

Court File No. CV-17-579357-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

ANTHONY WHITEHOUSE,
CARRIE COUCH AND JASON COUCH

Plaintiffs

- and -

BDO CANADA LLP

Defendant

Proceeding under the *Class Proceedings Act, 1992*

BOOK OF AUTHORITIES OF THE DEFENDANT

November 29, 2019

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TAB 1

2018 ONSC 7423
Ontario Superior Court of Justice

1705371 Ontario Ltd. v. Leeds Contracting Restoration Inc.

2018 CarswellOnt 21112, 2018 ONSC 7423, 27 C.P.C. (8th) 34, 300 A.C.W.S. (3d) 87, 85 C.L.R. (4th) 132

**1705371 ONTARIO LTD. carrying on business as B & A MASONRY (Plaintiff) and
LEEDS CONTRACTING RESTORATION INC. and PETER DURIC (Defendants)**

Cavanagh J.

Heard: November 23, 2018

Judgment: December 11, 2018

Docket: CV-17-583838

Counsel: William Ribeiro, for Plaintiff

Sakina Babwani, for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Insolvency

MOTION by plaintiff for default judgment against defendant PD; CROSS-MOTION by defendants to set aside default judgment against L Inc. and noting in default against both defendants.

Cavanagh J.:

Introduction

1 The plaintiff noted the defendants in default on November 28, 2017 and obtained default judgment from the registrar against the defendant Leeds Contracting Restoration Inc. ("Leeds"). The plaintiff then moved for default judgment against the defendant Peter Duric. The defendants were served with the motion materials at the direction of McArthur J.

2 Following receipt of the motion materials, the defendants brought a cross-motion to set aside the default judgment against Leeds and the noting in default against both defendants.

3 The plaintiff's motion for default judgment against Mr. Duric was also before me.

4 For the following reasons, the defendants' motions to set aside the default judgment against Leeds and the noting in default against both defendants is dismissed. The plaintiff's motion for default judgment against Mr. Duric is granted.

Procedural Background

5 The plaintiff commenced this action by statement of claim issued on October 3, 2017. The plaintiff claims payment of the sum of \$64,497.03 from the defendants representing the balance owing on an invoice that was sent under a verbal agreement whereby the plaintiff agreed to supply labour for installation of brick masonry to Leeds for construction of new subdivision homes on three lots in Kitchener, Ontario. The plaintiff also claims a declaration that all amounts paid to Leeds and all amounts owing to or received by Leeds on account of these contracts constitute a trust fund for the benefit of the plaintiff pursuant to s. 7, 8, and 9 of the *Construction Lien Act*, R.S.O. 1990 c. C.30 ("CLA"). The plaintiff claims a declaration that Leeds is a trustee for the said fund for the benefit of the plaintiff and that the individual defendant, Peter Duric, is liable for any breach of trust committed by Leeds, pursuant to sections 7, 8, 9, and 13 of the CLA. The plaintiff claims damages for breach of trust against Leeds and Mr. Duric for the full amount of \$64,497.03.

6 The plaintiff's evidence is that Mr. Duric and Leeds were served with the statement of claim in accordance with the *Rules of Civil Procedure* on October 16 and 31, 2017.

7 A process server, Carl Schiefer, swore an affidavit of service that states that Mr. Duric was served on October 16, 2017 by leaving a copy of the statement of claim with an adult Caucasian male in his mid-40's with short hair who refused to provide his name at 4263 Torino Crescent, Mississauga. According to Mr. Schiefer's affidavit of service, the adult person verbally admitted that he was a member of the same household in which Mr. Duric resides. The affidavit of service states that an unsuccessful attempt was made to serve Mr. Duric personally at the same address on October 16, 2017. The affidavit of service states that Mr. Schiefer sent a copy of the statement of claim by prepaid first class mail on the 16th of October, 2017 to Mr. Duric at the same address.

8 The evidence is that Michael Duric, Peter Duric's brother, resides at the Torino address with their mother. Peter Duric's evidence is that he and his brother were estranged at the time of service of the statement of claim and continue to be estranged to date.

9 The plaintiff also relies upon a separate affidavit of service of Mr. Schiefer in which he states that on October 31, 2017 he served Leeds with the statement of claim by leaving a copy with Juliana Duric, an agent of the corporation, at 4263 Torino Crescent, Mississauga, Ontario. Juliana Duric is the daughter of Michael Duric.

10 The Ministry of Government Services Corporation Profile Report for Leeds shows that its registered office address is 1270 Finch Avenue West, Suite 1, Toronto and that Peter Duric is the sole director.

11 The defendants did not file a statement of defence. Both defendants were noted in default on November 28, 2017. On November 28, 2017 the registrar issued judgment against Leeds for the amount claimed of \$64,497.03 plus prejudgment interest and costs.

12 Then, the plaintiff brought a motion for default judgment against Mr. Duric, without notice, in the amount of \$64,497.03 for breach of the trust provisions under the *CLA*. By endorsement dated May 18, 2018, McArthur J. required the plaintiff to serve its motion materials on Mr. Duric together with a copy of her endorsement. The plaintiff was granted leave to bring its motion again with notice to Mr. Duric.

13 The evidence given by Mr. Delgado on behalf of the plaintiff is that on May 25, 2018, Mr. Duric was served with the motion materials and the endorsement of McArthur J. by leaving a copy of the materials with him personally at 4263 Torino Crescent, Mississauga, Ontario. According to the affidavit of service, the process server was able to identify Mr. Duric by means of verbal admission. Mr. Duric's evidence is that he was not personally served on May 25, 2018, and that he received a package containing the motion materials in or around the weekend of May 26, 2018 when he visited his mother at the Mississauga address.

14 The defendants brought their cross motion for an order setting aside the noting in default of Leeds and Mr. Duric and setting aside the default judgment against Leeds by a cross motion record that was served by courier on June 27, 2018.

Analysis

Should the noting in default of Mr. Duric be set aside?

15 In *Intact Insurance Co. v. Kisel*, 2015 ONCA 205 (Ont. C.A.) Laskin J.A. set out at paras. 12-13 the factors that the court should consider when exercising its discretion to set aside a noting in default:

[12] Rules 19.03(1) and 19.08(1) provide the basis for setting aside a noting of default and a default judgment, respectively. Both rules give the court discretion to set aside the default "on such terms as are just." This court has held that the tests to be met under these rules are not identical. See *Metropolitan Toronto Condominium Corp. No. 706 v. Bardmore Developments Ltd.* (1991), 1991 CanLII 7095 (ON CA), 3 O.R. (3d) 278 (Ont. C.A.), at pp. 284-85.

[13] When exercising its discretion to set aside a noting of default, a court should assess "the context and factual situation" of the case: *Bardmore*, at p. 285. It should particularly consider such factors as the behaviour of the plaintiff and the defendant; the length of the defendant's delay; the reasons for the delay; and the complexity and value of the claim. These factors are not exhaustive. See *Nobosoft Corp. v. No Borders Inc.*, 2007 ONCA 444 (CanLII), 225 O.A.C. 36, at para. 3; *Flintoff v. von Anhalt*, 2010 ONCA 786 (CanLII), [2010] O.J. No. 4963, at para. 7. Some decisions have also considered whether setting aside the noting of default would prejudice a party relying on it: see e.g. *Enbridge Gas Distribution Inc. v. 135 Marlee Holdings Inc.*, [2005] O.J. No. 4327, at para. 8. Only in extreme circumstances, however, should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits: *Bardmore*, at p. 285.

16 Rule 16.01(a) provides that an originating process shall be served personally as provided in rule 16.02 or by an alternative to personal service as provided in rule 16.03.

17 The onus of proving service of the statement of claim is on the plaintiff. The affidavit of service of Mr. Schiefer sworn November 8, 2017 is proof of service of the statement of claim on Mr. Duric by an alternative to personal service in accordance with rules 16.01(a) and 16.03(5).

18 Rule 16.07 of the *Rules of Civil Procedure* provides that even though a person has been served with the document in accordance with these rules, the person may show on a motion to set aside the consequences of default that the document (a) did not come to the person's notice; or (b) came to the person's notice only sometime later than when it was served or is deemed to have been served.

19 On this motion, Mr. Duric's submission is that he always had a *bona fide* intention to defend any action brought by the plaintiff, as shown by his email sent on August 29, 2017 in response to the plaintiff's request for payment of the invoice where he wrote "[y]ou cost me a contract and are in breach of contract. I will gladly welcome a lien and a lawyers letter from you so we can sue you for a false lien and for breach of contract and lost revenue".

20 Mr. Duric submits that the statement of claim did not come to his notice on or soon after October 16, 2017, when it was served in accordance with the *Rules*. Mr. Duric's evidence is that he discovered in or around the weekend of May 26, 2018, for the first time, that he and Leeds had been sued. According to Mr. Duric's evidence, he retained a lawyer within the next two business days to defend the action. Mr. Duric's lawyer wrote to the plaintiff's lawyer on May 30, 2018, advised that Mr. Duric intends to defend the action, and requested whether the plaintiff will consent to the setting aside of the noting of Mr. Duric in default. This motion was brought on June 26, 2018.

21 In order to decide whether the noting in default of Mr. Duric should be set aside, I must first consider whether Mr. Duric has shown that the statement of claim did not come to his notice in October 2017 when it was served according to the *Rules*, but only on or about May 26, 2018. If Mr. Duric has discharged this onus under rule 16.07, he is entitled to an order setting aside the noting in default because, in my view, if Mr. Duric only received notice of the statement of claim on or about May 26, 2018, the steps that he took after May 26, 2018 were reasonable.

22 In Mr. Duric's affidavit sworn in support of his motion to set aside the noting in default against him (and the default judgment and noting in default against Leeds) he gave the following evidence:

4. I believe that B&A Masonry may have served the Statement of Claim by regular mail to the address at 4263 Torino Crescent, Mississauga, Ontario, L4W 3T4 ("Mississauga address") as this is the address listed on my driver's license.

5. I do not reside at the Mississauga address. The Mississauga address is my mother's home. I visit my mother at her home only occasionally.

6. In or about October, 2017 when the Statement of Claim was purportedly served, I was extremely busy with several projects of Leeds, and was out of the province for several weeks. I did not visit my mother during this time.

7. Several weeks later, when I did visit my mother, she did not inform me that I was served with a Statement of Claim. My mother has no knowledge of court documents and may not have understood the consequences of a Statement of Claim.

8. If the Statement of Claim was served at the Leeds office in Toronto, it was never brought to my attention.

9. I, therefore, did not know that Leeds and I had been sued.

...

12. In or around the weekend of May 26, 2018, I visited my mother at the Mississauga address. My mother informed me that a package that appeared to be a book had arrived for me. Upon opening the package, I discovered for the first time that Leeds and I had been sued.

23 The plaintiff does not accept the truth of these statements. The plaintiff submits that the evidence given by Mr. Duric under cross-examination shows that his affidavit evidence that he does not reside at the Torino address and that he visits his mother there "only occasionally" was not correct. The plaintiff submits that Mr. Duric has failed to show that the statement of claim did not come to his notice on or about October 16, 2017, when it was served by the process server, or when it was received at that address by mail.

24 On his cross-examination, Mr. Duric was asked to provide his personal address for the last ten years. He responded that one of several such addresses was 4263 Torino Crescent, Mississauga. Mr. Duric was asked for the time frames during which he lived at the addresses that he had identified. He answered that from 2014 or 2015, his address is the Torino Crescent address, his mother's home, although he has stayed at other places and does not stay at this address all the time. Mr. Duric answered that he spends several days a week at the Torino Crescent address (he also separately answered that he sleeps there "a couple of times a week"), and that he stays with friends a couple of days a week. Mr. Duric was asked to provide the names and contact information for the friends with whom he stays and his counsel refused to allow Mr. Duric to answer and took the question "under advisement".

