The victims of the blood tragedy in Canada cannot be made whole by this settlement. No one can undo what has been done. This court is constrained in these settlement approval proceedings by its jurisdiction and the legal framework in which these proceedings are conducted. Thus, the settlement must be reviewed from the standpoint of its fairness, reasonableness and whether it is in the best interests of the class as a whole. The global settlement, its framework and the distribution of money within it, as well the adequacy of the funding to produce the specified benefits, with the modifications suggested in these reasons, are fair and reasonable. There are no absolutes for purposes of comparison, nor are there any assurances that the scheme will produce a perfect solution for each individual. However, perfection is not the legal standard to be applied nor could it be achieved in crafting a settlement of this nature. All of these points considered, the settlement, with the required modifications, is in the best interests of the class as a whole.

¶ 133a I am obliged to counsel, the parties and the intervenors and especially to the individual objectors who took the time to either file a written objection or appear in person at the hearings. [The Court did not number this paragraph. QL has assigned the number 133a.] WINKLER J.

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Indexed as:

Rumley v. British Columbia

Her Majesty the Queen in Right of the Province of British Columbia, appellant;
v.
Leanne Rumley, John Pratt, Sharon Rumley, J.S. and M.M., respondents.

[2001] 3 S.C.R. 184
[2001] S.C.J. No. 39
2001 SCC 69
File No.: 27721.

Supreme Court of Canada

Hearing and judgment: June 13, 2001.
Reasons delivered: October 18, 2001.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie and Arbour JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA
(41 paras.)

Practice — Class actions — Class certification — Plaintiffs seeking to represent current and former students abused at residential school for deaf and blind operated by province — Whether plaintiffs meet certification requirements set out in provincial class action legislation — Class Proceedings Act, R.S.B.C. 1996, c. 50, s. 4.

From the early 1950s until 1992, British Columbia operated a residential school for deaf children. Until 1979, the school also enrolled blind children. Investigations by the provincial Ombudsman and later by a special counsel established that sexual, physical and emotional abuse of students by staff and peers took place at the school over many years. The government responded to the special counsel's report by acknowledging responsibility for abuse that occurred at the school and establishing an individual compensation program that awarded compensation in three tiers, with a minimum of $3,000 and a maximum of $60,000. The respondents commenced a class action against the appellant in 1998 seeking compensatory and punitive damages. Under s. 4 of the Class Proceedings Act, the court must certify a proceeding as a class proceeding if all of the following requirements are met: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of two 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; [page185] and (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. The British Columbia Supreme Court denied certification. The Court of Appeal allowed the respondents' appeal and certified the claims relating to sexual abuse as common issues.

Held: The appeal should be dismissed.

The respondents have satisfied the certification requirements set out in s. 4 of the Class Proceedings Act. The issues in dispute are whether there are questions common to the class and whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. Both the commonality and preferability requirements are satisfied in this case. With regard to commonality, all class members share an interest in the question of whether the appellant breached a duty of care. The issues of duty and breach are thus common to the class. That the standard of care may have varied over the relevant time period is not an obstacle to the suit's proceeding as a class action but simply means that the court may find it necessary to provide a nuanced answer to the common question. The structure of the special counsel's report, which explicitly divides the years between 1982 and 1991 into three discrete subperiods, suggests that such an approach would not be infeasible. Moreover, the Class Proceedings Act contemplates the possibility of subclasses, and the court may amend the certification order at any time. The appropriateness and amount of punitive damages is also, in this case, a question amenable to resolution as a common issue.

The preferability inquiry is directed at two questions:

first, whether the class proceeding would be a fair, efficient and manageable method of advancing the claim, and second, whether the class proceeding would be preferable in the sense of preferable to other procedures. The first factor to be considered under s. 4(2) is "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members". It seems likely that there will be relevant differences between class members here; as the respondents have limited their claims to claims of "systemic" negligence, however, the central issues in this suit will be the nature of the duty owed by the school to the class members and whether that duty was breached. [page186] Those issues are amenable to resolution in a class proceeding. While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), the individual issues will be a relatively minor aspect of this case. 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.

Cases Cited

Referred to: Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68; Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46; Anderson v. Wilson (1999), 44 O.R. (3d) 673; Chace v. Crane Canada Inc. (1996), 26 B.C.L.R. (3d) 339; Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158.

Statutes and Regulations Cited

Class Proceedings Act, R.S.B.C. 1996, c. 50, ss. 4, 6(1), 7, 8(3), 10(1).
Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5.
School Act, R.S.B.C. 1996, c. 412.

APPEAL from a judgment of the British Columbia Court of Appeal (1999), 72 B.C.L.R. (3d) 1 (sub nom. R. (L.) v. British Columbia), 180 D.L.R. (4th) 639, 48 C.C.L.T. (2d) 1, 38 C.P.C. (4th) 1, 131 B.C.A.C. 68, 214 W.A.C. 68, [1999] B.C.J. No. 2633 (QL), 1999 BCCA 689, reversing in part a decision of Kirkpatrick J. (1998), 65 B.C.L.R. (3d) 382, 25 C.P.C. (4th) 186, [1998] B.C.J. No. 2588 (QL), refusing to certify certain proceedings as a class action. Appeal dismissed.

James M. Sullivan, D. Clifton Prowse and Suzanne M. Kennedy, for the appellant.

Patrick G. Guy and Anne Sheane, for the respondents.
Solicitor for the appellant: The Ministry of the Attorney General, Vancouver.
Solicitors for the respondents: Acheson & Company, Victoria; McDonagh Sheane, Victoria.

The judgment of the Court was delivered by

¶ 1 **McLACHLIN C.J.**:— Like Hollick v. Toronto (City), [2001] 3 S.C.R. 158, 2001 SCC 68, this case [page187] raises the question of whether the plaintiffs below (respondents here) meet the certification requirements set out in provincial class action legislation. In this case the respondents seek to represent current and former students who were abused at the Jericho Hill School, a residential school for the deaf and blind operated by the province of British Columbia. At the end of the hearing, the Court concluded that the respondents had satisfied the certification requirements set out in s. 4 of the British Columbia Class Proceedings Act, R.S.B.C. 1996, c. 50, and dismissed the appeal, reasons to follow. These are those reasons.

I. Facts

¶ 2 From the early 1950s until 1992, Jericho Hill School ("JHS") operated as a residential school for deaf children. Until 1979, the school also enrolled blind children. Whereas most schools in British Columbia are managed by district school boards, JHS was a "provincial school" under British Columbia's governing legislation, currently the School Act, R.S.B.C. 1996, c. 412, and was operated and maintained by British Columbia's Ministry of Education. It is now clear that sexual and physical abuse of children took place at the school throughout its history. The first thorough investigation of abuse at the school was conducted by the British Columbia Ombudsman in 1992. His report, issued in 1993, concluded that sexual, physical and emotional abuse of students by staff and peers occurred over a period of many years. In response to the Ombudsman's report and to lawsuits initiated against the province after the report was issued, the Attorney General appointed Thomas Berger, Q.C., as special counsel. Berger's report was issued in March 1995. The Berger report concluded that "sexual abuse was at times widespread at the residence at Jericho Hill School, and ... it went on over a period of many years" (p. 14).

¶ 3 The findings of the Berger report are disturbing, to say the least. Berger interviewed 35 students who were at JHS in the 1950s, 1960s, 1970s, and 1980s. [page188] He found that "[m]any of these persons allege[d] that they were sexually abused or witnessed sexual abuse by staff or other students" (p. 13). Berger focussed principally on abuse that took place after 1980. According to the Berger report, two male students complained separately about abuse at the school in the early 1980s. The first complained that he had been sexually abused by a female child care counsellor and that students at the school were encouraged and even forced to have sex with one another; the second alleged that two male child care counsellors had abused him. After the second complaint, a social worker with the Ministry of Human Resources conducted interviews with a number of boys resident at the school. Some of the boys admitted having abused girls at the school, some as young as seven years old. The boys also alleged that they had been abused by two male child care counsellors.

¶ 4 According to the Berger report, there is compelling evidence that abuse was rampant throughout the 1980s. Some of the abuse took place at the residence associated with the school, but there were also indications of abuse in a group home run by a psychologist hired by JHS in 1983. In 1984 one student at the group home stabbed another to death. At the subsequent trial, the judge expressed concern about the adequacy of supervision in the group home, stating that the accused "was receiving what I can only characterize as the most inappropriate form of care and guidance in that foster home". In 1986 one of

the male students at JHS who had resided in the group home committed suicide after sexually abusing his niece at home.

¶ 5 The Berger report speaks separately about the period between 1987 and 1990. In January 1987 the student who had brought the first complaint in the early 1980s attempted suicide after abusing his younger siblings. After his suicide attempt, the student repeated his allegation of abuse at the hands of a female counsellor. He also admitted that he and [page189] other boys had abused elementary-age girls at the school. Around the same time, another male student was arrested for molesting a young boy. He stated that he himself had been abused by a child care worker at JHS and stated that he had engaged in sexual activity with boys and girls at the residence. He listed ten female students whom he had sexually abused and named three other boys who he said had abused female students. After these new allegations, the Ministries of Education and Social Services conducted an investigation, interviewing some 35 students beginning in early 1987. The students interviewed provided names of other children who they said had been forced to have sex or had forced others to have sex. One member of the investigative team, in reviewing the findings, identified "a pervasive culture at the residence that required students to submit to a sexual rite of passage if they were to successfully cohabit with their peers".

¶ 6 The Berger report did not go into detail about individual cases; its principal goal was to determine the prevalence of abuse at the school, not to determine whether any particular resident had been abused. The report stated (at p. 14):

> I make no findings here regarding individual cases. I am instead confining myself to stating my finding, applying generally to the state of affairs at Jericho Hill School, that from the 1950s, extending over about a 35-year period, there was sexual abuse by some child care staff, sexual abuse by some older children against younger children, and that some of these younger children (once they became senior students) sexually abused new entrants.
> The case histories can be shocking. There is no need to go into them in detail. But they do indicate that sexual abuse at the school may not entirely have come to an end even in 1987. One former student states that she was assaulted by a female child care worker from 1981 to 1990. Another former student states she was sexually assaulted many times, from 1980 to 1991. It remains to be seen whether these particular allegations will be made out, but they do indicate that the possibility of incidents of sexual abuse even after 1987 cannot be dismissed.
>
> [page190]
>
> In this report I do not go into detail about individual cases... . I am not ... engaged in determining the impact of abuse in any individual case, but rather setting out the whole picture.

¶ 7 The Berger report found that JHS's response to allegations of abuse was often inadequate, noting, for example, that "[e]xcept in a few cases, Jericho Hill School failed to report the disclosures to the parents of the boys or the girls, failed to identify the student offenders and to remove them from the school, and failed to ensure that the students who had been abused received appropriate therapy" (p. 9). The report found that "[a]lthough it had responsibility for the management of the school, the Ministry of Education had no policies and procedures laid down for running a residence for deaf children" (p. 15). It also noted that in 1978, all students -- boys and girls of all ages -- were placed together in a single dormitory and observed that "[i]t is certainly arguable that these arrangements were not in keeping with reasonable standards of care at the time" (p. 16).

¶ 8 The Berger report also emphasized the exceptional vulnerability of the children at the school. The report stated (at p. 7):

> [T]he vulnerability of the children at Jericho Hill School was the product of their failure to acquire language early; this meant that they did not have values instilled in them in the same way as hearing children do; it often meant increased vulnerability to any staff at the school who may have been disposed to abuse the children; it meant that the institution was more susceptible to the development of a culture of abuse; and it meant that the children usually did not have the ability or the means to communicate with or complain effectively to parents, teachers, physicians, police or social workers about sexual abuse.

¶ 9 The recommendations of the Berger report were that the province accept responsibility for the abuse that occurred at JHS; that the province establish a scheme to compensate those who had suffered abuse at the school; and that the compensation scheme should award compensation, for those [page191] claims accepted, in three tiers, with a minimum of $3,000 and a maximum of $60,000.

¶ 10 The government responded to the Berger report by acknowledging responsibility for abuse that occurred at JHS. In a ministerial statement made in June 1995, the Attorney General acknowledged the allegations of sexual abuse at the school, acknowledged that "[t]he province was responsible for the care and well-being of these people when they were children", and stated that "[t]o the extent that the province failed them, [it] must see that they are now compensated". The province also established the Jericho Individual Compensation Program (JICP), which is structured according to the recommendations of the Berger report. The program is open to students and former students who allege abuse as a result of attending or having attended the school, and provides for awards according to the three-tier system. As of March 31, 1998, the JICP had heard 49 claims.

¶ 11 The respondents commenced this action in January 1998. The suit seeks compensatory and punitive damages on behalf of a class consisting of:

- -- all current and former JHS students who have suffered abuse or who failed to receive a proper education while students of the school;
- -- all family members of current or former JHS students who suffered damage as a result of the abuse of a JHS student;
- -- all family members or others who were themselves abused by current or former JHS students as a result of the prior abuse of the JHS student.

The respondents asserted that the following issues are common to the class:

- -- whether the defendant breached the standard of care it owed to the plaintiffs between 1950 and 1992;

[page192]

- -- whether the defendant made negligent, reckless and/or fraudulent misrepresentations regarding the school;
- -- whether the defendant's conduct justified an award of punitive damages and, if

so, what amount of punitive damages is appropriate.

(Initially the respondents also asserted that vicarious liability constituted a common issue, but the respondents abandoned their vicarious liability argument early in the proceedings.)

¶ 12 The only issue on this appeal is whether the respondents have satisfied the class certification requirements set out in s. 4 of British Columbia's Class Proceedings Act.

II. Judgments

¶ 13 In the Supreme Court of British Columbia, Kirkpatrick J. denied certification: (1998), 65 B.C.L.R. (3d) 382. First addressing s. 4(1)(a), Kirkpatrick J. found that the statement of claim did not disclose a cause of action based on misrepresentation, emotional harm and mental suffering, breach of fiduciary duty owed to parents or other third parties, or educational malpractice. She found, however, that the statement of claim did disclose causes of action based on the claims of abuse of students, the claims of "secondary" abuse committed by students against other students or third parties, and breach of fiduciary duty owed to the students. Kirkpatrick J. also found that respondents had stated an identifiable class, as required by s. 4(1)(b).

¶ 14 Kirkpatrick J. rejected the contention, however, that there were issues common to the class as required by s. 4(1)(c). She addressed each of the asserted common issues in turn. As to the negligence issues, she reasoned that the standard of care owed by the defendant would not have been constant over the 42-year period identified in the statement of claim and, while this problem could be partially addressed by subdividing the 42-year period and determining the standard of care for [page193] each subdivision, "[s]uch an approach would not resolve the anticipated problems of individuals who spanned one or more periods, or whose own individual circumstances changed along with the standard of care during the times in question" (p. 402). Further, variations in the standard of care would "not necessarily relate only to when the claim is alleged to have arisen, but will likely depend also on who advances the claim, who is alleged to have perpetrated the wrong, and, perhaps, the nature of the abuse alleged" (p. 403).

¶ 15 Kirkpatrick J. rejected the misrepresentation issues as common to the class for similar reasons, writing that these issues were "individualistic in the sense that each plaintiff must demonstrate that [he or she] relied upon the defendant's alleged misrepresentation such that the representation had a real and substantial effect on the individual plaintiff's decision to enrol and continue to enrol the student at the school" (p. 404).

¶ 16 Finally, Kirkpatrick J. rejected the punitive damages issue as common to the class, reasoning that assessing punitive damages would require an individualized showing on the part of each plaintiff and noting that "the conduct of the defendant in relation to individual plaintiffs may aggravate or mitigate the assessment of punitive damages, which would fail to be considered in the determination of entitlement to punitive damages as a common issue" (p. 406). Kirkpatrick J. noted that even if punitive damages were certified as a common issue, the amount of punitive damages could not be a common issue because traditionally "[p]unitive damages are ... only awarded if compensatory damages are insufficient to deter or punish the defendant" (p. 406). The amount of punitive damages, therefore, could not be assessed until individual proceedings were completed.

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¶ 17 Kirkpatrick J. determined that there were no common issues as required by s. 4(1)(c) and, as

there were no common issues, a class action could not be "the preferable procedure for the fair and efficient resolution of the common issues", as required by s. 4(1)(d). She conceded, however, that the JICP is not an adequate alternative to judicial resolution of the dispute. She noted that the JICP limits awards to $60,000, does not compensate family members, and does not provide compensation for loss of income, opportunity, or future care. Further, the JICP prohibits applicants from being represented by counsel before the compensation panel. In Kirkpatrick J.'s view, however, the absence of common issues meant that individual litigation was nonetheless preferable to a class proceeding.