25 Counsel for the defendants responded to this question taken under advisement by letter dated August 27, 2018 and confirmed the refusal to answer the question on the ground that it is irrelevant. Counsel for the defendants explained her position:

Mr. Duric stated that he resides with his mother "couple of days a week" and with friends the rest of the time.

You state that your process server served at Mr. Duric's mother's home at 4263 Torino Crescent in Mississauga. You have not claimed that service was effected at any other place. Accordingly, information regarding Mr. Duric's friends is irrelevant to the motion.

26 The plaintiff was not required to accept Mr. Duric's evidence with respect to his place of residence and whether he stays with friends a couple of days a week. The plaintiff was entitled to test this evidence through cross-examination. The plaintiff was entitled to receive answers to questions asked on the cross-examination of Mr. Duric for the names and contact information for the friends with whom Mr. Duric stays for the purpose of testing whether this evidence is true. The relevance of the questions that were taken under advisement was explained on the record. If the true state of affairs was that Mr. Duric does not stay with friends several nights a week, the credibility of his evidence that he did not receive the statement of claim until May 26, 2018 would be significantly undermined. The questions that were refused were clearly proper, and the decision to maintain the refusals, even after taking them "under advisement", was unjustified.

27 Rule 34.15(1) of the *Rules of Civil Procedure* provides that where a person refuses to answer any proper question on a cross-examination, the court may (a) require the person to re-attend and answer the question, (b) where the person is a party, dismiss the party's proceeding or strike out the party's defence, (c) strike out all or part of the person's evidence, including any affidavit made by the person, and (d) make such other order as is just.

28 The plaintiff submits that I should draw an adverse inference from the refusal by Mr. Duric to answer this question.

29 The defendants submit that no adverse inference should be drawn. The defendants rely upon the fact that the plaintiff requested an adjournment of these motions in order to bring a motion to compel answers to refusals on the cross-examination of Mr. Duric, and that the plaintiff's counsel advised on September 10, 2018 that the plaintiff would not go forward with a motion to compel answers to undertakings and refusals. Counsel for the defendants submitted that, having decided not to proceed with a motion to compel answers to refusals, the plaintiff is precluded from asking the court to draw an adverse inference from the refusals to answer proper questions.

30 I disagree with the defendants' submissions. The questions that were asked and taken under advisement were clearly proper and directed to a relevant matter, that Mr. Duric had put into issue in his affidavit. The plaintiff had no obligation to move to compel answers to proper questions that were refused. In this regard, see *Snelgrove v. Steinberg Inc.*, 1995 CarswellOnt 1222 (Ont. C.A.) at para. 53. By choosing not to so move, the plaintiff did not acknowledge that the refusals were justified.

31 In 236523 *Ontario Inc. v. Nowack*, [2013 CarswellOnt 16986 (Ont. S.C.J. [Commercial List])], 235 Brown J. (as he then was) held at para. 28 that a court, on motion, may draw adverse inferences against a party who fails to comply with production and discovery obligations. The same reasoning applies where a proper question asked during cross-examination on an affidavit is refused. I am entitled to draw an adverse inference from Mr. Duric's refusal to answer proper questions on his cross-examination.

32 In the circumstances of this case, I draw an adverse inference against Mr. Duric because of his refusal to answer proper questions when he was cross-examined and when he refused to answer the questions that were taken under advisement. The evidence to which the questions were directed was given to support Mr. Duric's evidence that he did not receive the statement of claim on or about October 16, 2017. This evidence was necessary to explain Mr. Duric's conduct in support of the defendants' motion to set aside the consequences of their default. I infer that the answers would have exposed facts that are unfavourable to the merits of the defendants' motion.

33 Mr. Duric also refused to answer other questions on his cross-examination. In his affidavit, Mr. Duric stated that in or about October 2017 when the statement of claim was purportedly served, he was extremely busy with several projects of Leeds, and was out of the province for several weeks. He stated that he did not visit his mother during this time.

34 When he was cross-examined, Mr. Duric was asked what projects outside of Ontario he was working on in October 2017. He answered that he would have to get back with that information which he did not have handy and that he would have to look at his calendar. An undertaking was given to provide a list of the projects. Additional questions asking Mr. Duric to provide the names of the contracting parties with which Leeds contracted, copies of contracts, copies of the invoices on those projects, and information concerning what Leeds was doing on these projects were taken under advisement. Mr. Duric gave evidence that he probably travelled out of the province using his own vehicle, a Buick, and a request for gas receipts from out of province in October 2017 was taken under advisement.

35 In response to these questions, counsel for the defendants responded that they were refused on the ground of proportionality. Counsel advised that Mr. Duric had checked his calendar and is able to confirm that he travelled out of province to evaluate potential projects, but he does not recall specific details of the potential projects. The request for names of the parties, copies of contracts, contemporaneous invoices and what Leeds was doing on these projects was refused as being excessive and disproportionate to the motion, pursuant to rule 29.2 of the *Rules of Civil Procedure*. Counsel advised that Mr. Duric does not have gas receipts of his Buick automobile and, in any event, the request is excessive and disproportionate to the motion at hand, pursuant to Rule 29.2 of the *Rules of Civil Procedure*.

36 Rule 29.2 applies to, among other things, whether a person must answer a question or produce a document on an examination under rule 34, which would include a cross-examination on an affidavit. Rule 29.2.03(1) provides that in making a determination as to whether a person must answer a question or produce a document, the court shall consider whether (a) the time required for the person to answer the question or produce the document would be unreasonable; (b) the expenses associated with answering the question or producing the document would be unjustified; (c) requiring the person to answer the question or produce the document would cause him or her undue prejudice; (d) requiring the person to answer the question or produce

the document would unduly interfere with the orderly progress of the action; and (e) the information or the document is readily available to the party requesting it from another source.

37 Mr. Duric's affidavit evidence that he was out of the province for several weeks in October 2017 when the statement of claim was given to an adult person at the Mississauga address is important to the defendants' motion because, if true, it would help to explain why Mr. Duric did not receive the statement of claim on or about October 16, 2017. The plaintiff was not required to accept Mr. Duric's affidavit evidence on its face, and was entitled to test this evidence through cross-examination.

38 The questions requesting documents to substantiate the fact that Mr. Duric was out of the province for several weeks in October 2017 were clearly proper. If, in fact, Mr. Duric was not out of the province during this period of time, the defendants' position on this motion would be significantly undermined. I take note of the fact that Mr. Duric did not respond that he does not have any documents of the type requested. Instead, Mr. Duric refused to look for and produce these documents on the ground that the request for production is excessive and disproportionate.

39 Mr. Duric did not provide any information to show that the time required to produce the documents would be unreasonable, that the expense of producing the documents would be unjustified, or that production of the documents would cause Mr. Duric undue prejudice or unduly interfere with the orderly progress of the action. The documents are not readily available to the plaintiff from another source. In the absence of such evidence, I do not accept the position taken by the defendants that the questions asking for production of these documents are improper because they would call for Mr. Duric to take steps that are excessive and disproportionate. The questions asked were proper ones, and they were refused unjustifiably.

40 I draw an adverse inference from Mr. Duric's refusal to answer these proper questions that had these questions been answered, the answers would have exposed facts unfavourable to the defendants in relation to whether Mr. Duric was outside of the province for several weeks during October 2017.

41 Under rule 16.07, where a person has been served with a document in accordance with the rules and the person moves to set aside the consequences of default, the onus is on this person to show that the document did not come to the person's notice or came to the person's notice only at some time later than when it was served or is deemed to have been served. What is required to satisfy this onus will depend on the circumstances of each particular case.

42 I do not agree with the defendants' submission that Mr. Duric's affidavit remains consistent with his oral testimony at his cross-examination with respect to his place of residence. The cross-examination established that contrary to his affidavit evidence, Mr. Duric's personal address is his mother's house, the Mississauga address, at which he stays several days a week (or as he also separately said on his cross-examination, "a couple of times a week"). The Mississauga address is not just the address listed on Mr. Duric's driver's licence. Mr. Duric does not visit his mother at her home "only occasionally", as he stated in his affidavit. The admissions made under cross-examination materially undermine the statements made in Mr. Duric's affidavit to explain why the statement of claim did not come to his notice.

43 This evidence, combined with the adverse inferences that I have drawn, lead me to conclude that I cannot rely upon the statements in paragraphs 5, 6 and 7 of Mr. Duric's affidavit. This is the just approach to take to these paragraphs of Mr. Duric's affidavit in the circumstances, given the refusals. As a result, Mr. Duric has failed to discharge his onus under rule 16.07 to show that the statement of claim did not come to his notice on or about October 16, 2017 when a copy was delivered to an adult person at the Mississauga address where Mr. Duric resides or within a few days of this date when the copy that was mailed would have been delivered.

44 On this motion, the reasonableness of Mr. Duric's actions after May 26, 2018 to retain counsel, contact the lawyers for the plaintiff, and bring a motion to set aside the consequences of the defendants' default depends upon the court accepting his evidence that he discovered for the first time that he and Leeds had been sued in or around the weekend of May 26, 2018. For the reasons I have given, I am unable to do so. Accordingly, Mr. Duric has failed to show that he acted reasonably in taking the steps that he did beginning on or about May 26, 2018, many months after the statement of claim was served in accordance with the Rules.

45 In *Intact Insurance Co. v. Kisel*, the Court of Appeal confirmed that only in extreme circumstances should the court require a defendant who has been noted in default to demonstrate an arguable defence on the merits. On this motion, the defendants addressed the merits of their defence in Mr. Duric's affidavit. In *Mountain View Farms Ltd. v. McQueen*, 2014 ONCA 194 (Ont. C.A.), the Court of Appeal held, in relation to a motion to set aside a default judgment, that the presence of an arguable defence on the merits may justify the court exercising its discretion to set aside the default judgment, even if the other factors are unsatisfied in whole or in part. The presence of an arguable defence on the merits would also be a factor that may justify the court in exercising its discretion to set aside the noting in default of a defendant, even if the other factors are unsatisfied.

46 The judgment against Leeds is for payment of the balance of \$64,497.03 outstanding of the plaintiff's invoice dated July 19, 2017 for the supply of masonry services to Leeds for the construction of new homes on lots 231, 259 and 262 at a subdivision project in Kitchener Ontario. The evidence of Mr. Delgado is that the invoice is in the total amount of \$77,857.90, and that the amount owing was reduced by payment received from Activa of \$13,360.87. A copy of the invoice and Activa's cheque are attached as exhibits to Mr. Delgado's affidavit.

47 The claim against Mr. Duric is that he is a director and a person with effective control of Leeds and that he assented to, or acquiesced in, conduct that he reasonably ought to know amounted to a breach of trust by Leeds. The plaintiff claims that Mr. Duric is liable for breach of trust pursuant to s. 13(1) of the *CLA* because of non-payment by Leeds of the amount invoiced by the plaintiff and breach of trust by Leeds under section 8 of the *CLA*.

48 The evidence tendered on behalf of the defendants with respect to the merits of their defence consists of the following statements made by Mr. Duric in his affidavit:

Leeds and I have a defence based on the merits. Leeds has already paid B & A Masonry the sum of \$77,857.90 for the work done on three lots. Accordingly, Leeds and I do not owe B & A Masonry the sum of \$64,497.03 as claimed. Attached and marked hereto as **Exhibit "B"** is a true copy of my draft Statement of Defence and Counterclaim that I intend to deliver if this Honourable Court sets aside the Noting in Default of myself and Leeds, and the Default Judgment against Leeds.

49 The plaintiff submits that this evidence is insufficient to show that the defendants have a defence that has an air of reality. The plaintiff submits that the defendants have simply asserted that Leeds paid the sum of \$77,857.90 for work done on the three lots without providing any evidence to support this assertion by proving facts showing how and when the alleged payment was made.

50 The plaintiff also points to the email that was sent by Mr. Duric dated August 29, 2017 in response to a demand for payment in which Mr. Duric responded "[y]ou cost me a contract and are in breach of contract. I will gladly welcome a lien and a lawyers letter from you so we can sue you for a false lien and for breach of contract and lost revenue". The plaintiff points out that Mr. Duric does not state in this email that Leeds had already paid the plaintiff's invoice, and the plaintiff submits that he would have been expected to do so if, in fact, the invoice had been paid.

51 In response, the defendants submit that the test to set aside a default judgment does not require the defendant to put forward actual evidence in support of their defence. They submit that to require the defendant to do so would make the motion to set aside a default judgment akin to a summary judgment motion that requires the responding party to put its best foot forward. The defendants submit that, in any event, Mr. Duric was cross-examined on his affidavit and he was not asked questions about the proposed statement of defence and counterclaim. The defendants submit that, as a result, the statement of defence and counterclaim stands uncontested and the court must accept it as an arguable defence.

52 The defendants are incorrect in their submission that they are not required to put forward evidence to prove facts that establish that the defendant has an arguable defence on the merits. In *Watkins v. Sosnowski*, 2012 ONSC 3836 (Ont. S.C.J.), Perell J. held at para. 24:

In showing a defence on the merits, the defendant need not show that the defence will inevitably succeed. Rather, the principles applied on a motion for summary judgment should be considered. To set aside a default judgment, the defendant must show that his or her defence has an air of reality and that there is a genuine issue requiring a trial: [citations omitted].

53 As the Court of Appeal held in *Mountain View Farms Ltd.* at para. 48, the question is whether the facts establish that the defendant has an arguable defence on the merits. The facts must be proven by evidence.

54 A pleading is not evidence and, in his affidavit, Mr. Duric does not swear that the statements made in the proposed statement of defence and counterclaim are true. Even so, the pleading does not include any allegations of fact that go beyond the assertion made by Mr. Duric in paragraph 14 of his affidavit. Paragraphs 7-10 of the proposed statement of defence and counterclaim state:

7. Leeds asked B & A Masonry to perform work on the fourth lot in an attempt to salvage the project. B & A Masonry agreed to work on the fourth lot.

8. Thereafter, Leeds paid B & A Masonry the sum of \$77,857.90 for the work done on the aforementioned three lots.

9. However, B & A Masonry refuse to work on the fourth lot after receiving the payment of \$77,857.90.

10. Leeds and Peter Duric do not owe B & A Masonry the sum of \$64,497.03, as Leeds has already paid the sum of \$77,857.90 in full.

Even if Mr. Duric had sworn that the statements in the proposed pleading are true, the defendants proposed pleading does not plead facts that show how and when the payment of \$77,857.90 was made.

55 In this case, the claim is a simple one for payment of the balance due on an invoice for the supply of services. If the invoiced amount had been paid, Mr. Duric would have been able to provide evidence of facts that show that Leeds has already paid the plaintiff the sum of \$77,857.90 or that it had arguably done so (although this fact is not likely to be one that would be arguable; either the payment was made or it was not). If this payment was, in fact, made, the defendants could readily have provided evidence of cancelled cheques payable to the plaintiff, records showing payments to the plaintiff by electronic transfer from Leeds' bank account, or records of bank statements for Leeds' bank account showing a withdrawal of \$77,857.90. Leeds could have tendered evidence of its accounts payable journal or other accounting record in which the payment of the plaintiff's invoice would have been recorded as a business expense. No evidence of this sort was tendered by the defendants.

56 I do not accept that it was incumbent on the plaintiff to elicit evidence on Mr. Duric's cross-examination with respect to payments alleged to have been made by Leeds to the plaintiff. The defendants have the onus of satisfying the court that the noting in default and default judgment should be set aside. The plaintiff was entitled to respond to the motion on the basis of the evidence given on behalf of the defendants and argue, as it has, that the evidence is insufficient.

57 The statement in paragraph 14 of Mr. Duric's affidavit that Leeds has already paid B & A Masonry the sum of \$77,857.90 for the work done on the three lots is a bald, conclusory, statement that, without additional evidence of facts that show how and when this payment was made, is not sufficient to show that the defendants have an arguable defence to the plaintiff's claim. If Leeds paid \$77,857.90 to the plaintiff, the records that would show how and when the payment was made would be in the possession of the defendants, but such records were not tendered into evidence.

58 I conclude that the defendants have not tendered evidence of facts that establish that they have an arguable defence, one that has an "air of reality", on the merits of the plaintiff's claim.

59 Given this conclusion, in my view, if Mr. Duric were able obtain an order setting aside the consequences of default following service of an originating process in accordance with the *Rules of Civil Procedure* by tendering affidavit evidence that the originating process did not come to his notice when it was served and explaining why the document did not come to his notice and, when the explanation is challenged on cross-examination, materially changing his evidence in relation to

a key factual statement and then unjustifiably refusing to answer proper questions directed to testing the truthfulness of the explanation, the overall integrity of the administration of justice would be impaired.

60 For these reasons, I exercise my discretion to decline to set aside the noting in default against Mr. Duric.

Should the default judgment and the noting in default against Leeds be set aside?

61 Leeds relies on the affidavit of Mr. Duric in support of its motion to set aside the default judgment and noting in default against it. Leeds also relies upon the evidence that Juliana Duric who is the daughter of Michael Duric, Peter Duric's brother who lives at the Torino address, is not an agent of Leeds. Leeds also relies on Mr. Duric's evidence that he did not receive notice of the statement of claim until on or about May 26, 2018.

62 Rule 19.01 (1) of the *Rules of Civil Procedure* provides that where a defendant fails to deliver a statement of defence within the prescribed time, the plaintiff may, on filing proof of service of the statement of claim, or of deemed service under subrule 16.01 (2), require the registrar to note the defendant in default. The plaintiff acted under this rule when, on November 28, 2018, it filed a requisition to note Leeds in default and a requisition for default judgment. As I have noted, the affidavit of service that the plaintiff filed to prove service of the statement of claim on Leeds states that the process server served Leeds with the statement of claim by leaving a true copy with Juliana Duric, an agent of the corporation, at 4263 Torino Crescent, Mississauga, Ontario. The plaintiff has not shown that Juliana Duric is an agent of Leeds and, therefore, the purported service on Leeds on October 31, 2017 is not service on Leeds pursuant to rule 16.02(1)(c).

63 The plaintiff filed a separate affidavit of service to prove service on Mr. Duric. Mr. Duric is the sole director of Leeds, and service of the statement of claim on him would be notice to Leeds of the statement of claim. I have held that Mr. Duric has failed to show that the statement of claim did not come to his notice when it was served by an alternative to personal service under rule 16.03(5) effective five days after October 16, 2017. I am satisfied that the statement of claim came to the notice of Mr. Duric through service on him by an alternative to personal service. In my view, it would be unfair and unjust to set aside the default judgment against Leeds because service on Juliana Duric was not effective, in circumstances where the plaintiff separately served Mr. Duric, Leeds' sole director, and I have found that Mr. Duric has failed to show that the statement of claim did not come to his notice when it was served. Accordingly, in my view, it is necessary in the interests of justice to make an order pursuant to rule 16.08 validating service on Leeds effective five days after October 16, 2016 when the statement of claim was served on Mr. Duric pursuant to rule 16.03(5).

64 In *Mountain View Farms Ltd.*, the Court of Appeal set out the test for determining whether to set aside a default judgment at paras. 47-51:

The court's ultimate task on a motion to set aside a default judgment is to determine whether the interests of justice favour granting the order. The approach to be taken to this determination has been considered numerous times by this court. The following draws heavily on the summary of the principles in those cases by Perell J. in *Watkins v. Sosnowski*, 2012 ONSC 3836 (CanLII), at paras. 19-20 and 23-24.

[48] The court must consider the following three factors:

- (a) whether the motion was brought promptly after the defendant learned of the default judgment;
- (b) whether there is a plausible excuse or explanation for the defendant's default in complying with the Rules; and
- (c) whether the facts establish that the defendant has an arguable defence on the merits.

[49] To this list, I would add the following two factors the court should have regard to, as set out in *Peterbilt of Ontario Inc. v. 1565627 Ontario Ltd.* 2007 ONCA 333 (CanLII), 87 O.R. (3d) 479 (C.A.), at para. 2:

- (d) the potential prejudice to the moving party should the motion be dismissed, and the potential prejudice to the respondent should the motion be allowed; and

(e) the effect of any order the court might make on the overall integrity of the administration of justice.

[50] These factors are not to be treated as rigid rules; the court must consider the particular circumstances of each case to decide whether it is just to relieve the defendant from the consequences of his or her default.

[51] For instance, the presence of an arguable defence on the merits may justify the court exercising its discretion to set aside the default judgment, even if the other factors are unsatisfied in whole or in part. In showing a defence on the merits, the defendant need not show that the defence will inevitably succeed. The defendant must show that his or her defence has an air of reality.

65 Leeds' position is that it did not learn of the default judgment against it until on or about May 26, 2018. The plaintiff's evidence is that a letter dated January 15, 2018 was sent by plaintiff's counsel to Mr. Duric at the Torino address and at the office address for Leeds that enclosed the default judgment against Leeds, and that this letter was not returned. Mr. Duric's evidence is that he did not receive this letter at either address. I accept that Leeds' motion was brought reasonably promptly after May 26, 2018.

66 For the reasons I have given in relation to Mr. Duric's motion, I do not accept that Leeds has shown that it has a plausible excuse for its default in not defending the action after service of the statement of claim on Mr. Duric in October 2017.

67 I have held that the defendants have failed to tender evidence of facts that establish that they have an arguable defence on the merits.

68 In *Canadian Imperial Bank of Commerce v. Petten*, 2010 ONSC 6726 (Ont. S.C.J.), Corbett J. made the following comments, with which I agree, with respect to the analysis of relative prejudice:

The analysis of relative "prejudice", then, is seen in the context of the overall goal of orderly and efficient processing of cases, and not just the immediate impact on the parties to the dispute. An atomistic analysis of the "prejudice" to the moving party and to the responding party will almost always favour the moving party: if the motion is dismissed, the moving party will have lost the case and be liable for the claim. If the motion is allowed, the responding party will be delayed but may yet obtain and enforce its judgment, if it succeeds on the merits. Where can be shown that a responding party's position may deteriorate if the motion is allowed, this may be addressed by terms, for example: expediting the trial, securing a potential judgment, or preserving evidence. Thus if the over-arching principle under Rule 19.08 is "relative prejudice", the "principles established by the authorities", the three-part test, would be rendered largely nugatory.

69 For the reasons given by Corbett J. in *Petten*, I do not regard the "relative prejudice" factor to be a significant one on this motion.

70 When I consider the factors identified by the Court of Appeal in *Mountainview* including, most importantly in my view, the failure of the defendants to tender evidence of facts that establish an arguable defence on the merits, I conclude that the interests of justice do not favour an order setting aside the default judgment against Leeds.

Is the plaintiff entitled to default judgment against Mr. Duric?