¶ 18 The Court of Appeal for British Columbia, per Mackenzie J.A., allowed the appeal, disagreeing with the chambers judge with respect to commonality and preferability: (1999), 72 B.C.L.R. (3d) 1. In Mackenzie J.A.'s view, the chambers judge had erred in failing to recognize the "limited grounds" on which the respondents sought certification. While he conceded that there were relevant differences amongst the class members, Mackenzie J.A. reasoned that the "duty of the school to reasonably protect its students from sexual abuse is clear and immutable throughout the period that the school was in operation" (p. 8). He wrote (at pp. 8-9):

> It is true that the claims of class members may span a period of 42 years and that standards of operation and management of the school may have changed several times over that lengthy period. Nevertheless, ... the duty of the school to reasonably protect its students from sexual abuse is clear and immutable throughout the period that the school was in operation... .
>
> Claimants will not have to prove that the abuse was caused by a particular staff member or other student in [page195] the absence of a claim for vicarious liability. In essence the claims will be based on systemic negligence, the failure to have in place management and operations procedures that would reasonably have prevented the abuse.

Mackenzie J.A. concluded that the standard-of-care issue -- an aspect of both the negligence claim and the fiduciary duty claim -- was common to all those who alleged that they had been sexually abused at JHS. He also found that the preferability requirement had been satisfied, holding that the JICP was an inadequate alternative.

¶ 19 The issue of punitive damages was also common to all those who alleged that they had themselves been abused at JHS, Mackenzie J.A. concluded. "Any award for punitive damages," he wrote, "should reflect the overall culpability of the defendant. It does not have to be linked to the harm caused to any particular claimant and does not require individualized assessment." He continued: "[a] global award can be assessed for the successful class members as a group, and allocated among them as the trial judge considers appropriate" (p. 17).

¶ 20 Mackenzie J.A. rejected, however, the other common issues asserted by the respondents. He rejected abuse claims of a non-sexual nature, finding that non-sexual abuse was not a central concern of the pleadings and that there was some uncertainty as to whether non-sexual abuse falls within the definition of assault. He also rejected "secondary" abuse claims -- that is, abuse by a JHS student who had himself or herself been abused at the school. On this issue he agreed with the chambers judge that questions of duty, foreseeability, and proximity rendered secondary-abuse claims prohibitively complicated and individualized. Mackenzie J.A. also rejected the educational malpractice claims, finding no precedent suggesting that such claims could be prosecuted successfully and stating that "any attempt to litigate these issues in the same class proceedings as the sexual abuse claims would complicate the proceedings immensely" (p. 15). Finally [page196] he rejected claims for family members' emotional harm and suffering -- claims that relied in part on an allegation of negligent misrepresentation, reasoning that the claims were "amorphous" and in any event "[i]ssues of reliance

and causation linking representations to the harm alleged will undoubtedly vary from claimant to claimant" (p. 16).

¶ 21 Ultimately Mackenzie J.A. defined the class as follows (at p. 18):

> Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.

He certified the following questions as common issues (at p. 18):

1. Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measures in the operation or management of the school to protect students from misconduct of a sexual nature by employees, agents or other students at the school?
2. If the answer to common issue no. 1 is "yes", was the defendant guilty of conduct that justifies an award of punitive damages?
3. If the answer to common issue no. 2 is "yes", what amount of punitive damages is awarded?

¶ 22 The appellant now challenges Mackenzie J.A.'s decision, contending that he erred in certifying even the narrower class.

III. Legislation

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

> 4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> [page197]
>
> (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;
>
> ...
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;

(c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
(d) whether other means of resolving the claims are less practical or less efficient;
(e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

7 The court must not refuse to certify a proceeding as a class proceeding merely because 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 class members;

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(c) different remedies are sought for different class members;
(d) the number of class members or the identity of each class member is not known;
(e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

IV. Issues

¶ 24 Have the respondents satisfied the certification requirements set out in British Columbia's Class Proceedings Act?

Analysis

¶ 25 The only issue in this case is whether the Court of Appeal erred in granting certification. As the respondents do not cross-appeal from the decision of Mackenzie J.A., we need not consider whether certification could have been granted on a broader basis than was recognized by the Court of Appeal. The only question is whether, given the Court of Appeal's redefinition of the class and common issues, the certification requirements were met. Those requirements are set out in s. 4 of the British Columbia Class Proceedings Act and are similar to the certification requirements set out in Ontario's class action legislation, which I discuss at some length in Hollick. These reasons discuss the specifics of the British Columbia certification requirements only insofar as they differ materially from those set out in s. 5 of the Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6, and only to the extent that those differences bear directly on my analysis in this case.

¶ 26 Not all of the certification requirements are at issue on this appeal. The appellant does not dispute that the respondents have met the requirements of s. 4(1)(a), (b), and (e) -- that is, the appellant does not dispute that the pleadings disclose a cause of action, that the respondents have stated an identifiable class, and that the respondents would serve as [page199] satisfactory representatives of the class. The issues in dispute are whether there are questions common to the class, as required by s. 4(1)(c), and whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, as required by s. 4(1)(d).

¶ 27 In my view, both the commonality and preferability requirements are satisfied in this case. With

regard to commonality, I agree with Mackenzie J.A. that all class members share an interest in the question of whether the appellant breached a duty of care. On claims of negligence and breach of fiduciary duty, no class member can prevail without showing duty and breach. Resolving those issues, therefore, is "necessary to the resolution of each class member's claim": Western Canadian Shopping Centres Inc. v. Dutton, [2001] 2 S.C.R. 534, 2001 SCC 46, at para. 39. Accordingly I would conclude that Mackenzie J.A. was correct to find that the issues of duty and breach are common to the class.

¶ 28 The appellant concedes that none of the class members can prevail without showing that the appellant's conduct fell below an acceptable standard, but contends that the nature of the required showing is inescapably individualistic and not amenable to resolution in general terms applicable to all class members. The appellant does not dispute Mackenzie J.A.'s statement that the "duty of the school to reasonably protect its students from sexual abuse is clear and immutable throughout the period that the school was in operation" (p. 8). However in the appellant's view, "[t]he result of this litigation depends not on the definition of the standard of care, but rather the application of that standard to the facts found in respect of the circumstances of each claimant" (appellant's factum, at para. 64 (emphasis in original)). The appellant argues that in this case "[l]iability turns not on the breach of a standard of care in the abstract, but on whether the standard [page200] of care was breached with respect to the school's supervision of the particular class member in a way that contributed materially to his/her abuse" (appellant's factum, at para. 64). The theory of the appellant is essentially that the Court of Appeal was able to find a common issue within the meaning of s. 4(1)(c) only by framing the commonality between the class members in overly general terms.

¶ 29 There is clearly something to the appellant's argument that a court should avoid framing commonality between class members in overly broad terms. As I discussed in Western Canadian Shopping Centres, supra, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

¶ 30 I cannot agree, however, that such are the circumstances here. As Mackenzie J.A. noted, the respondents' argument is based on an allegation of "systemic" negligence -- "the failure to have in place management and operations procedures that would reasonably have prevented the abuse" (pp. 8-9). The respondents assert, for example, that JHS did not have policies in place to deal with abuse, and that JHS acted negligently by placing all residential students in one dormitory in 1978. These are actions (or omissions) whose reasonability can be determined without reference to the circumstances of any individual class member. It is true that the respondents' election to limit their allegations to systemic negligence may make the individual component of the proceedings more difficult; clearly it would be easier for any given complainant to show causation if the established breach were that JHS [page201] had failed to address her own complaint of abuse (an individualized breach) than it would be if, for example, the established breach were that JHS had as a general matter failed to respond adequately to some complaints (a "systemic" breach). As Mackenzie J.A. wrote, however, the respondents "are entitled to restrict the grounds of negligence they wish to advance to make the case more amenable to class proceedings if they choose to do so" (p. 9).

¶ 31 In arguing that the necessary inquiry is inescapably individualistic, the appellant's principal contention is that the relevant standard of care, if framed at the appropriate level of specificity, would have varied over time. I am not persuaded that this should be an obstacle to the suit's proceeding as a class action. It is true that there has been a "dramatic ... evolution" in law relating to sexual abuse between 1950 and 1992 and it is quite possible that the nature of a school's obligations to its students has

changed over time. However, courts have often allowed class actions to proceed in similar circumstances: see, e.g., Anderson v. Wilson (1999), 44 O.R. (3d) 673 (C.A.) (certifying class action for medical malpractice even though the action "concern[ed] allegations of a general practice over a number of years falling below acceptable standards" (p. 683)); Chace v. Crane Canada Inc. (1996), 26 B.C.L.R. (3d) 339 (S.C.) (certifying class action for negligent manufacture and sale over 11-year period on grounds that, if the defendant were "partially successful in its defence and ultimately found to have been negligent over part of the period only, that result c[ould] be accommodated in the answer to the general question" (p. 347)); Endean v. Canadian Red Cross Society (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) (certifying class action for negligence and spoliation over four-year period notwithstanding defendant's argument that "the standard of care would have been in flux throughout the material time" (p. 168)).

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¶ 32 That the standard of care may have varied over the relevant time period simply means that the court may find it necessary to provide a nuanced answer to the common question. The structure of the Berger report, which explicitly divides the years between 1982 and 1991 into three discrete subperiods, suggests that such an approach would not be infeasible. I further note that the Class Proceedings Act contemplates the possibility of subclasses and that the court may amend the certification order at any time: see s. 6(1) (permitting court to recognize subclasses under certain conditions); s. 7(e) (stating that the court "must not refuse to certify a proceeding as a class proceeding merely because ... the class includes a subclass whose members have claims that raise common issues not shared by all class members"); s. 8(3) (stating that "[t]he court, on the application of a party or class member, may at any time amend a certification order"); s. 10(1) (stating that "[w]ithout limiting section 8(3), at any time after a certification order is made ... the court may amend the certification order"). In my view the Class Proceedings Act provides the court with ample flexibility to deal with limited differentiation amongst the class members as and if such differentiation becomes evident.

¶ 33 As the Court of Appeal noted (at p. 9), it is in fact quite likely that there will be relevant differences between the class members:

> Limiting the ground of liability to systemic negligence does not eliminate all differences among class members. As the Berger report noted, the duty owed may vary over time depending upon the state of knowledge of those in charge of the school, the reasonably informed educational standards and policies of the day, the measures implemented to prevent abuse and other factors. At the end of the case, liability could be imposed for abuse during certain periods of the school's operation and not in others. It is conceivable that liability might be differentiated in other ways, for example abuse inflicted by staff but not by other students.

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For the reasons stated above, however, I agree with Mackenzie J.A. that these differences are not insurmountable. In any event I question the extent to which differences between the class members should be taken into account at this stage. The British Columbia Class Proceedings Act explicitly states that the commonality requirement may be satisfied "whether or not [the] common issues predominate over issues affecting only individual members": s. 4(1)(c). (This distinguishes the British Columbia legislation from the corresponding Ontario legislation, which is silent as to whether predominance should be a factor in the commonality inquiry.) While the British Columbia Class Proceedings Act clearly contemplates that predominance will be a factor in the preferability inquiry (a point to which I will return below), it makes equally clear that predominance should not be a factor at the commonality stage. In my view the question at the commonality stage is, at least under the British Columbia Class

Proceedings Act, quite narrow.

¶ 34 As noted above, Mackenzie J.A. certified as common not only the standard-of-care issue but also the punitive damages issues. Here, too, I agree with his reasoning. In this case resolving the primary common issue -- whether JHS breached a duty of care or fiduciary duty to the complainants -- will require the court to assess the knowledge and conduct of those in charge of JHS over a long period of time. This is exactly the kind of fact-finding that will be necessary to determine whether punitive damages are justified: see, e.g., Endean, supra, at para. 48 ("An award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff."). Clearly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue. Here, however, the respondents have limited the possible grounds of liability to systemic negligence -- that is, negligence not specific to any one victim but rather to the class of victims as a group. In my view the appropriateness and amount of punitive damages is, in this case, a question amenable to resolution [page204] as a common issue: see Chace, supra, at para. 30 (certifying punitive damages as a common issue on the grounds that the plaintiffs' negligence claim was "advance[d] ... as a general proposition" rather than by reference to conduct specific to any one plaintiff).

¶ 35 The question remains whether a class action would be the preferable procedure. Here I would begin by incorporating my discussion in Hollick as to the meaning of preferability: see Hollick, supra, at paras. 28-31. While the legislative history of the British Columbia Class Proceedings Act is of course different from that of the corresponding Ontario legislation, in my view the preferability inquiry is, at least in general terms, the same under each statute. The inquiry is directed at two questions: first, "whether or not the class proceeding [would be] a fair, efficient and manageable method of advancing the claim", and second, whether the class proceedings would be preferable "in the sense of preferable to other procedures" (Hollick, at para. 28). I would note one difference, however, between the British Columbia Class Proceedings Act and the corresponding Ontario legislation. Like the British Columbia legislation, the Ontario legislation requires that a class action be "the preferable procedure" for the resolution of the common issues: see Ontario Class Proceedings Act, 1992, s. 5(1)(d); British Columbia Class Proceedings Act, s. 4(1)(d). Unlike the Ontario legislation, however, the British Columbia legislation provides express guidance as to how a court should approach the preferability question, listing five factors that the court must consider: see s. 4(2). I turn, now, to these factors.

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¶ 36 The first factor is "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members": s. 4(2)(a). As I noted above, it seems likely that there will be relevant differences between class members here. It should be remembered, however, that as the respondents have limited their claims to claims of "systemic" negligence, the central issues in this suit will be the nature of the duty owed by JHS to the class members and whether that duty was breached. Those issues are amenable to resolution in a class proceeding. While the issues of injury and causation will have to be litigated in individual proceedings following resolution of the common issue (assuming the common issue is decided in favour of the class, or at least in favour of some segment of the class), in my view the individual issues will be a relatively minor aspect of this case. 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. I would conclude that the common issues predominate over those affecting only individual class members.

¶ 37 The second factor is "whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions", and the third is "whether the class proceeding would involve claims that are or have been the subject of any other proceedings": s. 4 (2)(b), (c). On these factors I would note again that no class member will be able to prevail without

making an individual showing of injury and causation. Thus it cannot be said that allowing this suit to proceed as a class action will force complainants into a passive role. Each class member will retain control over his or her individual action, and his or her ultimate recovery will be determined by the outcome of the individual proceedings on injury and causation (assuming, again, that the common issue is resolved in favour of the class). Further there is little evidence here to suggest that any significant [page206] number of class members would prefer to proceed individually.

¶ 38 I turn next to the fourth factor, which asks "whether other means of resolving the claims are less practical or less efficient": s. 4(2)(d). On this point I would agree with the Court of Appeal that individual actions would be less practical and less efficient than would be a class proceeding. As Mackenzie J.A. noted (at pp. 9-10), "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements". Further, "[t]he overall history and evolution of the school is likely to be important background for the claims generally and it would be needlessly expensive to require proof in separate individual cases" (p. 10). I would also agree with Mackenzie J.A. (and indeed with Kirkpatrick J.) that the JICP does not provide an adequate alternative to a class action. Amongst other limitations, the JICP program limits the recovery of any one complainant to $60,000, and it does not permit complainants to be represented by counsel before the panel. The JICP simply cannot be said to be an adequate alternative to a class proceeding.

¶ 39 The final factor is "whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means": s. 4(2)(e). On this point it is necessary to emphasize the particular vulnerability of the plaintiffs in this case. The individual class members are deaf or blind or both. 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. I am in full agreement, therefore, with Mackenzie J.A.'s conclusion that "[t]he communications barriers faced by the students both at [page207] the time of the assaults alleged and currently in the litigation process favour a common process to explain the significance of those barriers and to elicit relevant evidence." As he wrote, "[a] group action should assist in marshalling the expertise required to assist individual students in communicating their testimony effectively" (p. 9).

¶ 40 I conclude that the respondents have satisfied the certification requirements set out in s. 4 of the British Columbia Class Proceedings Act.

¶ 41 The appeal is dismissed. The respondents shall have costs throughout.

QL Update: 20011018
cp/e/qllls

Case Name:

Sorotski v. CNH Global N.V.

Between
Michael J. Sorotski, plaintiff, and
CNH Global N.V., Case Canada Corporation, and its affiliates, subsidiaries and associated corporations, and The Goodyear Tire & Rubber Company, defendants

[2006] S.J. No. 258
2006 SKQB 168
Q.B.G. No. 698/2003

Saskatchewan Court of Queen's Bench
Judicial Centre of Saskatoon
Allbright J.

Judgment: April 7, 2006.
(90 paras.)