71 In the statement of claim, the plaintiff pleads the following allegations of fact, the truth of which Leeds is deemed to admit pursuant to rule 19.02(1)(a) of the *Rules of Civil Procedure*:

- a. The plaintiff carries on business as a masonry construction contractor. (para. 2)
- b. The defendant Leeds carries on business as a general construction contractor. (para. 3)
- c. The defendant, Duric, at all material times, was a director and president of Leeds, and had effective control of its relevant activities.

d. The plaintiff supplied masonry services to Leeds for the construction of new homes on three lots in a subdivision project in Kitchener, Ontario. The plaintiff rendered one invoice number J195 to Leeds dated July 19, 2017 for which there remains outstanding the amount of \$64,497.03. (paras. 6, 7 and 8)

e. The masonry services supplied at the lots by the plaintiff were supplied at the request of Leeds, and were used by Leeds for the construction of the homes on the same lots, pursuant to three purchase orders entered into by Leeds with the developer of the subdivision, a company known as Activa Holdings Inc. ("Activa"). (para. 12)

f. Activa has provided evidence that it paid Leeds the amount of \$133,608.67 for the masonry services supplied to the three lots. Leeds did not account or remit any of these trust funds to the plaintiff. Leeds has been paid in full with respect to its prime contract with Activa as its own invoices rendered to Activa were paid in full. (para. 15)

g. The plaintiff registered a construction lien against title to one of the lots and received a payment in the amount of \$13,360.87 from Activa as its holdback obligation to the plaintiff. This payment was the only amount received on the plaintiff's invoice number J195, thereby reducing the principal amount outstanding to \$64,497.03. (para. 17)

72 In support of this motion, the plaintiff also provided the affidavit of Alexandre Delgado, a director of the plaintiff. Mr. Delgado states that Activa provided the plaintiff with copies of Leeds' three invoices whereby Leeds invoiced Activa for amounts totalling \$133,608.67 for masonry services for the three lots. Copies of these invoices were attached as exhibits to Mr. Delgado's affidavit.

73 Mr. Delgado also states that Activa provided the plaintiff with a copy of its cheque to Leeds whereby Activa paid Leeds the amount of \$133,608.67 for the masonry services supplied to the three lots. A copy of the cheque was appended as an exhibit to Mr. Delgado's affidavit.

74 Section 8(1) of the *CLA* provides that all amounts owing to or received by a contractor or subcontractor on account of the contract or subcontract price of an improvement constitute a trust fund for the benefit of the subcontractors and other persons who have supplied services or materials to the improvement who are owed amounts by the contractor or subcontractor.

75 Section 8(2) of the *CLA* provides that the contractor or subcontractor is the trustee of the trust fund created by subsection (1) and the contractor or subcontractor shall not appropriate or convert any part of the fund to its own use or to any use inconsistent with the trust until all subcontractors and other persons who supply services or materials to the improvement are paid all amounts owed to them in relation to the improvement.

76 The purpose and intent of section 8 of the *CLA* is to impose a trust, for the benefit of the parties who supply services and materials to a job site, on money owing or received on account of a contract or subcontract for the services and materials supplied: *Baltimore Aircoil of Canada Inc. v. ESD Industries Inc.*, [2002] O.J. No. 2727 (Ont. S.C.J.) at para. 36.

77 Section 8 of the *CLA* requires that a contractor or a subcontractor who receives money on account of its contract on a project must use those monies first to pay those who provided services or materials on the project. A failure to do so will constitute a breach of trust for which, in certain circumstances, the directors, officers or controlling minds of a corporate contractor may be personally liable: *St. Mary's Cement Corp. v. Construc Ltd.* [1997 CarswellOnt 939 (Ont. Gen. Div.)], 1997 CanLII 12114 and p. 11.

78 The party alleging breach of trust has the initial onus to prove the existence of a trust under s. 8 of the *CLA*. In order to discharge this onus, the party must show:

- a. The contractor received monies on account of its contract or subcontract price for a particular project.
- b. The party alleging breach of trust supplied services and materials for that project.
- c. The contractor owes money to the party alleging breach of trust for those services and materials.

If these elements are proven, the trust provisions of section 8 are triggered, and the onus then shifts to the contractor to show that its payment out of the trust funds complied with s. 8 of the *CLA*.

79 Section 13(1) of the *CLA* provides that every director, officer, or person with effective control of a corporation, or its relevant activities, who assents to, or acquiesces in, conduct that he or she knows, or reasonably ought to know, amounts to breach of trust by the corporation, is liable for the breach of trust. In *Baltimore Aircoil of Canada Inc.*, Wilkins J. addressed the breach of trust provision in s. 13 of the *CLA* at para. 40:

Section 13, in my view, is not a restatement of the common law but rather the creation of a separate and independent statutory scheme for the imposition of liability on certain persons. Breach of trust referred to in s. 13(1) is the breach of trust on the part of the corporation. In order to vest that liability upon officers, directors or persons with effective control, the common law is such that it is necessary to demonstrate that those persons are constructive trustees. Under the statutory provisions of s. 13, however, it is unnecessary to make that level of proof and it is sufficient to demonstrate that persons are within the defined group, and that their conduct falls within the conduct contemplated. The legislature does not require constructive trusteeship to impose liability. The bare statutory statement that certain persons may be held liable for the conduct of others is sufficient.

80 To be liable under s. 13, it is necessary to show that the personal defendant is a director, officer, or person with effective control of a corporation, or its relevant activities, who assents to, or acquiesces in, conduct that he or she knows, or reasonably ought to know, amounts to breach of trust by the corporation.

81 The plaintiff has shown that Mr. Duric was a director of Leeds and that he actively participated in the day-to-day operations of Leeds. Mr. Duric was the operating mind of Leeds and he would have been in control of funds received and disbursed by Leeds.

82 In *St. Mary's Cement Corp.*, Molloy J. held that the intention of the legislation was to set up a trust with respect to moneys received from owners in favour of unpaid trades, and observed that it would be inconsistent with that intention if individuals who by their conduct defeat the trust were not liable for breach of trust in the same manner as the corporate vehicles they control.

83 I am satisfied based upon the factual allegations in the statement of claim that are deemed to be true and the additional evidence provided by Mr. Delgado that Leeds breached the trust created by s. 8 of the *CLA* by refusing to pay the plaintiff for the supply of masonry services to the three lots out of the payments that it received from Activa, and that Mr. Duric is liable for the breach of trust by Leeds under s. 13 of the *CLA*.

Disposition

84 For these reasons:

- a. Mr. Duric's motion to set aside the noting in default against him is dismissed.
- b. Service of the statement of claim on Leeds is validated pursuant to rule 16.08.
- c. Leeds motion to set aside the default judgment and the noting in default against it is dismissed.
- d. The plaintiff's motion for default judgment against Mr. Duric is granted and Mr. Duric is ordered and adjudged to pay to the plaintiff the sum of \$64,497.03 together with prejudgment and postjudgment interest at the rates prescribed by the *Courts of Justice Act*.

85 The plaintiff may make written submissions with respect to costs within 20 days. The defendants may make written responding submissions within 20 days thereafter. The plaintiff may make brief reply submissions, if so advised, within 5 days thereafter.

Defendants' motions dismissed; plaintiff's motion granted.

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TAB 2

2016 ONSC 1956
Ontario Superior Court of Justice

2235512 Ontario Inc. v. 2235541 Ontario Inc.

2016 CarswellOnt 4231, 2016 ONSC 1956, 264 A.C.W.S. (3d) 788

**2235512 Ontario Inc., and Santa Marinella Inc., Applicants/Respondents
on Motion and 2235541 Ontario Inc., Joe d'Ercole, Tony de Marco,
Universalcare Canada Inc., Universalcare Home Health Inc., Universalcare
Health Services Inc., Unique Care Products Inc., 2247960 Ontario Inc.,
Potus Living Inc., Potus Dufferin North Inc., Potus Properties Inc., and
Major Mackenzie Group Inc., Respondents/Moving Party on Motion**

Douglas J.

Heard: February 18, 2016

Judgment: March 18, 2016

Docket: Newmarket CV-16-125248-00

Proceedings: additional reasons at *2235512 Ontario Inc. v. 2235541 Ontario Inc.* (2016), 2016 CarswellOnt 6385, 2016 ONSC 2741, Douglas J. (Ont. S.C.J.)

Counsel: M. Farace, R. Del Vecchio, for Applicants

R. Staley, J. Bell, for Respondents, 2235541 Ontario Inc., Joe D'Ercole and Tony De Marco

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Torts

MOTION to remove law firm as counsel for applicants, and prohibiting firm from acting for applicants and shareholders in any dispute involving company, shareholders or principals.

Douglas J.:

Overview

1 This motion arises from an allegation that the Applicants' lawyers are in a conflict of interest because, as former counsel for one of the corporate Respondents, they cannot now act on behalf of one of the shareholders of the former client, against both the former client and the remaining shareholder.

2 The moving parties (2235541 Ontario Inc., Joe D'Ercole and Tony De Marco, hereinafter referred to collectively as "the moving parties") seek orders removing Miller Thomson as lawyers of record for the Applicants and prohibiting Miller Thomson (hereinafter "MT") from acting as counsel for the Applicants or their shareholders in any dispute involving UniversalCare and its shareholders and principals.

3 In this application, the Applicants seek orders allowing the Applicants to purchase various entities (which are among the Respondents) that are equally owned by the Applicants and certain of the Respondents, on the basis that the entities are deadlocked.

4 For the reasons that follow I would allow the motion in part.

The Moving Parties' Position

5 The moving parties' position is summarized as follows:

- (a) MT has acted as counsel for a number of the jointly owned entities that are named as Respondents, including the principal entity that is the subject of dispute, UniversalCare Canada Inc. ("UniversalCare"). MT has also been, and continues to be, counsel to AllianceCare, a joint project of UniversalCare, funded by UniversalCare and important to the value of UniversalCare.
- (b) Despite the connectivity of UniversalCare and the AllianceCare project, it appears that Joseph Gulizia ("Gulizia"), the president and CEO of UniversalCare and the directing mind of the Applicants, is trying to take the AllianceCare project for himself and that MT is helping him do so. The Applicants dispute that UniversalCare has an ongoing interest in AllianceCare. This is a contentious issue between the parties.
- (c) UniversalCare has recently paid MT for legal services rendered to UniversalCare and certain of the other jointly owned entities. MT's involvement with these entities was originally as UniversalCare's (and not the Applicants') lawyers.
- (d) MT now acts for the Applicants who have sued entities that MT acted and continues to act for, including UniversalCare, which appears to be a current client (through MT's ongoing work on the AllianceCare project). MT cannot now act as counsel for the Applicants, whose position in this application is that UniversalCare has no entitlement to the AllianceCare project which MT itself was pursuing on UniversalCare's and shareholders' behalf. That in of itself is a disqualifying conflict.
- (e) Counsel for jointly owned entities should remain neutral and on the sidelines when there is a dispute among the shareholders. It is inappropriate for corporate counsel to choose sides in shareholder disputes as doing so will almost inevitably cause the corporation's counsel to disregard its obligations owed to the corporate body and structure as a whole, in favour of a particular corporate faction.
- (f) MT lawyers and personnel may well be witnesses in this application and appear to have information relevant to the disputes that would assist both sides (and which is now available only to Gulizia and the Applicants).
- (g) The application necessarily involves an inquiry into the day to day operation of UniversalCare and the other jointly owned entities and the value of those entities if the court concludes that a buyout should be ordered.
- (h) Given the link between the AllianceCare project and the value of UniversalCare, AllianceCare is relevant to the issues at dispute in this application.
- (i) Despite the fact that they clearly have relevant evidence to the issues at dispute on this motion, MT failed to put in any evidence denying their conflict of interest, nor have the Applicants been willing to produce the relevant documents in MT's files.

The Applicants' Position

6 The Applicants' position in response to the motion is summarized as follows:

- (a) The conflict motion is meritless and represents part of the moving parties' ongoing strategy to intimidate and harass the Applicants and drain their financial resources, evidence of which includes:
 - i. The supporting affidavit of Joe D'Ercole sworn February 1, 2016 contains no specific allegations or statements regarding any confidential information in MT's possession that may be misused in these proceedings;
 - ii. The moving parties' reply affidavit of Joe D'Ercole sworn February 11, 2016 contains only bald assertions as to an alleged conflict of interest, relying on allegations that the moving parties are or were also clients of MT on account of two invoices rendered by MT to UniversalCare Canada Inc. regarding work unrelated to the matters herein and

an "opportunity" considered by the Applicants and the moving parties respecting an entity that is a non-party to the proceedings and that is not favoured as between the parties;

iii. The Respondents are required by s. 15.2 of the Shareholders' Agreement dated March 1, 2010 to submit a dispute or question to a single arbitrator by written notice to the other parties, yet in the Notice of Arbitration of the moving parties dated December 31, 2015 they make no claim against the Respondents named in the notice as to any matter at all surrounding the AllianceCare issue that is raised in the affidavit of Mr. D'Ercole sworn February 11, 2016;

iv. The moving parties have insisted on an improperly constituted arbitration before an arbitrator with a determined apprehension of bias.

(b) The motion is the type of tactical conflict motion that the Supreme Court of Canada warns that courts should guard against while protecting clients and upholding the administration of justice.

(c) The Applicants and their principal and controlling mind Gulizia never provided MT with any confidential information. In fact, the moving parties state that they "would like to see MT's files in order to be able to further determine" the issue of a conflict of interest and confidential information purportedly in MT's possession available for misuse, effectively imposing a reverse onus on the Applicants.

(d) The moving parties' motion should be dismissed as a "fishing expedition".

The Facts

7 Many of the background facts are not in dispute and have been summarized in the parties' facts.

8 UniversalCare is a corporation incorporated under the laws of Ontario. It is owned by 512 and 541, each of which owns fifty percent of its common shares.

9 UniversalCare is governed by a unanimous Shareholders' Agreement. The Shareholders' Agreement was subsequently amended by Amending Agreement.

10 541 is a corporation incorporated under the laws of Ontario. 541 is owned by D'Ercole and De Marco with each holding fifty percent of its issued and outstanding common shares.

11 The Respondent UniversalCare Health Services Inc. ("Health Services") is a corporation incorporated under the laws of Ontario. Health Services is owned by Santa Marinella and 541, each of which owns fifty percent of its common shares. Health Services provides physiotherapy services to UniversalCare. Health Services is managed day to day by Angela Gulizia, Gulizia's wife.

12 The Respondent UniversalCare Home Health Inc. ("Home Health") is a corporation incorporated under the laws of Ontario. Home Health is owned by Santa Marinella and 541, each of which holds fifty percent of its common shares. Home Health does not actively carry on business.

13 The Respondent Major Mackenzie Group Inc. ("Major Mackenzie") is a corporation incorporated under the laws of Ontario. Major Mackenzie is owned by 512 and 541, each of which hold fifty percent of its common shares. Major Mackenzie receives consulting fees.

14 The Respondent Unique Care Products Inc. ("Unique Care") is a corporation incorporated under the laws of Ontario. 512 and 541 each hold twenty-five percent of its common shares. The remaining fifty percent is owned by 2247960 Ontario Inc. Unique Care imports and sells gloves and wipes to homes managed by UniversalCare.

15 The Respondents Potus Living Inc., Potus Dufferin North Inc, and Potus Properties Inc. are corporations incorporated under the laws of Ontario. They are investment holding companies that own properties related to living services for individuals with special needs. These companies receive rent payments. They do not actively carry on business.

16 Potus Living Inc. and Potus Dufferin North Inc. are each owned fifty percent by 541 and fifty percent by 512. Potus Properties Inc. is owned fifty percent by 541 and fifty percent by Santa Marinella.

17 Gulizia has a history in the nursing home/retirement home business. In 2010 he was looking to launch a start-up in that sector and was seeking investors. D'Ercole had prior dealings with Gulizia and Gulizia approached D'Ercole looking for potential investors.

18 D'Ercole brought the proposed investment to De Marco and they agreed through 541 to take a fifty percent interest in what became UniversalCare.

19 In addition to serving as the main operating entity, 512 and 541 had used UniversalCare to incubate various projects.

20 UniversalCare is governed by a unanimous Shareholders' Agreement dated March 1, 2010.

21 The Shareholders' Agreement provides at Article 3.2 that Gulizia is to receive a salary of \$150,000 plus certain specified benefits. Article 3.3 provides that UniversalCare shall be the owner of all of Gulizia's work product developed during the period of his employment at UniversalCare.

22 The Shareholders' Agreement prohibits Gulizia, D'Ercole and De Marco from competing with UniversalCare either "directly or indirectly, in any manner whatsoever".

23 The Shareholders' Agreement also contained a shotgun buy/sell clause that could not be invoked prior to March 1, 2015. Pursuant to the Amending Agreement the shotgun buy/sell clause could not be invoked prior to March 1, 2022. It was the purported exercise of that shotgun provision by 512 that gives rise to this application.

24 Through a proposed new structure called AllianceCare, UniversalCare commenced pursuit of the acquisition of a long-term care facility located in Scarborough along with others.

25 The moving parties are concerned that Gulizia and the Applicants are trying to appropriate the significant value that AllianceCare represents for UniversalCare for themselves despite the fact AllianceCare falls within the scope of the non-competition provision in the Shareholders' Agreement, meaning that Gulizia could not pursue it outside of UniversalCare without 541's consent.

26 While Michael Di Paolo served as the corporate counsel for UniversalCare, Gulizia retained MT to act for UniversalCare in other matters.

27 MT's relationship with UniversalCare goes back to at least April 2014 when Gulizia sent Enzo Di Iorio of MT an email referencing "our conversation about MT doing business with UniversalCare". Gulizia did not have a personal pre-existing relationship with MT. MT's first involvement with these entities was as UniversalCare's, and not Gulizia's or 512's counsel.

28 Around March 2015, MT performed legal work for UniversalCare in pursuing an opportunity relating to a property and potential business opportunity (the Elgin Ltd. Partnership). This work included an email from Di Iorio to Gulizia entitled "UniversalCare and MT" and references a meeting between Gulizia and Di Iorio where a number of items were discussed.

29 In July 2015 MT was engaged to review a contract between Home Health and Richview Manor (a UniversalCare-managed retirement home).

30 These matters were subject to an account issued by MT to UniversalCare in September 2015. The description of services shows that MT was retained by UniversalCare and provided advice on agreements to which UniversalCare and the UniversalCare entities were parties, and took instructions from Gulizia in doing so.

31 In August 2015 MT developed a licence agreement for UniversalCare. These services were covered by an account issued by MT to UniversalCare in September 2015. The services described show that MT was drafting agreements to which UniversalCare is a party and took instructions from Gulizia in doing so.

32 In October 2015 Gulizia asked MT for a quote to revise and "beef up" various contracts used by UniversalCare. At a meeting with 541 Gulizia advised that UniversalCare had engaged MT to address various of the standard contracts it was using.

33 An email from Di Iorio to Gulizia includes Di Iorio's commentary on an AllianceCare marketing brochure in which Di Iorio refers to the significant work "we" need to do on the document. Di Iorio's email also referenced "UniversalCare's involvement" in the project.

34 On December 2, 2015 512 issued a shotgun notice. Di Iorio of MT was identified in the letter as counsel for 512 and Gulizia.

35 On December 9, 2015 the moving parties advised 512 and MT that the shotgun notice was invalid because the shotgun is not available prior to March 1, 2022. MT's conflict of interest was raised by the moving parties.

36 On December 31, 2015, 541 gave its written notice that it wished to arbitrate its claim that the shotgun notice was invalid.

37 Responding outside the forty-eight hour deadline specified in the Shareholders' Agreement, 512 took the position in response to the Notice of Arbitration claim that disputes between 512 and 541 must be resolved by the courts and not by arbitration.

38 The parties have now agreed upon an arbitrator should this dispute proceed by way of arbitration.

Legal Framework

39 Courts have an inherent jurisdiction to remove a lawyer or law firm from the record on the basis of a conflict of interest (see *Wallace v. Canadian Pacific Railway*, [2013] 2 S.C.R. 649 (S.C.C.) [hereinafter McKercher]).

40 Lawyers owe their clients a fiduciary duty to avoid conflicts of interest. A solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client's interests and his own or his client's interests and those of another client to whom he owes the same duty of loyalty, dedication, and good faith (see *R. v. Neil*, [2002] 3 S.C.R. 631 (S.C.C.)).

41 In *Consulate Ventures Inc. v. Amico Contracting & Engineering (1992) Inc.*, 2010 ONCA 788 (Ont. C.A.), the Ontario Court of Appeal removed a lawyer on the basis that the removal was necessary for the maintenance and the integrity of the justice system. The court indicated:

This broader continuing duty of loyalty to former clients is based on the need to protect and promote public confidence in the legal profession and the administration of justice. What is of concern is the spectre of a lawyer attacking or undermining in a subsequent retainer the legal work which the lawyer did for the former client or of a lawyer effectively changing sides by taking an adversarial position against a former client with respect to a matter that was central to the previous retainer.

42 Courts have found that internal corporate shareholder disputes create "inherent conflicts of interest that effectively restrict a lawyer's ability to extend joint representation" (see *Rice v. Smith*, 2013 ONSC 1200 (Ont. S.C.J.)).

43 In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.) the Supreme Court of Canada identified three competing values that require consideration on conflict of interest motions:

- (a) The concern to maintain the high standards of the legal profession and the integrity of the justice system;

- (b) A litigant should not be deprived of his or her choice of counsel without good cause; and
- (c) The desire to permit reasonable mobility in the legal profession.

44 The Supreme Court established the appropriate test to address conflicts of interest as follows:

...the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest?

In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

Typically, these cases require two questions to be answered: 1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? 2) Is there a risk that it will be used to the prejudice of the client?

45 In *Wallace v. Canadian Pacific Railway* the Supreme Court of Canada held:

The first major concern addressed by the duty to avoid conflicting interests is the misuse of confidential information. The duty to avoid conflicts reinforces the lawyer's duty of confidentiality — which is a distinct duty — by preventing situations that carry a heightened risk of a breach of confidentiality. A lawyer cannot act in a matter where he may use confidential information obtained from a former client or a current client to the detriment of that client. A two part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: 1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? 2) Is there a risk that it will be used to the prejudice of that client? If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice.

46 Courts should be on guard to ensure conflict motions are not brought for a tactical advantage (see *Credit Union Central of Ontario Ltd. v. Heritage Property Holdings Inc.*, [2007] O.J. No. 1875 (Ont. S.C.J.)).

47 The solicitor client relationship is based on the general concept of contract and the specific concept of a retainer. When a corporation retains a solicitor, he or she is not the solicitor for the individual shareholders in the absence of a further retainer (see *Filipovic v. Upshall*, 1998 CarswellOnt 2305 (Ont. Gen. Div.), affirmed, 2000 CarswellOnt 2163 (Ont. C.A.)).

Analysis

What is MT's relationship with UniversalCare and AllianceCare?

48 The primary question here is about MT's relationship with UniversalCare, one of the parties against whom MT is acting in this proceeding.

49 MT is counsel of record for both Applicants in this proceeding, one of them being 512, a fifty percent shareholder in UniversalCare. MT is acting against UniversalCare, its former client, and 541. 541 is the other of UniversalCare's two shareholders.

50 It is clear that MT has acted in previous matters on behalf of UniversalCare. I am satisfied on the strength of the responding material that MT is not acting for UniversalCare on an ongoing basis.

51 The issue is the nature of MT's prior retainer by UniversalCare.

52 The germination of the solicitor and client relationship between MT and UniversalCare, is, on the evidence before me, traceable back to April 2014. In March of 2015 MT performed legal work for UniversalCare regarding the Elgin Ltd. Partnership. Other legal services relating to the AllianceCare project were performed as well. This is confirmed in an email from Di Iorio to Gulizia in which Di Iorio sets out a commentary on the AllianceCare marketing brochure and which refers to the significant work "we" need to do on the document. The email also referenced "UniversalCare's involvement" in the project. There is no evidence that any firm other than MT was performing legal services regarding AllianceCare. It appears that legal services were being performed in relation to AllianceCare at the same time that MT was providing legal services on other matters for UniversalCare.