Civil procedure — Parties — Class or representative actions — Common interests — Members of class — Representative plaintiff — Certification — Application by the plaintiff to certify his damages action as a class proceeding dismissed — Pleadings disclosed a cause of action — There was an identifiable class — Proposed representative plaintiff would appropriately represent the class — Case did not raise common issues that were appropriate for determination by way of a class action — Class action was not the appropriate procedure to resolve the proposed claim — Class Actions Act, S.S. 2001, c. C-12.01, s. 6.

Application by Sorotski to certify his action as a class action — Proposed class was all persons who purchased Case Quadtrac 9370 tractors in Canada and who suffered financial losses due to problems with their tractors' tracks — Defendant CNH Global NV manufactured and sold agricultural implements throughout the world and in parts of Canada — Defendant Case Canada Corporation was a subsidiary of CNH — Defendant Goodyear Tire & Rubber Company manufactured and supplied the tractor tracks to Case who manufactured the tractors — Sorotski was the proposed representative plaintiff — He was a farmer who purchased and used a tractor that developed damaged tracks — Sorotski claimed that the tracks did not last their normal lifespan — Other farmers across Canada experienced the same problem with the tracks — Sorotski brought this action because he and another farmer named Herle who experienced the same problem were not adequately compensated by the defendants — Basis of the action was breach of warranty, breach of contract and negligence — HELD: Application dismissed — Pleadings disclosed a cause of action in each of the three different causes of action — There was an identifiable class — Sorotski in his capacity as the representative plaintiff would fairly and adequately represent the interests of the class — He produced a workable plan for the action and did not have a conflict with the interests of the other class members — However, there were numerous individual issues that would have to be addressed before liability was determined — Sorotski submitted that the common issue was a complaint with the tracks — That complaint was not common — Expert evidence indicated that it was difficult to identify a common defect with the tracks — Sorotski and Herle, for example, used their tractors for different purposes and experienced different types of problems — Their liability issues were significantly different — Each tractor would have to be examined to determine the defendants'

liability for each member of the proposed class — Even if a common issues trial reached the conclusion that the tracks exhibited inherent design or manufacturing defects this conclusion would not significantly advance the litigation — It would merely be the first step in proving the entitlement and compensation of any class member — Sorotski therefore did not demonstrate that this case raised common issues that were appropriate for determination by way of a class action — Even if the court could formulate a common issue to be determined a class action was not the preferable procedure to resolve it — There were other options that Sorotski or Herle could resort to that would be more expeditious and efficient than a class action — Evidence suggested that the damages for many members of the putative class would be under $50,000 and such claims could be litigated expeditiously under the simplified procedure.

Statutes, Regulations and Rules Cited:

Agricultural Implements Act, R.S.S. 1978, c. A-10, s. 36, s. 36(2), s. 36(10), s. 44

Class Actions Act, S.S. 2001, c. C-12.01, s. 2, s. 2, s. 2, s. 2, s. 2, s. 2, s. 4(1), s. 6, s. 6(a), s. 6(b), s. 6(c), s. 6(d), s. 6(e), s. 6(e)(ii), s. 7(2), s. 9

Pre-judgment Interest Act, S.S. 1984-85-86, c. P-22.2,

Queen's Bench Rules, Rule 82, Rule 82(1), Rule 82(2), Rule 82(4), Rule 82(5), Rule 82(6), Rule 82(7), Rule 173(a), Rule 478(4)

Sale of Goods Act, R.S.S. 1978, c. S-1, s. 16

Counsel:

Reynold A. J. Robertson and Clinton G. Docken, Q.C. for the plaintiff

Murray R. Sawatzky, and Philip J. Gallet for the defendants, CNH Global N.V. and Case Canada Corporation

John T. Morin, Q.C. for the defendants, The Goodyear Tire & Rubber Company

JUDGMENT

ALLBRIGHT J.:—

The Action

¶ 1 The proposed representative plaintiff, Michael J. Sorotski, is a farmer residing in Kenaston, Saskatchewan, and seeks to have this action certified as a class proceeding on behalf of all persons (hereinafter referred to as the "Class") who purchased Case Quadtrac 9370 tractors in Canada and who suffered financial losses due to problems (severe cracks, fraying and shredding) with their tractors' tracks.

¶ 2 The defendant, CNH Global N.V., Case Canada Corporation, affiliates, subsidiaries and associated corporations (hereinafter referred to as "Global") are bodies corporate or groups of corporate bodies which manufacture and sell agricultural implements throughout the world, including in the

provinces of Alberta, Saskatchewan, Manitoba and Ontario, under the brand names "Case IH" and "Case".

¶ 3 The defendant, Case Canada Corporation (hereinafter referred to as "Case") is a subsidiary of CNH Global N.V.

¶ 4 The defendant, The Goodyear Tire & Rubber Company (hereinafter referred to as "Goodyear"), manufactured and supplied the tractor tracks to Case, and Case manufactured the Quadtrac 9370 tractors in question.

The Certification Application

¶ 5 The class action claim was issued April 11, 2003, and the application for certification of the action as a class action was launched on October 24, 2004.

¶ 6 The subsequent motion in the proceedings chronology was brought by the defendants Global and Case on December 2, 2004, seeking to have Goodyear added either as a respondent party or as a party defendant to the certification application.

¶ 7 In addressing this request, as part of a fiat dated February 16, 2005, I, in part, concluded:

> [17] I have considered the matter and have come to the conclusion that the Good Year Tire & Rubber Company is a party of significant interest to the certification application. The plaintiff's material to which I have briefly referred identifies the defendant "Case" as the manufacturer of the implement, and the Good Year Tire & Rubber Company as the manufacturer of the tracks in question.
> [18] On balance, I am of the view that the Good Year Tire & Rubber Company should participate in the certification application.
> [19] I have considered the potential ways to accomplish the involvement of the Good Year Tire & Rubber Company in the certification application and have concluded that the appropriate course of action is for me to order that the Good Year Tire & Rubber Company be added as a party defendant to the action for the purpose of dealing with the certification application. To that end this defendant will participate in the certification application proceedings in the same fashion as the initially named defendants. It will be open to the parties to address the Court at the time of the certification application, depending upon the results of that application on the question of the status of the various parties thereafter.

¶ 8 The plaintiff's statement of claim was amended without leave on October 13, 2005, and subsequently further amended with leave on December 14, 2005. The certification application then proceeded on December 14 and 15, 2005.

¶ 9 In brief, the parties' positions on the issue of certification may be summarized as follows.

(a) The Position of the Plaintiff

¶ 10 At the heart of the plaintiff's position is the proposition that:

> This action represents the quintessential class proceeding. It involves a single purpose product which is alleged to be defective. This core element of commonality is

such that a determination of liability to the representative plaintiffs would be determinative of liability to the entire class. ...
Ontario New Home Warranty Program v. Chevron Chemical Co. (1999), 46 O.R. (3d) 130 at para. 95 (Sup. Ct. Just.).

¶ 11 The plaintiff contends that the action is an appropriate one for class determination and that the nature of the claim satisfies all of the requirements set forth in s. 6 of *The Class Actions Act*, S.S. 2001, c. C-12.01.

¶ 12 The proposed Class is defined as "[a]ll purchasers of Case Quad 9370 Tractors who have suffered financial losses due to the defects in the tracks of these tractors."

¶ 13 The proposed common issues are:

(a) whether the defendants owed a duty to the Class members;
(b) whether the defendants are liable to the Class members on the basis of negligence;
(c) whether the defendants are liable to the Class members on the basis of breach of contract; and
(d) whether the defendants are liable to the Class members on the basis of express, implied or statutory warranty.

¶ 14 The plaintiff therefore requests that the action be certified as a class proceeding and that he be appointed as the representative plaintiff for the Class.

(b) The Position of Case

¶ 15 Case's position is that the action should not be certified. Section 6 of *The Class Actions Act, supra*, requires that the plaintiff establish the following in order to have the action certified:

(a) the pleadings disclose a cause of action;
(b) there is an identifiable class;
(c) there are common issues, whether or not they predominate over the individual issues;
(d) a class action is the preferable procedure for the resolution of the common issues; and
(e) the plaintiff is a proper representative plaintiff.

¶ 16 While Case has some reservations about the representative plaintiff and that aspect of s. 6, Case submits that the certification application must fail on the basis of the plaintiff being unable to meet the criteria of the identifiable class, common issues and preferable procedure tests. Following from that, Case submits that the plaintiff has not met the test of establishing an identifiable class, has not put forward a common issue which will advance the claim or establish that the class action would be the preferable procedure and, in addition, Case has reservations that the plaintiff will be able to put forward a cause of action and establish that he is in the circumstances an "appropriate representative plaintiff".

(c) The Position of Goodyear

¶ 17 In submitting that the matter is an inappropriate action for certification as a class action, Goodyear asserts a position similar to that of Case.

¶ 18 Goodyear suggests that the present action is premature and that the claim is founded upon hypothetical and speculative losses that may or may not be suffered at some point in the future. The plaintiff's case rests upon the possibility that the Class members may, one day, suffer some type of loss or damage because of alleged defects in the rubber tracks on the Case Quadtrac 9370 tractors, notwithstanding that they continue to use the tractors to the full and usual extent of their capacity in their farming operations. Goodyear's position continues that in any event, even if the potential future losses claimed by the plaintiff and the putative Class members are in some way ascertainable and compensable at the present time, such claims are not amenable to determination through the mechanism of a class proceeding.

Nature of the Claim

¶ 19 The plaintiff has been engaged in farming for over 40 years in the Kenaston area in the Province of Saskatchewan. On November 12, 1997, he purchased a Case 9370 Quadtrac tractor at a price of $252,300 from Redhead Equipment Ltd. This tractor is similar to other "regular" tractors with one significant difference being that the implement runs on tracks rather than standard rubber tires. This use of tracks is designed to offer greater traction with less compaction of the soil when compared to rubber-tired tractors. This track design purportedly also has a longer utility life than normal rubber tires.

¶ 20 The plaintiff contends that after approximately 400 hours of use, there were signs of cracking on the tracks. The tractor vendor, Redhead Equipment Ltd., replaced one of the tracks at about 800 hours of use as it was badly damaged. By 2,300 hours of use, all four tracks were cracked and, in the plaintiff's view, damaged. Essentially, the tractor was used only for farming and was kept in a shed when not in use.

¶ 21 It is a contention of the plaintiff that the usual life of regular tires is between 3,500 and 4,000 hours and that the tracks on his Quadtrac did not last as long as regular tires before becoming badly damaged.

¶ 22 In addition to the plaintiff, other farmers in Saskatchewan and across Canada have had similar problems with their Case 9370 Quadtrac tractors. As an example of this broader occurrence, the plaintiff points to another potential Class member, Bill Herle, who purchased a Case 9370 Quadtrac tractor in the spring of 1998. At approximately 900 hours of usage, the tracks were showing signs of tearing and there were numerous cracks. Two of these tracks were replaced under warranty, but the problems persisted on all four tracks. After approximately 3,700 hours, one of the tracks split and fell off while the tractor was being driven on the highway. In the opinion of Bill Herle, regular tracks can be expected to last as long as 7,000 hours.

¶ 23 The plaintiff asserts that neither he nor Bill Herle have received adequate compensation from the defendants in relation to the tracks, and he brings this action on behalf of himself and all others who have suffered similar loss resulting from their purchase of a Case 9370 Quadtrac tractor.

¶ 24 The plaintiff's claim, in essence, articulates three causes of action against the defendants. These are breach of warranty, breach of contract, and negligence.

¶ 25 The following pleadings from the plaintiff's amended statement of claim are relevant to the underpinning of these causes of action.

A. PARTIES

...

3. The class members (hereinafter referred to as the "class") are Canadian purchasers of Case Quadtrac Model 9370 tractors having tracks that developed severe cracks, fraying and shredding.

B. FACTS

4. Global are manufacturers and distributors of agricultural implements including a tractor known as the Case Quadtrac. They distribute their products throughout the world including the Provinces of Ontario, Manitoba, Saskatchewan and Alberta.
5. In late April 1997, Sorotski leased a new 1997 Case Quadtrac model 9370, S/N JEE0069071, which he subsequently purchased new for $252,300.00 pursuant to a retail installment contract dated November 12, 1997.
6. Sorotski and the class state that the Case Quadtrac is an agricultural implement to which *The Agricultural Implements Act,* [*infra*], applies and their purchases of these implements qualify as a sale of a new implement under the Act.
7. Sorotski and the class plead *The Agricultural Implements Act* and *The Sale of Goods Act*, [*infra*] and the rules of common law and equity as being applicable to this action.
8. Global is liable to Sorotski and the class, and Sorotski and the class may maintain an action against Global pursuant to s. 44 of *The Agricultural Implements Act* in addition to any other rights they have against Global.
9. Sorotski and the class members intended to use and did use the Case Quadtrac in their farming operations, which intentions and use were made known to Global, and Sorotski and the class relied on the skill and judgment of Global in promoting and recommending the Case Quadtrac to them, which was in the course of Global business to supply.

...

11. When Sorotski and the other class members purchased their Case Quadtracs, the tracks on the tractors were new. Eventually the tracks developed severe cracks, fraying and shredding, well before the time when Global represented that the tracks would have to be replaced, and rendering the implements unsafe to operate. Notwithstanding, Global refused to replace the tracks contrary to the representations and the express and implied warranties that the tracks were fit for the particular purposes of Sorotski and the class.

...

14. Sorotski contacted his dealer, Redhead Equipment Ltd., and Global on numerous occasions to have the tracks replaced, but was told that Global would not replace them.

15.(A) Global were designers, manufacturers and distributors of agricultural implements. They knew or ought reasonably to have known that the Case Quadtrac tractors using four independent tracks would be sold, leased or rented

in the ordinary course of their business to farmers requiring such products for agricultural operations. Further, Global knew or ought reasonably to have known that by distributing the Case Quadtrac to farmers they were placing the product in the stream of commerce. In the circumstances Global owed a duty of care to Sorotski and the class that the Quadtrac sold by them shall be reasonably fit for the purposes of Sorotski and the class.

15.B The Plaintiff for himself and the class states and the facts are that:

(i) The Good Year tracks are designed with a heavy-duty twisted cable to provide "superior carcass strength" and steel reinforcement plies to provide a "solid footprint" and consistent track alignment;
(ii) Deterioration of the cable has a negative effect on the performance of a track;
(iii) Cracks in the track expose the cable to the elements and the cables are rusting and deteriorating;
(iv) Once the cable has rusted through, it will no longer perform its intended purpose, resulting in poor track performance, causing the tracks to be dangerous to operate;
(v) In particular the steel cable in the Plaintiff's tracks are frayed and broken in places and continue to rust where these cables are exposed;
(vi) The large cracking at the edges of a track (including the cracking at the edges of the Plaintiff's tracks) compromise the structural integrity of the tracks and also compromise the safety of the operator;
(vii) Crack damage to the tracks is accelerating;
(viii) Cracking is accelerating and in particular, has led to and continues to lead to the loss of guide lugs and drive lugs on the tracks;
(ix) Due to the defects in the tracks, the structural integrity of the track and the safety of the tracks is compromised.
15(C) By virtue of the compromised safety, the operator of the tractor is exposed to greater risk of accidents, potentially resulting in physical injury to himself or others and to property damage.

15.1 As a consequence of the cracks, fraying and shedding [*sic*] of the tracks the tracks have lost their value and no purchaser will buy or accept as a trade in on a new machine the Case Quadracs [*sic*] of the class, except at a reduced, discounted value.

15.2 The Defendants knew of the defects in the tracks and either requested or directed their suppliers to redesign them to avoid or to limit the cracks, fraying or shedding [*sic*] of the tracks, yet refused to give the class the benefit of such redesign by removing and replacing the old tracks with the new ones.

C. BREACH OF WARRANTY

16. Sorotski and the class state that in addition to the warranties given under their respective contracts for the purchase of the Case Quadtrac, those contracts carry the additional warranty set forth under s. 36 of *The Agricultural Implements Act*, and s. 16 of *The Sale of Goods Act*, [*infra*].

17. Sorotski and the class state Global breached express, implied and statutory warranties contained in their respective contracts of sale.