53 In cross-examination of Gulizia it was confirmed that UniversalCare was paying expenses to facilitate the AllianceCare project and that every employee in UniversalCare's corporate office had worked on the AllianceCare project. Additionally, the AllianceCare brochures reference the management role of UniversalCare in all AllianceCare properties. This is consistent with the agreement alleged by the moving parties that UniversalCare was to partake in the AllianceCare project to the benefit of UniversalCare, 541 and 512.

54 There is no evidence that AllianceCare is anything other than a name assigned to a project that forms, at least, part of the fabric of this dispute. There is no evidence that AllianceCare has any corporate identity. As such it cannot be said, as submitted by the moving parties in their Factum, that "MT has....been and continues to be, counsel to AllianceCare". There can be no solicitor and client relationship with a non-corporate entity.

55 Therefore, while I find that MT has no ongoing solicitor/client relationship with UniversalCare, MT did previously have such a relationship and that such touched on corporate issues unrelated to these proceedings but included services in relation to the AllianceCare project.

Did MT receive confidential information attributable to a solicitor/client relationship relevant to a matter at hand? (See Wallace v. Canadian Pacific Railway, *supra*).

56 Development of a response to this question necessarily requires consideration of whether I should draw an adverse inference against the Applicants in the circumstances that follow.

57 The moving parties argue that during Gulizia's cross-examination MT refused a number of clearly relevant questions, many of which go to the root of the issues in dispute on this motion, including the AllianceCare issue. The moving parties invite me to draw an adverse inference that the evidence that would have been given would likely have been unhelpful to the Applicants in this motion. In response the Applicants describe this argument as a "mirage". AllianceCare, it is submitted, was merely a business opportunity being discussed, the relative insignificance of which is underscored by the moving parties' failure to reference same in their Notice of Motion.

58 The moving parties submit that the following refusals were relevant questions to this motion:

- (a) Who did the legal work for the AllianceCare project?
- (b) What work had MT done regarding the AllianceCare project?
- (c) Who retained MT to work on the AllianceCare project?
- (d) Whether MT had spoken with any UniversalCare employees regarding the AllianceCare project?
- (e) Whether AllianceCare existed as a corporate entity or was only an idea?
- (f) The current status of each of the proposed projects to be pursued by AllianceCare (including those that were being used by UniversalCare staff) and whether MT had that information?

(g) Whether Gulizia felt he had a material advantage in this application given that only he and Miller Thomson know whether the AllianceCare corporate opportunity is still available to UniversalCare?

(h) Whether it was open to Gulizia to use UniversalCare resources to pursue the AllianceCare project in which he now says UniversalCare cannot participate?

(i) To request UniversalCare employees to produce all documents they have regarding AllianceCare; and

(j) Whether Di Iorio was involved in any matter related to this litigation other than initiating the shotgun by 512?

59 At the commencement of the cross-examination of Gulizia on February 12, 2016 counsel for the Applicants stated:

...AllianceCare is not a party to the application. AllianceCare is not a party to the arbitration. Therefore, our position is that we are not going to be producing any documentation regarding AllianceCare.

60 Later in that same cross-examination counsel for the Applicants made it clear that no questions would be answered regarding AllianceCare as "AllianceCare is not a party to the proceedings" and it is "not a party as a result of the Notice of Arbitration" and "the Shareholders Agreement doesn't permit the subject matter of AllianceCare to be dealt with within the arbitration context".

61 AllianceCare is first referenced in the evidence before me in the reply affidavit of D'Ercole sworn February 11, 2016. No objection was raised by counsel for the Applicants to the effect that this was not proper reply evidence to come before me.

62 When Mr. Gulizia was subject to cross-examination on February 12, 2016 he would have had available to him the February 11, 2016 affidavit of D'Ercole.

63 The Applicants argue that relevance is determined on the basis of pleadings (see *Fabrikant v. Dzavik*, 2014 CarswellOnt 17 (Ont. S.C.J.)).

64 However, pleadings only exist in an action. This proceeding has been commenced by way of Notice of Application within which the current motion comes before me. There are no rules of pleading *per se* in respect of motions. The rules do require that the moving party deliver a motion record containing a table of contents, the Notice of Motion (which is to contain "Grounds for the Motion"), a copy of all affidavits and other material served for use on the motion, a list of all relevant transcripts of evidence and a copy of any other material in the court file necessary for the hearing of the motion. Of particular note is the fact no reference is made to the AllianceCare project as formulating a basis for the allegation of conflict of interest.

65 In this case, before cross-examinations were conducted and before argument was entertained, the moving parties had presented evidence relating to the AllianceCare issue. That evidence was presented in the form of the reply affidavit of Mr. D'Ercole served in accordance with the rules and relied upon, without objection from the Applicants.

66 In my view the Applicants have not been surprised by the AllianceCare issue. The evidence in relation to AllianceCare was before the court and related by the moving parties to the conflict issue prior to cross-examination of Gulizia and prior to argument of the motion before me. It is thus relevant, even though it was not specifically referenced in the Notice of Motion. The requirement that a moving party include Grounds for the motion is designed to promote procedural fairness by alerting a responding party to the material issues in play, supplemented by a broad description of the main allegations of fact. Here the notice of motion referenced the allegation of conflict of interest. A reply affidavit referenced the AllianceCare project prior to cross-examinations and related it to the conflict issue. I see no basis to conclude that the Applicants have been prejudiced in these circumstances.

67 The Applicants argue that there can be no relevance to AllianceCare when AllianceCare has not been made a party to this proceeding.

68 The difficulty with this argument is that there is no evidence before me that AllianceCare has evolved from a project to the level of corporate entity. This is one of the questions refused by the Applicants. I have no basis on which to therefore conclude that AllianceCare could possibly be added as a party.

69 Even if AllianceCare could be added as a party, such is not a necessary pre-condition to rendering questions in relation to AllianceCare relevant. There are many individuals who are referenced in the affidavit evidence and the transcript of the cross-examinations of the parties (for example Di Paolo and Di Iorio) who are not parties to this proceeding but about whom no objection has been raised as to relevance of questions. The relevance of questions at cross-examination is determined by defined issues, not by who is or is not a party.

70 It is apparent from the evidence summarized in part above, supplemented by Mr. D'Ercole's evidence given at cross-examination, that AllianceCare represents an important component of the dispute between the parties.

71 I therefore conclude that it was not proper for the Applicants to refuse to answer the questions put to them regarding AllianceCare and that it is open to me to draw an adverse inference to the effect that answers to the questions refused would have been unhelpful to the Applicants' position on this motion.

72 The questions refused were directed at determining the nature of the work performed and information received by MT in relation to the AllianceCare project. Answers would have shed light on whether MT received confidential information attributable to a solicitor/client relationship relevant to a matter at hand.

73 The refusals lead me to draw an inference that had the answers been provided such would likely have supported the moving parties' position on this issue that confidential information had been obtained.

74 According to *McKercher*, there is a rebuttable presumption that a lawyer possesses confidential information that raises the risk of prejudice if a new retainer is "sufficiently related" to the matters on which he or she worked for the former client.

75 The rebuttable presumption in *McKercher* is supplemented by the adverse inferences drawn from the Applicants refusal to answer questions regarding the AllianceCare project.

76 The concern is that the past representation by MT of UniversalCare provided access to confidential information that is sufficiently related to the subject matter of the current dispute.

77 For these reasons in response to the question "Did MT receive confidential information attributable to a solicitor/client relationship relevant to the matter at hand? I respond "yes".

Is there a risk that the confidential information will be used to the prejudice of the client? (See Wallace v. Canadian Pacific Railway, *supra*).

78 I have already described above the nature of the work performed by MT for UniversalCare in relation to the AllianceCare project. In my view, in the circumstances described herein, the retainer of MT by the Applicant 512 is sufficiently related to the matter addressed, in part, in the prior retainer of MT by the Respondent UniversalCare that a rebuttable presumption arises that MT possesses confidential information that raises a risk of prejudice (see *Wallace v. Canadian Pacific Railway, supra*). The value of the AllianceCare project, if value can be ascribed to it, will likely be a component of determination of the issues raised in the Application.

79 As the Applicants have refused to answer questions related to this issued, the presumption has not been rebutted.

80 For these reasons, in response to the question "Is there a risk that the confidential information will be used to the prejudice of the client?" I respond "yes".

Does a retainer of MT by UniversalCare necessarily extend, for conflict of interest purposes, to UniversalCare's shareholders (ie. 512 and 541)?

81 Although Di Paolo served as corporate solicitor for UniversalCare, MT also acted for UniversalCare in relation to the matters described in more detail above.

82 As confirmed in *Filipovic v. Upshall*, 1998 CarswellOnt 2305 (Ont. Gen. Div.) "...the solicitor and client relationship is based upon general concepts of contract, and the specified concept of a retainer". There is no evidence of a retainer between MT on the one hand and 541 on the other. Obviously there is a retainer of MT by 512 in this proceeding.

83 However, "...a lawyer representing a corporate organization must remember at all times that the corporation has a legal personality distinct from its individual directors and shareholders, and that those interests may very well diverge, thereby preventing a lawyer's continued involvement in an internal corporate dispute". (see *Rice v. Smith*, [2013] O.J. No. 784 (Ont. S.C.J.)).

84 The court in *Rice v. Smith* confirms that "...authorities have repeatedly identified corporate shareholder disputes as situations involving inherent conflicts of interest that effectively restrict a lawyer's ability to extend joint representation". In the context of *Rice v. Smith* "joint representation" referred to circumstances where corporate counsel purported to act for the corporation and two of the three shareholders in defence of an application commenced by the remaining shareholder. Having found sufficient relation between the work performed for UniversalCare by MT and the subject matter of this dispute, and this dispute being between one of UniversalCare's shareholders on the one hand (512) and UniversalCare and the remaining shareholder (541) on the other hand, I conclude that MT is in a conflict of interest.

85 For the foregoing reasons, in response to the question "Does a retainer of MT by UniversalCare extend, for conflict of interest purposes, to 512 and 541?" I respond "yes".

Conclusion

86 While our courts "...repeatedly have emphasized the right of litigants not to be deprived of their counsel of choice without good cause", this principle "...is tempered by ongoing concern to maintain the high standards of the legal profession and the integrity of the justice system, and this includes the courts' inherent jurisdiction to remove from the record lawyers who have a conflict of interest" (see *Rice v. Smith*).

87 I appreciate that an order removing counsel imposes a hardship upon the Applicants but on balance this is lesser than the harm occasioned by permitting counsel to continue in the circumstances described herein.

88 The relief sought by the moving parties in the form of a prohibition against MT acting as counsel for the Applicants on their shareholders in any dispute involving UniversalCare and its shareholders and principals is overbroad. Should the issue arise in future disputes between the parties it can and should be addressed within the context of the proceeding in which the issue arises.

89 For all the foregoing reasons:

1. MT shall be removed as counsel of record for the Applicants in this proceeding.
2. If unable to agree on costs, parties to provide written submissions to my assistant at Barrie, restricted to three pages (excluding Bill of Costs and Offers) within 30 days.

Motion granted in part.