D. BREACH OF CONTRACT

18. Sorotski and the class state Global breached express and implied terms contained in the contracts of sale as follows:

    (a) Global expressly or impliedly warranted that Case Quadtrac was of merchantable quality, safe, appropriate and fit for the purposes for which the tractor was intended, when they knew or ought to have know that the tractor's tracks were subject to fraying, cracking and/or fracturing, including the Case Quadtrac purchased by Sorotski and the class;
    (b) Global represented, expressly or impliedly, that the Case Quadtrac was a merchantable product, when they knew or ought to have known that it was unmerchantable, defective, inappropriate and/or unfit for the purposes for which it was intended and the defective, and/or unmerchantable quality of the tractor would result in damages to the users and potential users, including Sorotski and the class;
    (c) Global had a duty to ensure the Case Quadtrac, and in particular but not limited to the tracks on the vehicle, would not prematurely wear and result in continual and ongoing maintenance of the Case Quadtrac, which in turn would result in the users and potential users of the product being unable to use the vehicle. This duty arose out of common law duty to the proximate relationship that arose between Global and users and potential users, including Sorotski and the class. The duty also arose out of the contract, express or implied.

E. NEGLIGENCE

19. Sorotski and the class state Global was negligent and is liable to Sorotski and the class, the particulars of which are that Global:

    (a) Designed and manufactured the Case Quadtrac, when they knew or ought to have known that the design and/or manufacture of this product was defective and not fit for the purposes for which it was intended;
    (b) Promoted and distributed the Case Quadtrac when they knew or ought to have known that this tractor, and in particular but not limited to its tracks, were defective and not fit for the purposes for which they were intended;
    (c) Failed to do any and/or adequate testing or investigation concerning the tracks on the Case Quadtrac. In particular, Global failed to do any and/or adequate testing or investigation concerning the tracks of the Case Quadtrac;
    (d) Failed to issue any and/or adequate warnings, literature or disclosure to the purchaser, and in particular Sorotski and the class, or to warn them of the defective and/or limited use life of the Case Quadtrac regarding but not limited to the tracks on the Case Quadtrac which frayed, cracked and/or fractured.
    (e) Failed to warn the distributors of the tractor and the farming communities that the use of this product could result in the premature wear of the tracks on the vehicle and result in continual and ongoing maintenance to the

Case Quadtrac;

(f) Failed to warn users and potential users in addition to mechanics and dealers of the product that the use of this product could result in the premature wear of the tracks on the vehicle and result in continual and ongoing maintenance to the Case Quadtrac;

(g) Had a duty to ensure that Case Quadtrac and in particular but not limited to the tracks on the vehicle would not prematurely wear and result in continual and ongoing maintenance of the Case Quadtrac, which in turn would result in the users and potential users of the product being unable to use the vehicle. This duty arose out of common law due to the proximate relationship that arose between Global and users and potential users, including Sorotski and the class. The duty also arose out of the contract, express or implied;

(h) Failure to withdraw the product from the marketplace despite knowledge of its defective and unmerchantable quality and the effects this would have on its users, including Sorotski and the class.

¶ 26 The nature of the damages being sought by the plaintiff are set forth in the following fashion in the statement of claim:

G. DAMAGES

22. Sorotski and the class have suffered damages due to the negligence of Global or any of them and/or due to the breach of contracts and/or warranties between Sorotski and the class with Global or any of them including but not limited to the following:

(a) Premature repair and replacement of the Case Quadtrac tracks;

(a).1 Premature discounted trade-in value for the tractor and tracks;

(b) Inability to continue to farm and the economic losses associated thereto; and

(c) Such further and other expenses as may be proven at trial.

23. As a result of the wrongful actions of Global or any of them, Sorotski and the class have suffered out-of-pocket expenses and special damages as follows:

(a) Costs associated with the lease/purchase of the Case Quadtrac;

(b) Costs associated with the purchase of products used to attempt to repair the Case Quadtrac;

(c) Attempts to mitigate loss by returning the Case Quadtrac to the dealership for sale and the costs associated thereto;

(d) Past and future loss of income;

(e) Such further and other expenses as may be proven at trial.

Particulars of these losses will be provided to Global prior to trial.

24. Sorotski claims on his own behalf and as a member of and on behalf of members of the proposed class as may be certified pursuant to *The Class Actions Act*, [*supra*], AGAINST EACH OF THE DEFENDANTS JOINTLY AND

SEVERALLY as follows:

(a) Damages for breach of contract/warranty and/or alternatively for negligence on an individual or an aggregate award basis;
(b) Special damages;
(c) Relief or Judgment as may be set forth in any certification order granted certifying a class or sub-class;
(d) Relief or Judgment as may be appropriate on a determination of individual issues as provided for under *The Class Actions Act*, [*supra*];
(e) Any accounting as necessary;
(f) Pre-judgment interest pursuant to *The Pre-judgment Interest Act*, [S.S. 1984-85-86, c. P-22.2];
(g) Solicitor/client costs;
(h) Such further an other relief as this Honourable Court may deem fit.

The Class Actions Act* and *The Queen's Bench Rules

¶ 27 The following provisions of *The Class Actions Act, supra*, have application to the certification application before the Court:

2 In this Act:

...
"action" means an action as defined in *The Queen's Bench Act, 1998*;
"certification order" means an order certifying an action as a class action;
"class" means two or more persons with common issues respecting a cause of action or a potential cause of action;
"class action" means an action certified as a class action pursuant to Part II;
"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;

...
"defendant" includes a respondent.
...

4(1) One member of a class who resides in Saskatchewan may commence an action in the court on behalf of the members of that class.
...
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.

...

7 ...

(2) An order certifying an action as a class action is not a determination of the merits of the action.

...
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 class 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.

¶ 28 Rule 82 of *The Queen's Bench Rules* has relevance to a certification application and provides as follows:

82(1)A Notice of Motion for Certification pursuant to clause 4(2)(b) or section 5 of the Act shall be in Form 5D.

(2) An application for a certification order pursuant to section 4 of the Act must be supported by an affidavit of the proposed representative plaintiff:

(a) deposing to the proposed representative plaintiff's willingness to be appointed;
(b) setting out the basis of the proposed representative plaintiff's personal claim, where applicable, and the reason the proposed representative plaintiff believes that common issues exist for the rest of the members of the class;
(c) setting out objective criteria for determining membership in the proposed class, and providing the proposed representative plaintiff's best information on the number of members in the proposed class;
(d) setting out sufficient information to establish that the proposed

representative plaintiff would fairly and adequately represent the interests of the class and is aware of the responsibilities to be undertaken;

(e) exhibiting a plan for the class action that sets out a workable method of:

(i) advancing the action on behalf of the class; and
(ii) notifying class members of the action; and

(f) setting out sufficient information to establish that the proposed representative plaintiff does not have, on the common issues, an interest that is in conflict with the interests of other class members.

...

(4) A Notice of Motion for Certification and the supporting materials must be filed and a copy served on all parties to the action.

(5) Unless otherwise ordered, there must be at least 14 days between:

(a) the service of a Notice of Motion for Certification and supporting materials; and

(b) the day set for the hearing.

(6) Unless otherwise ordered, a party opposing an application for certification must:

(a) file an affidavit in response; and
(b) serve a copy of the affidavit on all parties to the action at least 7 days before the day set for the hearing.

(7) A party filing an affidavit under subrule (6) must provide the party's best information on the number of members in the proposed class.

(a) Other Relevant Legislative Provisions

¶ 29 *The Agricultural Implements Act*, R.S.S.

Warranties re sale of new implement

36 ...

(2) The warranties mentioned in this section are to apply for the longer of:

(a) one year from the date of first use of the new implement; and
(b) any longer period that is provided by this Act or is set out in the sales contract.

¶ 30 Section 16 of *The Sale of Goods Act*, R.S.S. 1978, c. S-1, as amended, provides:

Implied conditions as to quality or fitness
16 Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods

supplied under a contract of sale except as follows:

1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for that purpose;
2. Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality but if the buyer has examined the goods there shall be no implied condition with regard to defects which such examination ought to have revealed;
3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

¶ 31 Section 44 of *The Agricultural Implements Act, supra*, provides:

Liability of original dealer
44 Where the purchaser of an implement, other than a second-hand or rebuilt implement, purchases the implement from a dealer who is not the manufacturer thereof, the manufacturer which sold the implement to the dealer and the distributor representing that manufacturer are liable to the purchaser to observe, keep and perform the warranties set forth in this Act; and the purchaser may maintain an action against any such manufacturer or distributor, as well as against the dealer, or against any one or more of them, for any breach of any of those warranties.

Affidavits Filed on the Certification Application

¶ 32 The parties have filed the following affidavits, and I have set forth the relevant portions therefrom.

Affidavit of Michael J. Sorotski

¶ 33 2. In April 1997, I leased from Redhead Equipment Ltd. of Saskatoon, Saskatchewan, a 1997 Case 9370 Quad Tractor. This tractor was purchased from Redhead Equipment Ltd. by myself on November 12, 1997, for the sum of $252,300.00 less a trade in of $114,483.23. ...

...

4. At the time of purchase, there was approximately 200 hours on the tractor and there was no signs of cracks in the tracks. After 400 hours use there were signs of cracking on the tracks. At 2300 hours there were numerous severe cracks on all 4 tracks. The tractor was used solely for farming and was always shedded when not in use.
5. One track was replaced by the dealer at 800 hours. Although the one track was replaced by the dealer, the other 3 tracks were not replaced even though they showed severe cracks.

6. I contacted the dealer on 4 different occasions up to 2300 hours. Pictures were taken of the tracks on all 4 occasions, plus I sent a set of my own pictures to Case IH.
7. I have continued to use the tractor because it is the only one I have.
8. I was advised through Redhead Equipment Ltd. on several occasions that they had contacted Case IH representatives and that Case stated it would not replace the tracks because Goodyear Company stated that tracking is not a warrantable condition as it does not effect [*sic*] the serviceability of the track.
9. When I purchased the tractor I was advised by Case IH representatives that the tracks for the tractor would outlast tires by a factor of 2 or more. In my opinion, the useful life of tires is 3500 to 4000 hours.
10. I have retained Docken & Company, and Robertson Stromberg Pedersen LLP as solicitors to commence a class action in this matter. I believe in my discussions with several other farmers that there are others who have suffered the same experience and loss as I in relation to their treads on Case 9370 Quad Tractors.
11. I believe there is an identifiable class being:

    (a) All purchasers of Case Quad 9370 Tractors who have suffered financial losses due to the defects in the tracks of these tractors.

12. The claims of the class raise common issues relating to premature defects appearing in the tracks leading to a compromised ability to carry on farming and carrying with it a potential for earlier and unexpected failure resulting in economic loss and physical injury.
13. I have not received a satisfactory response from the Defendant respecting the replacement of, or damages for the problems encountered with these treads.
14. I have reviewed and had explained to me by my legal counsel the allegations raised in the Statement of Claim and I understand the common issues and believe I am not the only person who has experienced these problems.
15. I will fully and faithfully and adequately represent the interests of the class in this action.
16. My legal counsel has explained to me that I am responsible for producing 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 I have instructed my counsel to prepare such a plan.
17. I do not have on the common issues an interest that is in conflict with the interests of the class members.

Affidavit of Gloria Wozniuk

¶ 34 1. I am employed by Docken & Company as a legal assistant and as such I have knowledge of the matters herein deposed to, except where stated to be on information and belief.

2. I personally made telephone calls to several individuals who had purchased Case Quadtrac tractors. They included: ... Roger Bubiltz, Jody Klassen, Gary Stewart, [and] Jeff Cross.
3. The individuals I spoke to informed me, and I believed that each had a problem with their Case Quadtracs, being that the tracks on the treads were either severely cracked, frayed or had some other track problem with the treads.

Affidavit of Iain Le May

¶ 35 1. I am a Professional Engineer licensed to practice my profession in the Province of Saskatchewan, ...

...

3. I am also President of Metallurgical Consulting Services Ltd., which is an engineering and metallurgical consulting firm which is engaged to investigate product liability issues.
4. Attached as Exhibit "B" to this my Affidavit is a preliminary report prepared by Mr. Robert Peace, Engineer in Training, who is an employee of Metallurgical Consulting Services Ltd., which report I have reviewed and approved, and to which I have affixed my Professional Engineering stamp.
5. Based on the preliminary observations to date, and our investigation into the possible causes for the cracking of the rubber tracks of Mr. Michael Sorotski's Case 9370 Quad Tractor, the following conclusions can be drawn:

    (a) The amount of time the tracks have been used is low for this type of component.
    (b) The large cracking at the edges compromises the structural integrity of the tracks. This also compromises the safety of operating the tractor.
    (c) Track damage is expected to continue to accelerate.
    (d) The exposed and broken steel cable is rusting and this additionally compromises the integrity of the track.
    (e) The cracking observed is more than a cosmetic problem. It compromises the integrity of the track, and the safety of the tractor.

Affidavit of Bill Herle

¶ 36 1. I am a plaintiff in this action. I am also a farmer by occupation and have been farming in the Neilburg, Saskatchewan district for over 50 years.

2. In the spring of 1998, I purchased from Blais Inc. of Unity ("Blais"), Saskatchewan, a 1997 Case 9370 Quad Tractor (the "tractor"). This tractor was purchased for the sum of $256,500.00 after a trade in of my 1997 9682 Ford New Holland tractor.

...

4. At the time of purchase, there were less than 300 hours on the tractor and there was no sign of cracks in the tracks. I was also told verbally by the sales representatives at Blais with whom I was dealing, that I could expect the tracks to last as long as rubber tires which in my experience is about 7000 hours.
5. Around the 900 hour mark, in or about October, 1998 lugs showed signs of tearing and there were numerous cracks on all 4 tracks.
6. The front tracks were replaced under warranty, but not the rear tracks even though they showed cracks. When I inquired of a representative of Case regarding replacing the rear tracks, I was told that it was not worth replacing them at that time.
7. The condition of the tracks continued to worsen over time and use.
8. Around the 2000 hour mark I was advised by a Case representative at Blais that I could replace the tracks under warranty, which would have cost me $2,500 per

track or about $10,000 in total. I did not have this amount of money to expend for this purpose so I did not purchase replacement tracks.

9. When I discussed this with a Case representative at Blais, I was of the opinion that I should bear no cost for the replacement.
10. In the spring of 2004, at about 3350 hours, I noticed the left rear track was rotating and operating in an abnormal manner.
11. Pictures were taken of the left rear track around this time, and copies were sent to Ted Smith Sales and Service in Unity ("Ted Smith") where I believe they were reviewed by the salesman I dealt with for the tractor because I dealt with him again regarding this latest problem.
12. It is also my believe that Case became aware of these pictures and the related track problem because I was advised by the salesman that Ted Smith would not replace the track as it was no longer covered under warranty.
13. Since the time of purchase until January, 2005 I complained of the tracks at least six times in person to representatives of Case either at tradeshows or the dealership where the tractor was purchased. I was not given a definite answer regarding replacement of the tracks, which I took to mean that they decided they would not replace the tracks.
14. On January 18, 2005, at around the 3700 hours of use mark, the left rear track split and fell off.

...

16. I recently paid to replace the rear left track and continue to use the tractor because it is the only one I have.
17. The tractor was used primarily for farming and occasionally for snow ploughing, and was always shedded when not in use.
18. I have retained Docken & Company, and Robertson Stromberg Pedersen LLP to represent me in the within class action commenced by Mr. Sorotski.
19. I believe there is an identifiable class being:

    (a) All purchasers of Case Quad 9370 Tractors who have suffered financial losses due to the defects in the tracks of these tractors.

20. The claims of the class raise common issues relating to premature defects appearing in the tracks leading to a compromised ability to carry on farming and carrying with it a potential for earlier and unexpected failure resulting in economic loss and physical injury.
21. I have not received a satisfactory response from the Defendant respecting the replacement of, or damages for the problems encountered with these treads.
22. I have reviewed and had explained to me by my legal counsel the allegations raised in the Statement of Claim and I understand the common issues and believe I am not the only person who has experienced these problems.
23. I do not have on the common issues an interest that is in conflict with the interests of the class members.

Affidavit of Terri Hullibarger

¶ 37 1. I am the Sales and Production Administrator for Rubber Track Products for the defendant Goodyear Tire & Rubber Company ("Goodyear"), and as such I have knowledge of the matters deposed to herein.

2. Goodyear manufactures rubber tracks for the Quadtrac tractor. All of these tracks are sold to the other named defendants who I will refer to as Case. Case specifies a shipment destination for the tracks depending on whether Case intends to either use the tracks for original equipment when building new tractors, or store the tracks for service. These shipping destinations are in the United States.
3. Once Goodyear delivers the tracks to Case, Goodyear has no knowledge as to where Case markets the Quadtrac tractors, or where the tracks ultimately end up.
4. Goodyear is only able to determine a final geographic location of tracks if Goodyear receives a track warranty claim. Warranty claims are filed by the dealer and include the address of the dealer and the address of the owner of the tracks. I receive the warranty claims for the tracks and the only information that I have about where the end-users of the tracks are located is derived from these warranty claims.
5. I have looked through our files and I have found track warranty claims for flex cracking for nine (9) separate tracks from dealers in Saskatchewan. I am unable to ascertain whether the nine (9) separate tracks were on nine (9) separate tractors or whether more than one track was on a single tractor.
6. These are the only tracks for which I have been able to locate documentation to show that they were on tractors sold in Saskatchewan.

Affidavit of Bob Overmann

¶ 38 1. I am the Project Engineer for CNH America LLC ("Case") ....

2. Case began manufacturing and selling the Quadtrac tractor which is the subject matter of this action in 1996 and continues to sell the tractor today.
3. The treads which are the subject matter of the within action are and at all material times were supplied to Case by the Respondent, The Good Year Tire & Rubber Company ("Good Year").
4. I have reviewed the business records for Case and they indicate that from 1996 to 2005 there were 305 sales of Quadtrac tractors in Canada. Of those, 53 were sold in the Province of Saskatchewan.
5. That Case does maintain a record of all complaints and/or warranty claims in relation to the Quadtrac tractors. There are different ways in which a search of the records maintained by Case can be conducted. Two searches have been conducted to date, one involving a search of complaints in relation to the "undercarriage of the Quadtrac tractors" and the other being a more detailed search of the Product Identification Numbers for the Quadtrac tractors sold in Saskatchewan.
6. A review of these searches revealed that there were 12 complaints or warranty claims in relation to the treads on the Quadtrac tractors sold in Saskatchewan, in addition to the complaint received from Michael Sorotski, the Plaintiff in the within action.
7. As the treads are manufactured and supplied by Good Year (and warranted by Good Year) Case will not necessarily have a record of all the replacement treads supplied.

Affidavit of Gary R. Tompkin

¶ 39 I, GARY R. TOMPKIN, residing in the Municipality of Copley, Ohio in the United States of

America, make oath and say:

1. I have been retained by Fasken Martineau DuMoulin, LLP to provide a report on the condition of the Quadtracs belonging to Michael Sorotski and Bill Herle.

...

3. Attached as Exhibit "B" to this my Affidavit is my report entitled "Observations of Quadtrac Tracks". Based upon my examination of the Quadtracs belong [*sic*] to Messrs. Sorotski and Herle, I have come to the following conclusions:

   (a) The cracks appear on the outer surface of the track in the rubber between the raised rubber treads where they open up or gap as the track wraps around the drive and idler wheels. The cracks close up in the flat portions of the track between the points of bending and although still discernable they are less apparent.
   (b) The flex cracks have stopped spreading where they reached a cable surface.
   (c) None of the cracks after reaching a cable have propagated along the cable at the rubber interface resulting in a cable becoming separated from the rubber matrix.
   (d) Where cracks terminated at a cable surface the exposed wire surfaces did in some instances have some minor surface rust. There is no indication that exposed cables at the base of the cracks had broken wires due to rusting or damage. There was no indication that wires within a cable had rust where the cable remained rubber covered.
   (e) The various layers of cables retained their positions relative to one another in the tracks in spite of the presence of cracks in the outer rubber. The engineering integrity of the track reinforcement has not been compromised as a whole or as individual components.
   (f) The tracks on the Sorotski tractor are still functional for agricultural work on the farm and on the roads between fields. The tread wear of the Sorotski tracks is only in the 15 to 20 percent range after eight seasons. The remaining tread is suitable for continued service.
   (g) The Herle track that was damaged while plowing snow suffered drive lug loss in two portions of the track. The damaged track had many broken cables in both portions of the track where successive lugs had been lost. Either the broken cables or the loss of three or more successive drive lugs would create an end of life condition.
   (h) The second Herle track removed in January 2005 is not at its end of life even though single drive lugs are missing in three separate portions of the track. This track could continue to be used for agricultural work.
   (i) Tracks used in construction or earth moving service have a different warranty of one year compared to four years for tracks used in agricultural service. Due to the differences in stresses anticipated and experienced in the two services, construction tracks have a more robust design.
   (j) The cracks are a cosmetic issue and do not weaken the strength of the track in a manner that would result in significantly reduced performance or potential duration of agricultural service.
   (k) The rubber cracks do not create a safety concern for the operator or

persons near the tractor.

¶ 40 In Mr. Tompkin's curriculum vitae, attached to his affidavit, he sets forth the areas of his "research chemist background", and notes in a conclusory fashion:

> The background in rubber to metal bonding is extensive. Work over more than 30 years has included evaluation of the performance of many different products under laboratory and field conditions with analysis of failure mode and cause. Adhesion has been studied regarding almost every non-tire product. ... Work included FEA analysis of many rubber products with an emphasis on what takes place during service at the textile or metal reinforcement and how this relates to the stresses within the product in service. ...

The Plan of Proceedings (s. 6(e)(ii) of *The Class Actions Act, supra*), as submitted by the Plaintiff

¶ 41 **INTRODUCTION**

The solicitors for the Plaintiff propose that the final plan of proceeding be as follows:

Stage 1: Notice to Class

(a) Because this is an action involving a farm implement, it is proposed that Notice of Certification be advertised in two consecutive issues of The Western Producer, a weekly farm newspaper serving Canadian farm families across Canada; and
(b) That individuals who are identified from the records of the Defendants as having purchased the farm implements identified in this action be notified individually.

Stage 2: Pleadings

(a) That the Defendants file a Statement of Defence within 30 days of Certification;
(b) That the Plaintiff file a reply if so advised within 14 days of the filing and service of the Statement of Defence; and
(c) Mediation under the auspices of the Dispute Resolution Office for the Province of Saskatchewan, take place in Saskatoon at a time convenient to the parties and the Dispute Resolution Office.

Stage 3: Document Production

(a) It is proposed that document production occur within the time limits set out in the Queen's Bench Rules of Court for Saskatchewan.

Stage 4: Examinations for Discovery

(a) It is proposed that examinations for discovery be held in accordance with the Queen's Bench Rules of Court for Saskatchewan.

Stage 5: Exchange of Expert Opinions/Case Management

(a) Following examinations for discovery, and the exchange of expert

opinions, the Plaintiffs intend to attend before the Court in order to clarify and/or redefine the common issues. On conclusion, the Plaintiffs intend to apply to the Court for a Pre-Trial Settlement Conference on the common issues.

Stage 6: Interlocutory Relief Applications/Case Management

(a) Throughout, the parties are at liberty to apply to the Court for interim interlocutory relief in accordance with the Queen's Bench Rules of Court if for any reason the case management Judge is unable to hear the application.

Stage 7: Common Issues Trial

(a) The common issues Trial will determine whether the Defendants could be liable to any/or all Plaintiffs based on the various common issues.

Stage 8: Individual Issues Determination

(a) At the conclusion of the common issue Trial, the Plaintiffs propose that the individual damage assessments proceed in front of a referee.

Analysis of the Application for Class Action Certification

(a) Section 6(a) - "the pleadings disclose a cause of action".

¶ 42 The various requirements set forth in s. 6 of the Act are conjunctive. In order for an action to be certified as a class proceeding, the representative plaintiff must satisfy each of the five mandatory prerequisites for certification as prescribed in the section. If but one of those criteria cannot be satisfied, the application for certification may not succeed.

¶ 43 The first requirement is "(a) the pleadings disclose a cause of action".

¶ 44 As reflected in the pleadings referenced earlier herein, the plaintiff's claim articulates three causes of action against the defendants, being breach of warranty, breach of contract and negligence.

¶ 45 The general test to be applied in determining whether the plaintiff has sufficiently pleaded a cause of action for the purposes of s. 6(a) of the Act is the "plain and obvious" test as utilized in considering motions to strike out pleadings under Rule 173(a) of *The Queen's Bench Rules*. Authority for this proposition is found in the Saskatchewan Court of Queen's Bench decision of *Hoffman v. Monsanto Canada Inc.*, 2005 SKQB 225, [2005] 7 W.W.R. 665 at 679; and the Ontario Court of Appeal ruling in *Kumar v. Mutual Life Assurance Company of Canada* (2003), 226 D.L.R. (4th) 112 at para. 36 (Ont. C.A.).

¶ 46 In *Daniels v. Canada (Attorney General)*, 2003 SKQB 58, [2003] 6 W.W.R. 72, McLellan J. of this Court addresses the relevant test where at paragraph 13, he observes:

> 13 ... [A]lthough the onus is on the plaintiffs, on a certification application, to satisfy the Court that the pleadings disclose a cause of action, it is not a very high onus.

¶ 47 McLellan J. further comments at paragraphs 15-19:

15 In *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), the Supreme Court of Canada pointed out:

> Thus, the test in Canada governing the application of provisions like Rule 19 (24)(a) of the British Columbia *Rules of Court* is the same as the one that governs an application under R.S.C. O. 18, r. 19; assuming 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. Only if the action is certain to fail because it contains a radical defect ranking with the others listed in Rule 19(24) of the British Columbia *Rules of Court* should the relevant portions of a plaintiff's statement of claim be struck out under Rule 19(24)(a) (per Wilson J. at p. 980)

16 Madam Justice Wilson continued 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.

17 The issue was considered in the context of a certification application in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Gen. Div.). In that case Moldaver J. sitting in the Division Court stated:

> 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. (at p. 469)

18 The generous approach to be adopted on this application is specifically spelled out in s. 7 of [*The Class Actions Act, supra*] which provides:

> 7(1) The court may adjourn the application for certification to permit the parties to amend their materials or pleadings or to permit further evidence to be introduced.
> (2) An order certifying an action as a class action is not a determination of the

merits of the action.

19 In *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, (2001), 205 D.L.R. (4th) 19 (S.C.C.), the Supreme Court pointed out, when considering the *Class Proceedings Act* [S.O. 1992, c. 6] in Ontario, that the Act should be construed generously. Chief Justice McLachlin also pointed out at pp. 28-29 that:

> [15] The Act reflects an increasing recognition of the important advantages that the class action offers as a procedural tool. ... [C]lass 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.... 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.
>
> [16] It is particularly important to keep this principal in mind at the certification stage. In its 1982 report, the Ontario Law Reform Commission proposed that new class action legislation include a "preliminary merits test" as part of the certification requirements. The proposed test would have required the putative class representative to show that "there is a reasonable possibility that material questions of fact and law common to the class will be resolved at trial in favour of the class": *Report on Class Actions, supra*, vol. III, at p. 862. Notwithstanding the recommendation of the Ontario Law Reform Commission, Ontario decided not to adopt a preliminary merits test. Instead it adopted a test that merely requires that the statement of claim "disclose ... a cause of action": see *Class Proceedings Act, 1992*, s. 5(1)(a). Thus the certification stage is decidedly not meant to be a test of the merits of the action: see *Class Proceedings Act, 1992*, s. 5(5) ("An order certifying a class proceeding is not a determination of the merits of the proceeding"); see also *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 at p. 320, 148 D.L.R. (4th) 566 (Gen. Div.) ("any inquiry into the merits of the action will not be relevant on a motion for certification"). Rather the certification stage focuses on the *form* of the action. The 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 ....

¶ 48 Here, the plaintiff has asserted the three noted causes of action, and each such cause of action must be tested against the "plain and obvious" standard. Purported causes of action that do not satisfy this standard will be struck out and will not be permitted to "piggyback" on other legally cognizable causes of action.

(i) Breach of Warranty

¶ 49 The statement of claim alleges that the defendants have breached expressed, implied and statutory warranties. Specifically, s. 36 of *The Agricultural Implements Act, supra*, sets out several statutory warranties with regard to the purchase of any agricultural implement. Section 36(10) reads:

36 ...

...

(10) Every contract for the sale of a new implement is deemed to include a warranty that:

(a) the new implement will be durable if used under fit and suitable conditions and kept with proper care;
(b) parts proving defective will be replaced free of charge on return of the defective parts to the dealer's place of business or to the distributor;
(c) if the purchaser returns the new implement to the dealer's place of business, the dealer will install the new parts without charge; and
(d) all parts replaced within the warranty period are durable for the duration of the original warranty period prescribed in subsection (2) or for 90 days from the date of installation, whichever is longer.

¶ 50 In addition, s. 16 of *The Sale of Goods Act, supra*, says:

16 Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:

1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for that purpose;
2. Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality but if the buyer has examined the goods there shall be no implied condition with regard to defects which such examination ought to have revealed; ...

¶ 51 In addressing the cause of action, the plaintiff suggests that the Case Quadtrac tractors that were sold breached these statutory conditions. The tracks were not reasonably fit for their purpose, of merchantable quality or durability when used with proper care. The parts were not replaced and installed free of charge.

¶ 52 If the allegations contained in the statement of claim are true, the plaintiffs would have a cause of action against the defendants. The plaintiffs further submit that at this stage of the certification process, it is not necessary to prove the facts relating to the merits of the claim. It is simply enough that the claims raise a cause of action.

(ii) Breach of Contract

¶ 53 The plaintiff also alleges that the defendants are liable for breach of contract. To that end, the statement of claim alleges at paragraph 18 that the defendants expressly or impliedly warranted that the Case Quadtrac was of merchantable quality, safe, appropriate and fit for the purposes for which the

tractor was intended, when they knew or ought to have known that the tractor's tracks were subject to fraying. Again, if this allegation is true, the defendants would be liable to the Class under breach of contract.

(iii) Negligence

¶ 54 In addressing the third cause of action, the statement of claim also alleges that the defendants were negligent in the manufacture of Case Quadtrac tractors. It is alleged in paragraph 19 that the defendants had a duty of care to purchasers to warn them about the problems with the tracks. The plaintiff alleges that the defendants breached that duty by failing to disclose the defects in the product. As a result, the Class members have suffered damages. Following from this, the plaintiff suggests that the damages suffered have been appropriately pleaded in the statement of claim to include the inadequate value of the defective tracks and the cost of replacing or repairing the tracks.

¶ 55 Finally, it is also alleged in paragraphs 15 and 19 of the statement of claim that the defendants placed the tractor with a defect in it into the stream of commerce. Therefore, the defendants are liable for the foreseeable losses of that defective product, including but not limited to the reduced value of the tractor.

¶ 56 I am of the view in proceeding through this analysis in dealing with the causes of action that the plaintiff has demonstrated, as required by s. 6(a) of *The Class Actions Act*, that the pleadings disclose a cause of action in each of the three different causes of action. Therefore, the plaintiff has met the requirement in s. 6(a).

(b) Section 6(b) - "there is an identifiable class".

¶ 57 This provision of *The Class Actions Act* requires that there must be an identifiable class of two or more persons. This class must be related to the cause of action and be defined based on objective criteria such as to easily allow the Court and potential plaintiffs to determine who will fall within the proposed class.

¶ 58 The Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, 2001 SCC 46, laid out the basic requirements of class definitions as follows, at paragraph 38:

> 38 ... 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. ...

¶ 59 In *Spencer v. Regina (City)*, 2003 SKQB 109, 231 Sask.R. 68, the Saskatchewan Court of Queen's Bench (Zarzeczny J.) emphasized the primary function of the class definition as follows at paragraph 26:

> [26] I am satisfied, in part based upon the defendant Carma's own materials filed upon this application, that although the description of the proposed class is succinct and simple, it nevertheless serves the primary function outlined by the cases referenced respecting the purpose for this requirement, namely; the ability of the court in due

course to identify members of the class. ...

¶ 60 The plaintiff suggests that the proposed class definition in this case satisfies the requirements of s. 6(b) and accords with established jurisprudence. The proposed Class will contain all persons who purchased the defective product and suffered losses as a result. The plaintiff further asserts that this type of class is easily defined, is directly connected to the cause of action, and that product liability cases such as this make for an ideal identifiable class.

¶ 61 In *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158, 2001 SCC 68, the Supreme Court of Canada at paragraph 20 commented:

> 20 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) ....

¶ 62 In considering the criteria and the pleadings, I am satisfied that the plaintiff's identification of the proposed Class as: "All purchasers of Case Quad 9370 Tractors who have suffered financial losses due to the defects in the tracks of these tractors", is sufficient to adequately describe an identifiable class as required by s. 6(b) of *The Class Actions Act*. Therefore, the plaintiff has satisfied this criterion.

> *(c)* Section 6(c) -"the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members".

¶ 63 Section 2 of *The Class Actions 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".

¶ 64 To satisfy s. 6(c) of *The Class Actions Act*, the action must raise at least one common issue. In this instance, the notice of motion for certification sets forth the common issues in the action. These common issues are "[w]hether damages arise as a result of a manufacturing defect, design defect, a failure to warn, negligent misrepresentation, breach of contract or breach of statutory warranty or other warranties, or negligence in relation to the tracks placed on the Case QuadTrac Tractors."