TAB 3

2019 ONCA 822
Ontario Court of Appeal

Bancroft-Snell v. Visa Canada Corporation

2019 CarswellOnt 16738, 2019 ONCA 822, 310 A.C.W.S. (3d) 469

Jonathon Bancroft-Snell, and 1739793 Ontario Inc. (Plaintiffs / Moving Parties) and Visa Canada Corporation, Mastercard International Incorporated, Bank of America Corporation, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des caisses Desjardins du Quebec, National Bank of Canada Inc., Royal Bank of Canada, and Toronto-Dominion Bank (Defendants / Moving Parties)

Jonathon Bancroft-Snell, and 1739793 Ontario Inc. (Plaintiffs / Responding Parties) and Visa Canada Corporation, Mastercard International Incorporated, Bank of America Corporation, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des caisses Desjardins du Quebec, National Bank of Canada Inc., Royal Bank of Canada, and Toronto-Dominion Bank (Defendants / Responding Parties)

Jonathon Bancroft-Snell, and 1739793 Ontario Inc. (Plaintiffs / Responding Parties) and Visa Canada Corporation, Mastercard International Incorporated, Bank of America Corporation, Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Capital One Financial Corporation, Citigroup Inc., Federation des caisses Desjardins du Quebec, National Bank of Canada Inc., Royal Bank of Canada, and Toronto-Dominion Bank (Defendants / Responding Parties)

G.R. Strathy C.J.O., J.C. MacPherson, Robert J. Sharpe, M. Tulloch, M.L. Benotto J.J.A.

Heard: September 4, 2019
Judgment: October 17, 2019
Docket: CA M49808, M50041, M50130 (C66008)

Proceedings: quashing appeal *Bancroft-Snell v. Visa Canada Corporation* (2018), 2018 CarswellOnt 15098, 2018 ONSC 5166, Perell J. (Ont. S.C.J.)

Counsel: Reidar Mogerman, Katie Duke, for Moving Parties (M50130), Responding Parties (M49808 & M50041), Jonathan Bancroft-Snell and 1739793 Ontario Inc.

Robert E. Kwinter, for Moving Party (M50130), Responding Party (M49808 & M50041), Visa Canada Corporation
Jeffrey B. Simpson, James B. Musgrove, for Moving Party (M50130), Responding Party (M49808 & M50041), Mastercard International Incorporated

Katherine L. Kay, for Moving Parties (M50130), Responding Parties (M49808 & M50041), Bank of Montreal, Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Royal Bank of Canada and Toronto-Dominion Bank

Sean Griffin, Antoine Brylowski, for Moving Party (M50130), Responding Party (M49808 & M50041), National Bank of Canada Inc.

James C. Orr, Kyle R. Taylor, for Moving Party (M49808), Responding Party (M50130), Home Depot of Canada Inc.

Edward J. Babin, Cynthia L. Spry, Michael Bookman, for Moving Party (M50041), Responding Party (M50130), Wal-Mart Canada Corp.

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial

MOTION to quash appeal of judgment reported at *Bancroft-Snell v. Visa Canada Corporation* (2018), 2018 ONSC 5166, 2018 CarswellOnt 15098 (Ont. S.C.J.), approving partial settlement of class action; MOTION by class members for leave to act as representative plaintiff.

G.R. Strathy C.J.O.:

1 This appeal focuses on the procedural rights of class members in certified class proceedings, specifically the right to challenge settlement approval orders by way of appeal under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("CPA").

2 The nature of a class proceeding and the goals of the *CPA* impact the procedural rights afforded to class members. Class actions permit the efficient resolution of disputes in a manner that is fair to all parties and promote access to justice, judicial economy and behaviour modification. In part, efficiency is achieved through the appointment of one or more class members as representative plaintiffs, to conduct the litigation in the best interests of all class members.

3 While class members have a *sui generis* status, they do not possess the same degree of autonomy as parties to the litigation and do not enjoy the rights or bear the responsibilities of parties. Class members have a right to notice of a certified class proceeding, the right to opt out of the class, and the right to object to settlement agreements. However, class members who do not choose to opt out of the class proceeding, are bound by the outcome. A settlement of a class proceeding that is approved by the court binds all class members.

4 In contrast to class members who do not play an active role, the representative plaintiff has carriage of the litigation on behalf of the class and, with the advice of class counsel, makes all litigation decisions on behalf of the class, including the decision to accept or reject a defendant's settlement offer. Significantly, it is the representative plaintiff who bears the litigation risk, including the risk of an adverse costs award.

5 In the present appeal, two class members, Wal-Mart and Home Depot (the responding parties to Motion M50130, "responding parties"), neither of which is a representative plaintiff, have appealed an order of Perell J. of the Superior Court of Justice approving a partial settlement of this certified class action. They did not avail themselves of an opportunity to opt out of the class action at the time of an earlier settlement. Accordingly, subject to their right to object at the settlement approval hearing, they were bound by any judgment or settlement in the class action. They took advantage of the opportunity to object before the settlement approval judge, who did not give effect to their objections.

6 The moving parties moved to quash the appeal on the ground that the responding parties have no standing to appeal. This motion is supported by the representative plaintiff and by three defendants, Visa, Mastercard, and National Bank. There are related motions before us: one by Wal-Mart, pursuant to s. 30(5) of the *CPA*, seeking leave to act as the representative plaintiff for the purpose of the appeal; and one by Home Depot, for an order granting leave to act as the representative plaintiff in the event that the moving parties' motion is granted.

7 A five-judge panel was convened, at the request of the responding parties, to enable them to advance the submission that the decision of this court in *Dabbs v. Sun Life Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (Ont. C.A.) , leave to appeal refused, [1998] S.C.C.A. No. 372 (S.C.C.) ("Dabbs "), should be overruled. That decision held that a class member has no right to appeal a settlement approval order.

8 I would dismiss the responding parties' motions, grant the moving parties' motion, and quash the appeal. My reasons are set out below.

I. Dabbs remains good law and has not been overtaken by other decisions

9 *Dabbs* held that class members' rights of appeal in class proceedings are found in the *CPA* and are not supplemented by the general appeal rights in s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990 c. C.43 (the "CJA").

10 The responding parties contend that subsequent decisions have established that s. 6(1)(b) of the *CJA* can provide an appeal route where the matter is not specifically addressed in the *CPA*.

11 I do not accept this submission. *Dabbs* remains good law. It has stood for more than 20 years and has been consistently applied in Ontario: see e.g. *Cavanaugh v. Grenville Christian College*, 2013 ONCA 139, 360 D.L.R. (4th) 670 (Ont. C.A.); *Locking v. Armtec Infrastructure Inc.*, 2012 ONCA 774, 299 O.A.C. 20 (Ont. C.A.); *Davies v. Clarington (Municipality)*, 2010 ONSC 418 (Ont. S.C.J.). Its logic and authority have never been questioned. It was expressly applied in the decision of this court in *Directright Cartage Ltd. v. London Life Insurance Co.*, [2002] O.J. No. 512 (Ont. C.A.). See also *Labourers' Pension Fund of Central and Eastern Canada v. Sino-Forest Corp.*, 2013 ONCA 500, 19 C.B.R. (6th) 124 (Ont. C.A.), leave to appeal refused, [2013] S.C.C.A. No. 395 (S.C.C.).

12 The responding parties have not demonstrated that the *ratio* of *Dabbs* is flawed in any way. Appeal rights are statutory. *Dabbs* was decided on the basis of statutory interpretation. The responding parties have not advanced any other persuasive interpretation of the *CPA*.

13 The responding parties' submission that *Dabbs* has been "superseded" by subsequent decisions is not borne out by an analysis of those decisions, none of which involved an appeal by a class member who was not a representative party. All of those decisions are readily distinguished on that basis: *Welsh v. Ontario*, 2019 ONCA 41, 432 D.L.R. (4th) 117 (Ont. C.A.) (the appellant was the representative plaintiff); *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 (Ont. C.A.), leave to appeal refused, (2018), [2017] S.C.C.A. No. 476 (S.C.C.) (the appellants were the representative plaintiffs); *Waldman v. Thomson Reuters Canada Ltd.*, 2015 ONCA 53 (Ont. C.A.) (the appellant was a party to the action); *Charles Trust (Trustee of) v. Atlas Cold Storage Holdings Inc.*, 2009 ONCA 690, 311 D.L.R. (4th) 323 (Ont. C.A.) (the appellants were class counsel); *Main v. Cadbury Schweppes plc*, 2011 BCCA 21, 20 B.C.L.R. (5th) 11 (B.C. C.A.), leave to appeal refused, [2011] S.C.C.A. No. 105 (S.C.C.) (the appellants were non-settling defendants).

14 *Dabbs* was cited with approval by the Court of Appeal for British Columbia in *Coburn and Watson's Metropolitan Home v. Home Depot of Canada Inc.*, 2019 BCCA 308 (B.C. C.A.) ("Coburn"), released August 30, 2019. That case, a class proceeding related to this, raised precisely the same issue as these motions. The court found the reasoning in *Dabbs* "compelling": at para. 32. It rejected the responding parties' submission that the authority of *Dabbs* had been undermined by more recent case law. The court observed, at para. 34:

None of the cases directly questioned the authority of *Dabbs* and some do not refer to it. Rather, the cases deal with different issues and rest on the principle that if the availability of appeal rights are not effectively addressed by the *CPA*, then the general jurisdiction to entertain appeals governs.

15 I agree with this observation.

16 In summary, appeal rights in class proceedings can be described as follows:

- The effect of s. 30 of the *CPA* is that the Divisional Court and the Court of Appeal have divided appellate jurisdiction with respect to appeals of various types of orders and judgments in class proceedings. Parties have those appeal rights that are expressly designated by s. 30. Appeals, both as of right and with leave, must be taken to the court stipulated in s. 30.
- Where s. 30 does not specifically address the appeal route for a particular type of order or judgment, s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 will govern whether an appeal lies to this court or to Divisional Court. Accordingly, parties may appeal final orders of those matters not specifically mentioned in s. 30 of the *CPA* to the Court of Appeal.
- Class members who are not representative parties have no direct right of appeal pursuant to s. 30 of the *CPA*. If a representative plaintiff does not appeal pursuant to s. 30(3) or abandons an appeal pursuant to s. 30(3), class members have a right to seek leave to appeal pursuant to s. 30(5). That right exists only in respect of those matters specified in s. 30(3), those being judgments on common issues or determinations of aggregate damages.

17 As the responding parties have no direct right of appeal, I turn to the issue of whether they may seek leave to appeal pursuant to s. 30(5).

II. Settlement approval is neither a judgment on common issues nor a determination of aggregate damages

18 The responding parties' second argument is that a settlement approval order should be understood as a "judgment on common issues" or a determination of aggregate damages, with the result that a class member may appeal the disposition with leave if the representative plaintiff fails to pursue an appeal, pursuant to ss. 30(3) and 30(5) of the *CPA*. The responding parties rely on *Dabbs* at paras. 18 to 21, in which O'Connor J.A. considered, and dismissed, a motion by class members for leave pursuant to s. 30(5) of the *CPA*.

19 I would reject this submission. There is nothing in the settlement agreement, the order approving the agreement, or the reasons of the class proceedings judge to indicate that the court was pronouncing judgment on a common issue or making an aggregate assessment of damages. It was simply a determination that the settlement was fair and reasonable and in the best interests of the class. I respectfully agree with the observation of Harris J.A. in *Coburn*, who rejected a similar submission, observing at para. 21:

In my opinion, a judgment on a common issue involves an adjudication by a court of contested issues. It does not capture an order approving a settlement in which, typically, liability is disavowed as a condition of the settlement.

20 To avoid any future uncertainty on the point, I reject the responding parties' suggestion that the final four paragraphs of *Dabbs* confirm that a class member may appeal the approval of a settlement, with leave, under s. 30(5) of the *CPA*. The court in *Dabbs* indicated that it would have denied leave in any event and did not address the substantive basis of this argument. In my view, for the reasons I have given, a settlement approval is not a judgment on the common issues and s. 30(5) is inapplicable.

III. Giving individual class members the right to appeal the settlement of class action would lead to uncertainty and inefficiency

21 Third, and finally, the responding parties argue that because the vast majority of class proceedings are resolved through settlement, it would be unreasonable to accept that the legislature intended that there be no avenue of appellate review of settlement approvals. Because access to justice and the protection of class members is a primary purpose of the *CPA*, it would be unreasonable, they say, to deny class members an opportunity to appeal.