¶ 65 In *Western Canadian Shopping Centres v. Dutton, supra*, the Court offered the following explanation of the common issues requirement at paragraph 39:

> 39 ... 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. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit.

¶ 66 While the presence of individual issues is not fatal to a certification application, it is important that a resolution of the common issues will "significantly" advance the interests of the class and that the common issue must be a "substantial ingredient" of each of the class members' claims.

¶ 67 The common issues and the concept of commonality are the cornerstones of *The Class Actions Act*. It is the commonality of the legal and factual issues among all of the members of the class that gives the class action its utility, the opportunity to "avoid duplication of fact-finding or legal analysis."

¶ 68 A class proceeding will only produce greater judicial economy and improved access to justice if the resolution of the common issues will "significantly advance the action." The plaintiff must therefore show that the resolution of the common issues will move the litigation forward to a sufficient degree so as to justify the certification of the action as a class proceeding with its attendant costs.

¶ 69 In *Moyes v. Fortune Financial Corp.* (2002), 61 O.R. (3d) 770 (Ont. S.C.J.), the court on the matter of common issues observed at paragraphs 25 and 26:

> [25] The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. Any proposed class action that has any chance of being certified will, virtually by definition, have common issues. Rather, the issue is whether the resolution of the proposed common issues is going to move the litigation forward to a sufficient degree 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 ....
> [26] I repeat the principles which I have said, on previous occasions, can be drawn from the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 25 S.C.R. 534, 201 D.L.R. (4th) 385:
>
> - the resolution of the common issues must be necessary to each member's claim;
> - the common issues need not predominate over non-common issues nor does the resolution of the common issues need to be determinative of each member's claim;
> - the common issues must be a "substantial" common ingredient of each member's claim;
> - whether the common issues justify a class action involves an examination of the "significance" of the common issues in relation to the individual issues.

¶ 70 In the current action the plaintiff seeks certification of the action as a class proceeding to determine the issue: "Whether damages arise as a result of a manufacturing defect, design defect, a failure to warn, negligent misrepresentation, breach of contract or breach of statutory warranty or other warranties, or negligence in relation to the tracks placed on the Case QuadTrac Tractors."

¶ 71 In considering the evidence relating to the representative claims of Mr. Sorotski and Mr. Herle, and the causes of action as set forth in the statement of claim, I am of the view that there are numerous individual issues that will have to be addressed before making any determination on liability. It is difficult to ascertain from the plaintiff's causes of action what the appropriate common issue might be said to be. To that end, the plaintiff suggests a complaint with the tracks; however, even that complaint, as pleaded, is not common. In considering the expert reports which have been filed by the plaintiff and the defendant Goodyear, such reports reflect the difficulty in identifying a "common" defect with the tracks. The report of Dr. Le May filed by the plaintiff relates to the observations which he made of Mr. Sorotski's tracks. In conjunction with this is the report filed by Mr. Tompkin on behalf of Goodyear wherein he references the "problems" as alleged by Mr. Sorotski and Mr. Herle to be completely different. In particular, he observes:

(a) The difficulties with the treads of the Sorotski tractor have not jeopardized the integrity of the treads. The cracks are cosmetic and not functional.
(b) With respect to the observation of the Herle tracks, the two rear tracks were removed in January of 2005. The right rear track has cracks but does not impair the integrity of the track. The left rear track was significantly damaged in that there were broken cables with many missing track drive lugs. The damage to this track was a result of a catastrophic event due to foreign material between the track and drive wheel.

¶ 72 Mr. Tompkin, in his report, points out that from his understanding Mr. Sorotski's implement appears to have been utilized solely for agricultural purposes, where as Mr. Herle's tractor was used to some extent for plowing snow in conjunction with the oil industry and could well be termed to be an industrial or commercial use. This is reflected as a part of Mr. Tompkin's report where he comments:

9. Tracks used in construction or earth moving service have a different warranty of one year compared to four years for tracks used in agricultural service. Due to the differences in stresses anticipated and experienced in the two services, construction tracks have a more robust design.

¶ 73 Further, in considering the parameters of the potential claims of Mr. Sorotski and Mr. Herle, I am of the view that the liability issues relating to each of them will be different in a significant fashion. Also, in addressing the question of potential damages, I am satisfied from the material that there will be numerous individual issues which must be resolved in order to fairly adjudicate the claims of individual parties.

¶ 74 What would amount to virtually a tractor-by-tractor examination will be required in the present instance to determine the defendants' liability to any particular member of the proposed Class. Theoretically, were it to be determined by the trier of fact that there is an inherent defect in the tracks used on the Quadtrac tractors in question, no Class member would be entitled to a remedy without also demonstrating that the tracks on that claimant's Quadtrac tractor exhibited physical deterioration, that the inherent defect is a significant contributing factor in such deterioration and that compensable loss has been sustained as a result. In this regard, I agree with the contention of Goodyear that each claimant would be required to address and answer the following type of inquiries:

(a) What sort of functions, operations, applications or purposes was the Quadtrac used for?
(b) What sort of surfaces was the Quadtrac operated on?
(c) What sort of temperatures and weather conditions was the Quadtrac operated in?
(d) If the Quadtrac was used in agricultural operations, what is the acreage farmed

and what implements were pulled?

(e) What speed was the Quadtrac operated at?

(f) How intense was the usage in terms of hours per week or per month that the Quadtrac was operated?

(g) What modifications, if any, have been made to the Quadtrac?

(h) How have all of the foregoing factors, alone and in combination, impacted upon track condition and track function?

(i) Did the claimant purchase the Quadtrac new or used and, if used, what uses were made of the Quadtrac by its previous owner(s)?

(j) Did the claimant suffer any damages as a result of the cracking of the tracks?

(k) Did those damages, if any, take the form of replacement and repair costs, loss of profits from farming or other income-producing activities, or losses on the resale or trade-in of the Quadtrac?

(l) In respect of each of these heads of damages, has the complainants taken all reasonable actions to mitigate the loss?

¶ 75 Even in the event that a common issues trial were able to reach the conclusion that the tracks in question exhibited inherent design or manufacturing defects, this conclusion would not significantly advance the litigation, and would merely mark the first step in proving the entitlement to compensation of any particular Class member.

¶ 76 Accordingly, in considering this requirement of s. 6 of *The Class Actions Act*, I am of the view that the plaintiff has not demonstrated that this case raises common issues appropriate for determination by way of a class action.

(d) Section 6(d) - "a class action would be the preferable procedure for the resolution of the common issues."

¶ 77 To be certified as a class proceeding under s. 6(d) (preferable procedure), a class proceeding should be certified only if it is demonstrated that it is the preferable means by which the Class members can obtain relief. The preferability analysis has two components, the first being that even if there is an identifiable class whose claims raise common factual or legal issues, those issues should be determined only through a class proceeding if such a proceeding would be inherently fair, efficient and manageable and, secondly, where it is demonstrated that a class proceeding is superior to any other reasonably available procedure or procedures for obtaining redress for the class members.

¶ 78 In commenting upon this general test, McLachlin C.J. in *Hollick v. Toronto (City), supra*, observes at paragraphs 27 and 28 the following:

> 27 I cannot conclude, however, that "a class proceeding would be the preferable procedure for the resolution of the common issues", as required by s. 5(1)(d). The parties agree that, 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. ...
> 28 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.

¶ 79 In applying this rationale, both parts of this test must be considered in the context of the three recognized objectives of *The Class Actions Act* (judicial economy, enhanced access to justice, and behaviour modification), and both parts of the test must be considered in relation to the resolution of the claims of the class members as a whole, not merely the resolution of the common issues.

¶ 80 In the present case, I am of the view that a class action proceeding does not address either aspect of the concept of preferability. Firstly, even if the Court is able to formulate a common issue to be determined, there will be numerous individual issues that need to be litigated prior to the resolution of the claim. Secondly, I am not persuaded that a class action would be advantageous over the various other options that are open in this case either to Mr. Sorotski or to Mr. Herle. The evidence tends to suggest that the damages for many members of the putative Class would be less than $50,000 and therefore could be litigated expeditiously under the Court of Queen's Bench provisions dealing with simplified procedure. In those instances where the damages would be in excess of $50,000, the general procedure provisions would be available. In some instances, the damages would perhaps be demonstrably minimal and the small claims procedure might be even be available to such a litigant.

¶ 81 In considering the issue of behaviour modification, I have come to the conclusion that it is not a particularly pressing issue as both of the defendants, Case and Goodyear, appear to have put into place mechanisms for addressing various of the complaints described in the statement of claim.

¶ 82 Overall, I find that in the present case, there are alternative procedures available to Class members that would afford a more expeditious and efficient access to the relief which each Class member would claim. I am also mindful of the fact that the $50,000 limitation applying to the simplified procedure does not bar members of the Class from joining their claims in a single simplified proceeding action. Rule 478(4) of *The Queen's Bench Rules* provides that where actions are brought by multiple plaintiffs, "the simplified procedure shall be used if each plaintiff's claim, considered separately, meets the requirements of Subrule (1)" (that being that the claim does not exceed $50,000).

¶ 83 I am mindful of the need in undertaking the preferability analysis to also take into consideration the presence and significance of the matters which are set forth in s. 9 of *The Class Actions Act*. To that end I observe, firstly, that the quantification of damages will require individual assessment after determination of the common issues; and, secondly, that the relief claimed relates to separate contracts (each claimant will have purchased their Quadtrac under a separate contract of purchase, likely from different dealers of agricultural equipment and these contracts may have significantly different terms that may arise from different jurisdictions); and thirdly, that different remedies may be sought by different claimants. While all claims seek monetary damages, some claimants will have suffered loss in the form of track replacement costs, while others will have suffered loss in the form of the diminution of the value of their Quadtrac tractors and/or lost profits.

¶ 84 In conclusion, I am of the view that none of the public policy rationales for the enactment of class action legislation would be served by certifying this as a class action procedure to determine the claims of the plaintiff and other proposed class members. The action involves a limited number of potential claimants, each of whom has a claim of such magnitude as to be individually viable, and alternative methods of resolution are available to each potential claimant such as would likely achieve the same results in a more efficient and expeditious manner.

¶ 85 Accordingly, I am of the view that the plaintiff has not satisfied the requirement of s. 6(d) of *The Class Actions Act*.

> *(e)* Section 6(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".

¶ 86 While there have been some concerns expressed by the defendants as to the adequacy and viability of the plan set forth for the class action, more particularly the requirement that the plan demonstrate a workable method of advancing the action on behalf of the Class and of notifying Class members of the action, I am of the view that the plaintiff has met the three subcriteria set forth in this overarching criterion. To that end, I propose only to briefly comment that I am satisfied that Mr. Sorotski is a person willing to be appointed as a representative plaintiff, that he would fairly and adequately represent the interests of the Class and that he does not have on the potential common issues an interest that is in conflict with the interests of other class members. Further, on balance, I am of the view that there is a demonstrated plan for the class action as required in s. 6(e)(ii).

¶ 87 Therefore, I have concluded that the plaintiff has met the s. 6(e) requirements.

Summary

¶ 88 Section 6 of *The Class Actions Act* again provides:

> **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.

¶ 89 For the foregoing reasons, I have concluded that the plaintiff has met the criteria set forth in s. 6 (a), 6(b) and 6(e). I have also found that the plaintiff has not met the criteria set forth in s. 6(c) and 6(d).

¶ 90 As the Court is mandated to certify an action as a class action only where all of the criteria have been satisfied, that is not the situation before me and therefore, I decline to certify the action as a class

action, and the plaintiff's application to do so is dismissed.

ALLBRIGHT J.

QL UPDATE: 20060508
cp/e/qw/qlrds
CIVT,

Sparling v. Southam Inc. et al.; Kerrigan et al., Intervenors

Indexed as: Sparling v. Southam Inc. (H.C.J.)

66 O.R. (2d) 225
[1988] O.J. No. 1745
Action No. 23031/87

ONTARIO
High Court of Justice
Callaghan A.C.J.H.C.

October 27, 1988.

Corporations — Shareholders — Action by director under Act for declaration that certain transactions oppressive — Settlement — Approval — Presumption in favour of settlement — Objectors failing to dislodge presumption — Canada Business Corporations Act, S.C. 1974-75-76, c. 33, ss. 234, 235(2), 253.

The plaintiff, the director appointed under s. 253, brought an action pursuant to s. 234 of the Canada Business Corporations Act, S.C. 1974-75-76, c. 33, for a declaration that the actions of the defendants in respect of a share exchange agreement between the two corporate defendants, an S. family voting trust, arrangements between the two corporate defendants and the S. family concerning support for S.'s slate of directors, a "standstill" agreement preventing acquisition of further shares by the defendant T. Corp. and an agreement by T. Corp. to sell shares acquired by it to the family trust, all arranged without approval by a shareholders' meeting, were oppressive or unfairly prejudicial to the shareholders' interests. The defendants alleged that the arrangements were intended to forestall a "predatory" take-over. Following examinations for discovery, a settlement was reached involving termination of the agreement concerning voting of shares subject to any arrangement approved at a shareholders' meeting, and payment of a sum of money by the family to S. Inc. The plaintiff then applied for approval of the settlement pursuant to s. 235(2). It was agreed that the order would not derogate from the rights of other potential claimants under s. 234. Five shareholders of S. Inc. objected.

Held, the settlement should be approved.

There is a public interest in the settlement of lawsuits. It is not the function of the court to substitute its judgment for that of the parties, nor litigate the merits of the action. Neither should it function simply as a rubber stamp. It must be satisfied that the settlement is fair and reasonable. The director acts as a public officer, as parens patriae under the Act and settlements proposed by the director run with a strong initial presumption that they are reasonable and fair. He acted on the advice of competent counsel and negotiations were bona fide and at arm's length. The court should conduct a limited evaluation as to whether the potential rewards of the litigation with its attendant risk and costs are outweighed by the benefits of the settlement. The proceedings were apt to last several years and involved substantial expense and considerable risk, and the objectors were a small percentage of the shareholders. The presumption had not been displaced.

Cases referred to

Young v. Katz, 447 F. 2d 431 (1971); Greenspun v. Bogan, 492 F. 2d 375 (1974); Howard Smith Ltd. v. Ampol Petroleum Ltd., [1974] A.C. 821

Statutes referred to

Canada Business Corporations Act, S.C. 1974-75-76, c. 33, ss. 234 (am. 1978, c. 9, s. 74), 235(2), 253

MOTION for an order pursuant to s. 235(2) of the Canada Business Corporations Act approving the settlement of an action.

D.R. O'Connor, Q.C., and C.D. Bredt, for plaintiff.

J.F. Howard, Q.C., and N. Finkelstein, for defendant, Southam Inc.

D.J.M. Brown, Q.C., and J. O'Donnell, for defendant, Torstar Corp.

H.L. Morphy, Q.C., and S. Block, for defendant directors, George L. Crawford et al.

K.C. Cancellara, for intervenors, Philip Kerrigan et al.

P. Anisman, for objectors.

R.N. Robertson, Q.C., for objector, Imperial Life Assurance Company of Canada.

CALLAGHAN A.C.J.H.C. (orally):— This is a motion brought by the plaintiff, Frederick H. Sparling, the director appointed under s. 253 of the Canada Business Corporations Act, S.C. 1974-75-76, c. 33 (the "Act"), for an order pursuant to s. 235(2) of the Act, approving the settlement of this action.

This action was brought by the plaintiff pursuant to s. 234 of the Act, for a declaration that the actions of the defendants in entering into a share exchange agreement, a Southam family agreement and a Southam shareholders' agreement without seeking the approval of the Southam shareholders were oppressive or unfairly prejudicial to, or unfairly disregarded the interests of the Southam shareholders.

The plaintiff's action was based upon a series of transactions that took place in 1985 which the individual directors believed to be a good business deal for Southam Inc. and which were taken to prevent a "predatory" take-over they were advised was likely imminent.

These transactions included:

(i) A Share Exchange Agreement between Southam Inc. and Torstar Corporation ("Torstar") implemented on August 26th, 1985;
(ii) A Voting Trust Agreement among members of the Southam Family Group put in place later in 1985; and
(iii) Certain related arrangements among the two corporations and the Southam Family Group including: a Torstar commitment to support the Southam slate of nominees for election to the Southam Board, and a "Standstill" Agreement prohibiting Torstar from acquiring additional Southam shares. These arrangements, like the Southam Family

Agreement, would expire (unless extended by agreement) on August 26th, 1995.

As an exception to the standstill agreement, Torstar was permitted to acquire (and did acquire) an additional 5% of the outstanding shares of Southam Inc. on the market, but Torstar agreed, however, that if the voting trust among members of the Southam family group was put in place, then the Southam family group would be entitled to purchase one-half of the shares that Torstar acquired on the market from Torstar at Torstar's cost of acquisition plus carrying costs. After the Southam family agreement was put in place, the Southam family group did purchase 21/2% of the shares of Southam Inc. from Torstar.

The plaintiff requested a number of remedies including, inter alia, the following:

(i) a shareholders' meeting to consider ratification of the Share Exchange Agreement, and in the event that the shareholders chose not to ratify the Agreement, an order that the share exchange transaction be unwound; alternatively, the plaintiff asked that the defendant directors of Southam Inc. who approved the share exchange be required to make a payment to shareholders of Southam Inc. on the basis that the shareholders suffered a loss of value in their shares because of the share exchange and related transactions;
(ii) that Torstar be prohibited from accepting instructions to vote for the Southam slate of Southam Inc. directors;
(iii) that the defendant directors who approved the Share Exchange Agreement be required to account to Southam Inc. for the value of the option given by Torstar to the Southam Family Group with respect to one-half of the 5 percent interest in Southam Inc. acquired by Torstar in the market as permitted under the Standstill Agreement.

Seven persons on behalf of the defence and two on behalf of the plaintiff were examined in the course of pre-trial proceedings, and the trial was scheduled to begin on Tuesday, September 20, 1988. From the affidavit of the plaintiff filed, it appears that the plaintiff recognized the expense and the attendant uncertainties in the financial markets that would result from a trial and potential appeals, and that any remedy, given court processes and potential appeals, might not be achieved for some years. Accordingly, the plaintiff entered into a settlement with the defendants, which settlement is subject to court approval. The defendants throughout the pre-trial proceedings and presently take the position that they have a good defence to all the plaintiff's claims and that the share exchange agreement was entered into in good faith and on reasonable grounds and was in the best interest of the corporation and all of its shareholders.

The terms of the proposed settlement can be summarized as follows:

(i) subject to any ongoing arrangement that may be approved at a Southam Inc. shareholders meeting, at which meeting Torstar would not vote its shares of Southam and parties to the Southam Family Agreement would not vote in accordance with the procedure in that Agreement, the Share Exchange Agreement, the Southam Family Agreement and the Southam Shareholders Agreement will terminate on June 30, 1990 (rather than August 26, 1995 being the date when they would otherwise terminate unless extended);
(ii) the obligation of Torstar to vote its shares of Southam Inc. in favour of the candidates for election to the Southam Board of Directors designated by the Board of Directors will terminate immediately;
(iii) certain rights of Torstar to purchase shares of Southam Inc. being sold by parties to the Southam Family Agreement and not purchased by other parties to that Agreement

will be modified, effective immediately;

(iv) parties to the Southam Family Agreement will pay $1,250,000.00 to Southam Inc. within 60 days, without claiming any consideration or compensation therefor; and

(v) Southam Inc. and Torstar will pay $125,000.00 to defray the plaintiff's costs.

Further, it is agreed that the order approving the settlement, if issued, will state that it does not derogate from the rights of other potential claimants under s. 234 of the Act, or otherwise, with respect to the matters complained of in the statement of claim other than the corporate reorganization (rectification) and share option remedies. Further, as to any potential claimant who does not attend at the hearing to consider the settlement, there will be no derogation even with respect to the corporate reorganization (rectification) and share option remedies, if that claimant did not receive notice or if the notice was inadequate.

The plaintiff, the director appointed under the Act, believes the settlement to be fair and reasonable.

The objectors on this application are appearing pursuant to notices of intention to appear and are five existing shareholders of the defendant Southam Inc., four of whom held shares on August 26, 1985, and acquired further shares thereafter, and one of whom only acquired shares after that date.

The objectors, apart from the objector Imperial, ask the court to withhold approval of the proposed settlement. The main thrust of their submission, as I understand it, is that the plaintiff had a reasonable likelihood of success on the merits of this action in relation to the share exchange agreement. The objectors claim that the allegations in the plaintiff's statement of claim are supported by the examination for discovery of the defendants and that the share exchange agreement at trial would be set aside as not adequately protecting the interests of the Southam Inc. public shareholders.

I think I should note that at the outset of this motion I declined the invitation of counsel on behalf of the objectors to review the voluminous discoveries with him. I was satisfied that the concession of the objectors that the directors were acting bona fide and believed that the share exchange agreement in issue made good business sense rendered such a review unnecessary.

The concession, in my view, made it clear that the issue as to "primary purpose", would have been a live issue between the parties on the trial of this matter.

The objectors further claim that the proposed settlement would deprive the Southam Inc. shareholders of personal rights of action, in that it precludes them from attacking the reorganization attendant upon the share exchange, and furthermore, it precludes any action with respect to the share option remedy which had been sought by the director in the main action.

There were subsidiary and collateral objections made with reference to the funds payable to the company by the defendants and in particular with reference to the benefits accruing to the shareholders from those funds as a result of proportional shareholdings. I note these objections and weigh them in the result.

Section 235(2) provides as follows:

> 235(2) An application made or an action brought or intervened in under this Part shall not be stayed, discontinued, settled or dismissed for want of prosecution without the approval of the court given upon such terms as the court thinks fit and, if the court determines that the interests of any complainant may be substantially affected by such

> stay, discontinuance, settlement or dismissal, the court may order any party to the application or action to give notice to the complainant.

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.

When the director under the Act proposes a settlement for approval, he is acting as a public officer authorized, as parens patriae under the Act not only to institute actions but also to compromise them. Settlements proposed by the director, in my view, run with a strong initial presumption that they are reasonable and fair.

That presumption operates where, as here, the director is acting after extensive pre-trial discovery, on the advice of experienced and competent counsel, in circumstances where his negotiations have been conducted at arm's length, and, indeed, in a manner which all parties agree, including the objectors, was bona fide. In this context, the judicial evaluation of a proposed settlement involves a limited inquiry as to whether the potential rewards of successful litigation, with its attendant risks and costs, are outweighed by the benefits of the proposed settlements.

The matter was aptly put in two American cases that were cited to me in the course of argument. In a decision of the Federal Third Circuit Court in Young v. Katz, 447 F. 2d 431 (1971), it is stated:

> 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 procedure 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 defences, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable.

In another case cited by all parties in these proceedings, Greenspun v. Bogan, 492 F. 2d 375 at p. 381 (1974), it is stated:

> ... any settlement is the result of a compromise -- each party surrendering something in order to prevent unprofitable litigation, and the risks 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 to the extent of the settlement, that to approve the settlement would be an abuse of discretion.

(Emphasis added.)

While the litigation itself has only been pending 12 months, without the proposed settlement, the trial and ensuing appeals would unquestionably consume additional years in a case of this magnitude and complexity. The defendants throughout have denied liability and quite properly have raised all possible defences. The expense of preparing the case, not only on the issue of liability but on issues such as the assessment of the value of options, would be substantial and time-consuming.

By the time the final decision would be rendered, the financial markets would have been placed for a long period of time in a state of uncertainty which would impact adversely on the interests of all shareholders involved. I note that this consideration played a role in the decision of the Securities Commission which was cited to me in argument in relation to earlier proceedings with reference to this matter.

The objectors in these proceedings represent at the very best count a small percentage of the shareholders. That indicates that most of the shareholders approve the proposed settlement. I cannot let the matter pass without noting that the legal costs of the objectors in this proceeding, save those of Imperial, are all financed by a single investment group (record p. 217). That is a matter which I believe goes to the weight to be attributed to the objections.

This proposal, as noted, comes forward at a point in the litigation when counsel have had an opportunity to assess their positions in the light of the productions and discoveries made by the plaintiff and the defendants herein. Such counsel are acting, in recommending this proposal, with a firm grasp of the strengths and weaknesses of this case, and it is not for this court to second-guess that professional judgment.

In assessing the fairness and reasonableness of the proposal, the court should also consider the nature of the risks involved in establishing the liability claimed.

In this regard, it is noted that the objectors have conceded that the defendant directors believed that the exchange agreement which is in issue in these proceedings made good business sense for the defendant Southam Inc.: see the factum of the objectors, para. 4(f). Furthermore, it is apparent that there were no statutory or regulatory rules mandating shareholder approval of that exchange. The success of the plaintiff's claim would rest on a court finding as a fact that the primary purpose of the share exchange was to prevent a take-over. In light of the foregoing, establishing that primary purpose -- or the scienter, as it is sometimes referred to -- would have been a contentious matter, both as a matter of fact and as a matter of determining the applicable law in these circumstances. The "proper purpose" doctrine relied upon by the objectors, as it appears in Howard Smith Ltd. v. Ampol Petroleum Ltd., [1974] A.C. 821, to put it simply, is not universally accepted; and I do not believe it has been clearly defined as the only applicable doctrine by the Court of Appeal of this province to govern the fiduciary duties and objectives of directors of a target company resisting unsolicited take-over bids. In my view, there were considerable risks attendant upon the plaintiff's claim. There were issues of some legal and factual

significance that were open in this matter, and it would be ludicrous to suggest that the plaintiff in this litigation was so obviously correct in his assertions of law and fact that it was unreasonable for him to compromise.

While the settlement in a limited sense affects the right to sue of the existing shareholders, as it removes from prospective litigation the unwinding of the share exchange agreement, it does not affect the right of the shareholders to initiate action for any damages they may have sustained as a result of the impugned transactions. It specifically preserves the rights of potential claimants with respect to the matters complained of in the statement of claim.

It has been submitted on behalf of Imperial that this court should direct a vote of a certain group of the public shareholders on the proposed settlement. This submission, while intriguing, is not one which I believe the court should accept. Aside from the mechanical problems -- which would be substantial -- in determining such matters as constituency, content of information circulars, etc., I am not convinced that I should derogate from the responsibility placed on the court by the Act. In this proceeding there has been extensive notification to all of the shareholders of Southam Inc. and an opportunity afforded them to be heard. A relatively few have appeared. The Act imposes the responsibility on the court to consider this matter on the basis of the material put before it. I do not believe that that responsibility should be passed on or adjourned pending such a vote. I note that the Ontario Securities Commission, when this matter was brought before it, concluded, after consideration of a similar request, that such sanction was not appropriate (affidavit of R.W. McDowell, ex. B, p. 30). For the reasons stated by the commission, I am of the same view and I decline to make such an order.

In conclusion, therefore, I accept the recommendation of the director. I am not satisfied that the presumption of fairness and reasonableness mentioned above has been overcome, and I am satisfied that the settlement effects a substantial modification of the original arrangements herein and avoids the costs and uncertainty of what was bound to be very extensive litigation. Accordingly, the application for approval is granted.

The order will include a direction that all documents and discoveries are to be made available to shareholders who execute an appropriate confidentiality agreement indicating that such documents and discoveries are for use only in considering prospective litigation. I leave it to counsel to work out the appropriate terms.

I have considered the matter of costs and am of the view that this court has no mandate to deal with costs incurred by these parties before the Ontario Securities Commission. I have concluded that this is not a proper case for costs in any event.

Order accordingly.

Indexed as:

Sawatzky v. Societe Chirurgicale Instrumentarium Inc.

Between
Bonita Jean Sawatzky, plaintiff, and
Societe Chirurgicale Instrumentarium Inc.,
Instrumentarium Surgical Corp. Inc., 177046 Canada Inc.,
Gestion Michelle Laferriere Inc., 1041402 Ontario Inc.
and La Corporation Instrumentarium Inc., Instrumentarium Corp.
Inc., defendant, and
Dr. Richard Greenwood (also known as Dr. Richard Edward
Greenwood), E. Wayne Tunis Professional Corporation (also
known as E.W. Tunis Professional Corporation),
Dr. Donald I. Wakeham, Calgary Regional Health Authority
operating as the Colonel Belcher Hospital, the
Colonel Belcher Hospital, the Health Sciences Centre (also
known as the University of Manitoba Health Science Centre),
University Hospitals Board, University Hospitals Board
operating as University of Alberta Hospital, University of
Alberta Hospital, Capital Health Authority (successor to
University Hospitals Board), Governors of the University of
Alberta Hospital, and Dow Corning Canada Inc., third parties

[1999] B.C.J. No. 1814
Vancouver Registry No. C954740

British Columbia Supreme Court
Vancouver, British Columbia
Brenner J.

Heard: July 15, 1999.
Judgment: filed August 4, 1999.
(19 pp.)

Practice — Persons who can sue and be sued — Individuals and corporations, status or standing — Class or representative actions, for damages — Settlements — Court approval — By plaintiff and defendant, effect on third party claims.

Application by the defendant Instrumentarium for court approval of a settlement agreement in a class action. It also requested a bar order against the third parties. Instrumentarium distributed a defective jaw implant. It broke down and resulted in foreign body reactions. These reactions caused the jaw to deteriorate and erode. Even after the implants were removed they caused problems because materials remained in the body. Implants recipients required reconstructive surgery. Instrumentarium ceased operations. Its sole asset was product liability insurance of $10 million. The policy was issued in Quebec. The policy amount was paid into a trust account. The settlement provided that class members would be paid from this fund. Individual claim amounts depended on the total number of claims and the

severity of injury suffered by each claimant. The class members who shared in the settlement agreed to release Instrumentarium and its insurer. The bar order was intended to cap Instrumentarium's risk of settlement. It barred actions by the third parties. It was to ensure that neither Instrumentarium nor its insurer would be subject to further liability. The agreement was approved by the parties' counsel.

HELD: Application allowed. The settlement agreement was approved. The bar order was granted. The agreement was fair and reasonable to all class members. It was unlikely that the class members would receive more compensation if they pursued litigation. The bar order was appropriate. The province where the policy was issued was a direct action jurisdiction. Instrumentarium's insurer was exposed to a direct claim. Without the bar order the insurer would have to defend Instrumentarium in the future.

Statutes, Regulations and Rules Cited:

Class Proceedings Act, R.S.B.C. 1996, ss. 12, 13.

Class Proceedings Act, 1992, S.O. 1992, c. 6, ss. 12, 13.

Court Note:

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

Counsel:

D. Klein and C. Docken, for the plaintiff.
P. Walker and A. Stone, for the defendant, Instrumentarium.
L. Jackie, for the third parties, Dr. Tunis, E. Wayne Tunis Professional Corporation and Dr. Wakeham.
D. Mullan, for the third party, Dow Corning.

¶ 1 **BRENNER J.**:— On July 15, 1999 I heard an application for court approval of a settlement agreement in the within class action. I also heard an application by the defendant, Instrumentarium, for a Bar Order against the third parties with the exception of Dr. Greenwood, which was a term of Instrumentarium's agreeing to the settlement. These applications were not opposed. At the conclusion of the submissions I approved the settlement agreement and issued the bar order with written reasons to follow. These are those reasons.

BACKGROUND

¶ 2 Instrumentarium was the Canadian distributor of a medical device known as the Vitek Temporomandibular Joint Implant ("TMJ Implant"). Instrumentarium sold the implants in Canada. The contention of the plaintiff is that the implants were defective. Components of the implants broke down in the jaw, resulting in foreign body reactions. These reactions in turn caused deterioration and erosion of the jaw. Unfortunately even after the implants are removed, the foreign body reactions and resulting deterioration of the jaw continues because the teflon material from the implants remains imbedded in the surrounding tissues. Implant recipients require reconstructive surgery to repair the damage; some will have to undergo periodic surgeries for the rest of their lives.

¶ 3 The plaintiff contends that the implants never received the appropriate regulatory approval in

Canada.

THE LITIGATION

¶ 4 This action was filed August 23, 1995. The Statement of Claim was amended on April 16, 1996 to include Instrumentarium as a defendant. The plaintiff alleges negligence and misrepresentation by the defendants.

¶ 5 On September 9, 1996 I certified this as a class proceeding against Instrumentarium. The plaintiff, Sawatsky, was appointed as the representative plaintiff.

¶ 6 About seventy British Columbia resident class members have been identified.

¶ 7 Similar actions were filed and certified in Ontario and Quebec. Counsel advise that there are approximately three hundred class members in the three Canadian class actions.

SETTLEMENT NEGOTIATIONS

¶ 8 The only defendant in this action that was involved in the sale or distribution of the Vitek TMJ Implants is Instrumentarium. It ceased operations on October 31, 1994 and has no assets. The Guardian Insurance Company of Canada provided product liability insurance to Instrumentarium from January 21, 1986 until October 31, 1994 in an amount which totals $7.5 Million. Instrumentarium has no other form of applicable insurance coverage. The Guardian Policy represents the only asset of the company.

¶ 9 The defendants have denied the allegations of negligence and misrepresentation. At trial the defendants would raise a number of defences including:

(a) expiration of limitation periods;
(b) lack of causation;
(c) no negligence on the part of the defendants; and
(d) no misrepresentations on the part of the defendants.

¶ 10 As set out in the Affidavit of Candace Wall sworn July 6, 1999 the settlement negotiations were guided by an analysis of the facts and law applicable to the claim of the British Columbia Class. The factors considered included the expense of litigation and the risks and uncertainties associated with protracted trials and appeals in an area of the law dependent upon highly technical scientific and medical expertise. An additional factor was the increased stress for class members who have already waited some four years for a resolution of the litigation.

¶ 11 The negotiations were conducted by plaintiffs' counsel with experience in class proceedings.

THE SETTLEMENT AGREEMENT

¶ 12 A memorandum of understanding was signed by class counsel and counsel for the defendants in October, 1998 setting out preliminary terms of a settlement agreement. Instrumentarium through its insurer, the Guardian, deposited $9,385,000 into an interest bearing trust account on October 30, 1998. These funds represent the full amount of Instrumentarium's product liability insurance plus pre-settlement interest, costs of administration and disbursements. The parties estimate that this lump sum will increase to approximately $10 Million by the time it can be paid out to the claimants.

¶ 13 The settlement agreement was signed by class counsel and counsel for the defendants in June, 1999. The settlement is subject to the approval of the courts in British Columbia, Ontario and Quebec. The following is a summary of the terms of the settlement agreement:

(a) Class members will be paid from a settlement fund which will initially consist of $8,385,000 plus accrued interest. There will be a reserve fund of $1,000,000 plus accrued interest. The reserve fund will provide payments to individuals who would otherwise be eligible to make claims under the settlement agreement but who continue to assert claims against Instrumentarium. Subject to claim payouts the reserve fund will be maintained for three years at which time $500,000 plus interest will be transferred to the settlement fund for distribution to class members. After an additional three years any remaining funds will be transferred to the settlement fund for distribution to class members;

(b) Class members' claims will be paid from the settlement fund on the basis of a point system based on the number of implants, age at implantation, degree of bone resorption and degree of granuloma formation. Individual claim amounts will depend on the total number of claims and severity of injury suffered by each claimant;

(c) The settlement agreement utilizes a point system which is almost identical to one that was used in the settlement agreement in Backstrom v. The Methodist Hospital (the "Methodist Settlement") which is a similar class proceeding that was filed in Texas. Many Canadians were registered as class members in the Methodist Settlement;

(d) Claimants will be required to produce appropriate product identification and proof of injuries. Class members whose claims were accepted in the Methodist Settlement will not be required to resubmit documentation unless they wish to claim at a higher point level;

(e) Individual claim awards will depend on the number of class members and the severity of their injuries;

(f) Claims will be administered by a court appointed claims administrator whose fees will be paid out of the settlement fund. The Ontario Court will review the claims administrator's fees from time to time; and

(g) Claimants will be able to appeal decisions of the claims administrator by filing a Notice of Appeal with the British Columbia, Ontario or Quebec courts. The decision of the court will then be final.

ADVANTAGES OF THE SETTLEMENT

¶ 14 Counsel say that for the following reasons, this settlement is preferable to continued litigation:

(a) Class members will receive compensation without the burden or the litigation risk of having to prove that the TMJ implant caused their injury;

(b) No class member will be ineligible to receive compensation because of expiry of a limitation or prescription period;

(c) Class members will not have to appear in court and will have their confidentiality protected;

(d) Class members will likely receive compensation more quickly than if they were to pursue litigation; and

(e) Class members will not have to face the uncertainty of collection on a judgment from defendants who have limited insurance and no assets. Any race to judgment by individual plaintiffs due to limited resources will thereby be

avoided.

¶ 15 A significant factor is that this settlement exhausts Instrumentarium's product liability insurance. Since it has no other insurance or assets, there is arguably little point in pursuing the matter through trial. In effect, the settlement agreement attempts to distribute the insurance that is available on principles that are consistent with tort theories to all class members in an efficient and equitable manner.

¶ 16 Many Canadians were registered as class members in the Methodist Settlement. The point system and proof of claim requirements in that court approved settlement are almost identical to this settlement. As such, many class members will not be required to resubmit documentation for product identification and proof of injuries which will expedite the claims process.

¶ 17 The settlement agreement is supported by the representative plaintiff Bonita Jean Sawatsky. It was negotiated by senior counsel in three jurisdictions who have extensive experience in class actions. The plaintiff's counsel in each of the Canadian class actions consider the settlement agreement to be fair and in the best interests of the class.

¶ 18 The settlement agreement compares favourably with the Methodist Settlement in which the defendants paid $30 Million to settle the claims of approximately 4,000 class members.

THE LAW

¶ 19 Settlement of the class proceeding must be approved by the court. For approval the settlement must be fair, reasonable and in the best interests of those affected by it. The court is concerned with the interests of the class as a whole rather than the demands of a particular class member.

> Haney Iron Works Ltd. v. Manulife Financial, [1998] B.C.J. No. 2936, (December 16, 1998) Vancouver C954749 para. 27 B.C.S.C.;
> Dabbs v. Sun Life, [1998] O.J. 1598, (February 24, 1998) Ontario Court of Justice 96-CT-022862 (Gen. Div.), para. 14

¶ 20 The courts power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. It may only approve or disapprove the settlement.

Haney para 22;

Dabbs para 10; and

> Harrington v. Dow Corning Corporation, [1999] B.C.J. No. 321, (February 16, 1999), Vancouver C954330 (B.C.S.C.), para. 7

¶ 21 A settlement must fall within a zone or range of reasonableness. The range of reasonableness has been described as follows:

> 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 interest of those affected by it when compared to the alternative of the risks and costs of litigation.
> Dabbs v. Sun Life (1998), 40 O.R. (3d) 429 (Gen. Div.)

See also Haney para. 25.

¶ 22 In making its decision on the reasonableness of a settlement, the court must consider the litigation risk to the plaintiffs (Haney para. 16; Dabbs pg. 400)

DISPOSITION RE. SETTLEMENT AGREEMENT

¶ 23 In my view the proposed settlement agreement is fair and reasonable to all members of the class. It has been approved by the representative plaintiff and senior counsel. I consider it unlikely that the class members would receive more compensation if they were to pursue litigation and hence in my view the settlement is clearly in the best interests of the class.

THE BAR ORDER APPLICATION

¶ 24 Under the terms of the settlement agreement the class members who share in the limited funds in the settlement proceeds agree to release Instrumentarium and its insurer, the Guardian. However, those class members specifically reserve their rights against all others, although such other persons are to be credited for the amount received by each claimant.

¶ 25 The relevant portion of the release is found in clauses 17.1 and 17.2 of the settlement agreement. Clause 17.2 states:

> Except as otherwise provided herein, nothing in the Settlement Agreement 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 persons and/or entities other than the Defendant and Released Parties [as defined in section 1(r) to include Instrumentarium, its related companies and its insurer]. Nevertheless, Settlement Class Members further agree that in the event the Settlement Class Member commences or continues litigation or pursues a claim or makes a claim against any person or entity arising from, arising out of, or connected directly or indirectly with the distribution and insertion of a Vitek Proplast TMJ implant, including all claims for non-pecuniary, punitive, aggravated, and consequential damages, then the Settlement Class Member expressly agrees not to include in respect of any such claim any right to recover from such person or entity any such amounts as have been paid under the terms of this Settlement Agreement to the Settlement Class Member or Settlement Class Members.

¶ 26 The parties recognize that this wording does not protect Instrumentarium from claims for contribution and indemnity including independent claims for indemnity. Accordingly by clause 22.1.2 of the settlement agreement, they provided that the waiver of such claims or the issuance of a bar order would be condition of the settlement agreement.

¶ 27 This clause recognizes that a significant obstacle for Instrumentarium in concluding the settlement is its ability, in exchange for the payment being made, to put an end to all outstanding claims for contribution and indemnity brought against it in several provinces, as well as to prevent such claims being brought against it by parties in existing litigation. Specifically its concern and the concern of its insurer, the Guardian, is that despite having paid out the policy limits in the within action, either or both might be joined as a party to other extant or future actions by persons or parties who are defendants or third parties in existing litigation in Canada. In addition to the class proceedings in British Columbia, Ontario and Quebec, a number of individual actions have been commenced in the Provinces of Ontario, Manitoba, and Alberta in which Instrumentarium has been named as either a Defendant, or Third Party,

or in which they may be so named. Since Quebec is a direct action jurisdiction, the concern of the Guardian is a very real one.

THIRD PARTIES

¶ 28 Prior to filing the third party notices, Instrumentarium had obtained agreements for waivers of all claims (present and potential) for contribution and indemnity and claims for indemnity based on an alleged independent duty from all of the existing defendants and third parties in other actions in which Instrumentarium was a party, with the exception of those that are third partied in the within action. They were added by reason of Instrumentarium's failure to obtain such an agreement. As a result of further negotiations the named third parties have now agreed not to oppose this application. Instrumentarium has made arrangements with the third party, Dr. Greenwood, and does not seek a bar order against him.

BAR ORDER

¶ 29 The purpose of the bar order sought is to cap the defendant's risk of settlement by ensuring that neither it nor its insurer will be subject to any further liability with respect to the underlying and related litigation. The order would bar the rights of the third parties to pursue claims over against Instrumentarium insofar as they relate to the claims of class members of the British Columbia class regardless of residency.

¶ 30 Bar orders have their origin in the United States and have been frequently been used to achieve settlement of complex tort and securities litigation including class action law suits. They came about in order to counteract the inhibiting effect of claims for contribution on settlements.

¶ 31 In a recent Ontario class proceeding Ontario New Home Warranty v. Chevron Chemical Company et al, [1999] O.J. No. 2245, (Ontario Superior Court of Justice, 1999, court file no. 22487/96) the settling defendants and class members sought a Bar Order as against the non-settling defendants. While Winkler, J. stated (at page 7) that he was unable to accept the American authorities as being dispositive of the issue, he went on to say:

> I do, however, find that the underlying principles on which "bar orders" are granted in the American cases have some application to these proceedings. Moreover, the Class Proceedings Act provides a specific mechanism through which these objectives can be achieved in class proceedings in Ontario. Under s. 13 the Court may "stay any proceeding relating to the class proceeding before it, on such terms as it considers appropriate." This broad discretion is buttressed by s. 12 which permits the court, on a motion by a party or class member, to make such orders as are necessary to ensure the fair and expeditious determination of the class proceeding.

¶ 32 Section 12 of the Ontario Class Proceedings Act, 1992, S.O. 1992, c. 6 (the "Ontario Act") provides:

> The court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

¶ 33 Section 13 provides:

> The court, on its own initiative or on the motion of a party or class member, may stay any proceeding related to the class proceeding before it, on such terms as it considers appropriate.

¶ 34 In discussing the role of these two provisions, Winkler J. stated at page 7:

> By including ss. 12 and 13 in the Act, the Legislature has given the Court a flexible tool for adapting procedures on a case specific basis. As stated in the Report of the Attorney General's Advisory Committee on Class Action Reform at 37:
>
> > [These sections describe] the general power of the court to control its own process and to develop procedures as needed from case to case.
>
> In view of the fact that it is apparent that a court has the statutory discretion to issue the order asked for, on appropriate terms, I turn to the objections raised by the non-settling defendants...

¶ 35 New Home Warranty was a class action products liability claim brought by the Ontario New Home Warranty Program ("ONHWP") and two individuals as representative plaintiffs concerning allegedly defective gas or propane furnaces, boilers and hot water heaters with High Temperature Plastic Vent ("HTPV") exhaust systems. In that action, three of the defendant companies wished to settle, although the defendant furnace manufacturers did not.

¶ 36 Following mediation, the plaintiffs and settling defendants agreed that the settling defendants proportionate share of liability was 65% of the repair cost figure plus costs. The plaintiffs moved to have this portion of the settlement approved at once, and the class proceedings certified against the settling defendants so that the plaintiffs could take advantage of the payment. The plaintiffs intended to bring a subsequent motion for certification against the non-settling defendants for litigation purposes. The settling defendants agreed, so long as the judgment approved the entire settlement agreement, including the provision preventing the non-settling defendants from making any further claims for contribution and indemnity against the settling defendants for any damages awarded to the plaintiffs at trial. The non-settling defendants sought to preserve this right by opposing this provision of the settlement agreement.

¶ 37 Winkler J. approved the settlement and granted the bar. He described the Ontario Act as sui generis legislation, that not only envisioned the balancing of interest between the parties to litigation, but that also provided the court with the "necessary power to adapt procedures" to adequately protect the interest of all parties. At p. 12 he stated:

> [73] The Class Proceedings Act is meant to provide a mechanism for the redress of mass wrongs which are linked by an element of commonality. This is such a case. The court must remain flexible and exercise its inherent jurisdiction to meet the needs of the parties and to achieve the purpose of the statute.
> [74] The settlement before this court meets the underlying objective of the Act. There is no objection to its terms, save for the prohibitive provisions. However, if these provisions are not approved the entire settlement will fail. This will seriously prejudice the plaintiff class in terms of delay and costs of litigation and further, expose the plaintiffs to the risks of litigation. Conversely, to ignore the procedural concerns advanced by the non-settling defendants would unfairly prejudice those parties.
> [75] The Class Proceedings Act is sui generis legislation which envisions the balancing of interests between the parties. Through legislative foresight, the court has been given

the necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict. Here, the benefits of the settlement to the plaintiffs favour the approval of the settlement as presented, including the contentious prohibitive provisions. As I have stated above, these provisions do not occasion any substantive prejudice to the defendants. The procedural concerns may be adequately addressed through the terms on which the settlement is approved.

¶ 38 The language of the B.C. Act is similar to the Ontario Statute. S. 12 of the B.C. Act states:

> 12. The court may at any time make any order it considers appropriate regarding the conduct of a class proceeding to ensure its fair and expeditious determination and, for that purpose, may impose on one or more of the parties, the terms it considers appropriate.

¶ 39 S. 13 provides:

> 13. The court may at any time stay any proceedings relating to the class proceeding on the terms the court considers appropriate.

¶ 40 In my view this language illustrates that the legislature contemplated the possibility that the presiding judge in a class proceeding may need to make an order not contemplated in the specific wording of the Act. I concur with Winkler J.'s view that this statutory language provides the court with the "necessary power to adapt procedures to ensure that the interests of all parties can be adequately protected in situations where those interests conflict".

¶ 41 In the case at bar, a bar order is particularly appropriate. The contract of insurance was issued in Quebec and since that province is a direct action jurisdiction, Instrumentarium's insurer is exposed to a direct claim. There is a real concern that despite having paid out its limits under the policy, Instrumentarium's insurer could be called upon to defend Instrumentarium and/or itself in existing and future actions. In addition, Instrumentarium is without assets and no longer carries on business. In the absence of a bar order, Instrumentarium or its insurer could still be called upon to attend and defend an action notwithstanding a complete lack of assets.

¶ 42 By agreeing to pay out its policy limits now, Instrumentarium and the insurer seek to purchase for themselves judicial certainty which will be denied if they are forced to defend future or existing allegations of class members even indirectly through third party proceedings in respect of whom they have already made payment.

¶ 43 Even if Instrumentarium were to be kept in the Ontario, Alberta and Manitoba proceedings, there would be no benefit to the opposing parties since it has no assets and all the insurance proceeds are being paid out. Those third parties would, when facing joint and several liability, have to pay more than their fair share in any event particularly given the Ontario, Alberta and Manitoba law regarding joint and several liability. In those jurisdictions, unlike in British Columbia, the liability of joint tort-feasors continues to be joint and several, even if the court finds contributory negligence on the part of a plaintiff.

¶ 44 The proposal in the case at bar provides a credit to the non-settling party in the amount of any judgment received by a class member in the action. In my view this proposal most closely reflects what would actually transpire in a "limited fund" case with a finding of joint and several liability in any event.

DISPOSITION RE. BAR ORDER

¶ 45 Accordingly the bar order will be granted on the terms sought by Instrumentarium.

BRENNER J.

QL Update: 990810
cp/i/drk/jjl

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

JOINT BOOK OF AUTHORITIES
(Motion for Settlement Approval returnable August 29, 30 and 31, 2006)

THOMSON, ROGERS
3100 - 390 Bay Street
Toronto, Ontario
M5H 1W2

Craig Brown
Tel: (416) 868-3163
Fax: (416) 868-3134

KOSKIE MINSKY LLP
900 – 20 Queen Street West
Toronto, Ontario
M5H 3R3

Kirk M. Baert
Tel: 416-595-2117
Fax: 416-204-2889

Counsel for the Plaintiffs