22 I respectfully disagree. There are sound policy reasons why class members should not be entitled to appeal a settlement order where the representative plaintiff declines to do so. The Court of Appeal for British Columbia identified some of these reasons in *Coburn*, at paras. 14 and 15. To permit a class member to appeal a settlement proposed by the representative plaintiff, recommended by class counsel, and approved by the class proceedings judge, would be problematic in several ways. It would introduce uncertainty into the negotiation and approval of class action settlements, undermine the authority of the representative plaintiff and class counsel, and impede settlement. As the moving parties note, abuses have been experienced in the United States where appeals by objecting class members have been permitted. See: *Abihsira c. Johnston*, 2019 QCCA 657, [2019] J.Q. No. 2785 (C.A. Que.), at para. 85; B. D. Greenberg, "Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements" (2010) 84 St. John's L. Rev. 949 at 951.

23 Notably, the Ontario Law Commission, in its recent report, "Class Actions: Objectives, Experiences and Reforms", made no recommendation to this effect, although it did make recommendations concerning appeal routes for parties.

IV. Disposition

24 For these reasons, I would dismiss the responding parties' motions, grant the moving parties' motion and quash the appeal.

25 In the event the parties are unable to agree on costs, they may make written submissions.

J.C. MacPherson J.A.:

I agree.

Robert J. Sharpe J.A.:

I agree.

M. Tulloch J.A.:

I agree.

M.L. Benotto J.A.:

I agree.

Moving parties' motion granted; class members' motion dismissed.

TAB 4

2019 ONSEC 21
Ontario Securities Commission

BDO Canada LLP (Re)

2019 CarswellOnt 9322, 2019 ONSEC 21, 42 O.S.C.B. 5239

In the Matter of BDO Canada LLP

Timothy Moseley V-Chair

Heard: May 3, 2019
Judgment: June 6, 2019
Docket: 2018-59

Counsel: Doug McLeod, Eric Leinveer, for Moving Party, BDO Canada LLP
Robert L. Gain, Anna Huculak, for Staff of the Commission

Subject: Corporate and Commercial; Securities

Timothy Moseley V-Chair:

3.1 OSC Decisions

3.1.1 BDO Canada LLP

REASONS AND DECISION ON A MOTION

REASONS AND DECISION

I. Overview

1 Staff of the Ontario Securities Commission (*Staff of the Commission*) alleges that BDO Canada LLP (*BDO*), in conducting audits relating to Crystal Wealth Management Systems Limited (*Crystal Wealth*), breached certain provisions of the *Securities Act*¹ (the *Act*).

2 The proceeding against BDO is in its early stages. Staff has made disclosure to BDO of documents and information in Staff's possession relating to the allegations. BDO submits that the disclosure it has received is inadequate. BDO has brought this motion seeking an order of the Commission requiring Staff to make further disclosure. In particular, BDO seeks disclosure of files relating to compliance reviews of Crystal Wealth (the *Compliance Reviews*) conducted by Staff and by staff of the British Columbia Securities Commission (*BCSC Staff*). BDO also objects to Staff's decision not to disclose documents that pre-date January 1, 2012 (three years before the effective date of the earlier of the two impugned audits).

3 The motion was heard on May 3, 2019. On May 7, 2019, I issued an order dismissing the motion for reasons to follow. These are my reasons.

4 As I explain more fully below, for BDO to be entitled to an order requiring disclosure of any further documents or information regarding the Compliance Reviews, BDO would have to demonstrate a sufficient connection between the allegations against it and the Compliance Reviews. BDO has failed to do so. BDO also failed to articulate a basis for an order requiring disclosure of documents that pre-date January 1, 2012.

II. Background

A. Fraud at Crystal Wealth

5 Staff previously brought an enforcement proceeding against Clayton Smith, who was the founder and directing mind of Crystal Wealth and of the investment funds managed by Crystal Wealth (the *Funds*). In a settlement of that proceeding,² Smith admitted that from 2012 to 2017, he and Crystal Wealth committed various breaches of Ontario securities law, including by engaging in fraud with respect to two of the Funds. Specifically, Smith agreed that he had caused monies to be advanced from the two funds, purportedly to purchase investments for the funds, but instead the monies went to Smith, to Smith's holding company, or to a related company.

6 In April 2017, the Ontario Superior Court of Justice granted the Commission's application to appoint a receiver over Crystal Wealth, the Funds, and Smith (among other entities).³

B. Allegations against BDO

7 Following the settlement with Smith, Staff commenced this proceeding against BDO. In this proceeding, Staff alleges that from 1998 to 2017, BDO was the auditor of Crystal Wealth and of the Funds. Staff also alleges that with respect to the audits of the Funds as at and for the years ended December 31, 2014, and December 31, 2015, BDO falsely represented to the Funds' unitholders that it had performed the audits in accordance with Canadian generally accepted auditing standards (*GAAS*).

8 Staff contends that BDO failed to comply with GAAS in three ways:

- a. BDO did not obtain sufficient appropriate audit evidence with respect to the Funds' assets;
- b. BDO did not undertake its work with sufficient professional skepticism; and
- c. BDO did not complete the engagement quality control reviews that it had determined were required.

9 Staff alleges that as a result, BDO breached:

- a. subsection 78(3) of the Act, which requires the auditor of a mutual fund to "make such examinations as will enable the auditor to make the [required] report"; and
- b. clause 122(1)(b) of the Act, which prohibits the making of a materially misleading or untrue statement in a financial statement required to be filed or furnished under Ontario securities law.

C. BDO's motion for further disclosure

10 Following a first appearance on October 29, 2018, the Commission ordered that by November 9, 2018, Staff disclose to BDO any "non-privileged relevant documents and things" in Staff's possession or control. Staff took steps to comply with that requirement.

11 On February 19, 2019, BDO filed this motion, by which it seeks additional disclosure from Staff. BDO's concerns fall into three categories:

- a. First, BDO contends that there were various technical issues with certain electronic disclosure that Staff had made, and that as a result BDO was prevented from carrying out a proper review of that disclosure. At the hearing of this motion on May 3, 2019, the parties agreed that the technical issues had been resolved.
- b. Second, BDO asks that the Commission require Staff to disclose to BDO all documents and things in Staff's possession or control relating to:
 - i. compliance reviews of Crystal Wealth and its Funds commenced by Staff in 2011 and 2014 (the **OSC Compliance Reviews**);

- ii. compliance reviews of Crystal Wealth commenced by staff of the British Columbia Securities Commission (the **BCSC**) in 2013 and 2015 (the **BCSC Compliance Reviews**);⁴ and
 - iii. "any and all other compliance reviews or investigations conducted by OSC or BCSC Staff of Crystal Wealth or its representatives".
- c. Third, BDO objects to Staff's decision not to disclose any documents that pre-date January 1, 2012.

III. Analysis

A. Issues

12 This motion presents the following issues:

- a. What is the extent of Staff's disclosure obligation in an enforcement proceeding?
- b. Should Staff be required to disclose the contents of Staff's files relating to the OSC Compliance Reviews?
- c. If Staff's disclosure obligation does extend to include the file contents of the OSC Compliance Reviews, what steps if any should Staff be required to take with respect to BCSC Staff's files relating to the BCSC Compliance Reviews?
- d. Should Staff be required to disclose documents that pre-date January 1, 2012?

B. What is the extent of Staff's disclosure obligation in an enforcement proceeding?

1. The disclosure obligation generally

13 Rule 27(1) of the *Ontario Securities Commission Rules of Procedure and Forms*⁵ (*OSC Rules*) requires Staff to provide to every other party "copies of all non-privileged documents in Staff's possession that are relevant to an allegation". This rule embodies a disclosure standard similar to that imposed on the Crown in criminal proceedings by *R. v. Stinchcombe*.⁶

14 Staff must initially assess which non-privileged documents it considers to be relevant to an allegation. In exercising that judgment, which is later reviewable by the Commission, Staff must:

- a. include not only documents on which Staff intends to rely, but also documents that might reasonably assist a respondent in making full answer and defence to Staff's allegations, including by helping the respondent make tactical decisions;
- b. assess the relevance of documents in the context of the specific allegations being made by Staff;
- c. reasonably anticipate defences or issues that a respondent might properly raise, in order to inform Staff's assessment of relevance;
- d. include both inculpatory and exculpatory documents; and
- e. err on the side of inclusion.⁷

15 BDO submitted, Staff conceded, and I agree, that the confines of disclosure are not conclusively dictated by Staff's view of the case. A respondent may review the disclosure it receives and consider whether the disclosure appears to be complete. If a respondent believes that it is not, the respondent may request further disclosure from Staff, and if still not satisfied may seek the necessary order from the Commission.

16 A respondent's belief that the disclosure provided is incomplete could arise for varying reasons, including for example where the respondent contemplates a defence that Staff did not foresee, despite Staff's reasonable efforts to anticipate potential defences. Following initial disclosure, therefore, the burden lies on the respondent to articulate a basis for requesting further disclosure.

17 While Staff's disclosure obligation is broad, the obligation is not unlimited. Relevance ultimately depends on there being a sufficient connection between the document in question and the respondent's ability to make full answer and defence to Staff's allegations.

18 BDO argued strenuously that on a motion such as this, the Commission is not to make an admissibility ruling as if this were the merits hearing at which Staff's allegations were being litigated. I agree, but while relevance for the purpose of disclosure may be more expansive than admissibility at a hearing, there are still limits, in that relevance is determined with reference to the specific allegations.

19 BDO further submitted that Staff's disclosure obligation extends beyond those documents that are relevant, to documents that might possibly be relevant. However, Rule 27(1) of the OSC Rules explicitly imposes the standard of "relevant to an allegation", and nothing broader. In my view, the approach set out in paragraph [14] above, which incorporates a reasonableness standard as well as the obligation to err on the side of inclusion, accurately reflects Rule 27(1) and the applicable authorities, and adequately responds to BDO's submission on this point.

2. Is "Staff work product" an exception to the disclosure obligation?

20 Staff's written submissions refer to a category of documents and information it calls "Staff Work Product", that Staff submits need not be disclosed because those documents and information are irrelevant. In its written submissions, Staff includes within this category the following:

- a. internal Staff notes, analyses or communications;
- b. guidance to Staff field team reviewers in respect of the OSC Compliance Reviews;
- c. communications between Staff and other regulators; and
- d. other similar documents and information.

21 It is true that some documents falling within this category would not generally need to be disclosed. However, in my view, the term "Staff Work Product", as defined by Staff in its written submissions, is overly broad, is imprecise and is not helpful in analyzing the issues that this motion presents. To illustrate the point, it includes internal Staff notes, which may record statements made by a respondent relating directly to the allegations in the case. In addition, or instead, the notes may record a Staff member's opinions about such statements. Those two different types of content should attract different considerations when determining relevance.⁸

22 Accordingly, deciding whether a document ought to be disclosed must involve reference to the document's content. The mere fact that a document is generated by Staff as opposed to gathered by Staff from a third party would not necessarily be determinative of whether the document is relevant and disclosable. Documents gathered by Staff from a third party are sometimes referred to as "fruits of the investigation", although as Staff submitted on this motion, that term might also include Staff's note made of a meeting with a third party.

23 In *Phillips, Re*,⁹ the Commission considered the same issue presented by this motion. There, the Commission defined "Staff work product" more narrowly, as "internally-generated documents evidencing Staff's analysis, commentary, opinion or discussions about commencing proceedings", and held that Staff was not required to disclose "Staff work product" because it

was irrelevant to the issues that the Commission would consider at the merits hearing.¹⁰ In oral submissions, Staff counsel adopted a definition that is substantially similar to this narrower characterization.

24 That definition is more helpful, in that it more faithfully reflects the principles involved. However, like "fruits of the investigation", the term "Staff work product" is of limited value across multiple cases, since the boundaries are not always consistently defined. In addition, each of the two categories may, depending on the context of the particular case in which the question arises, contain both relevant and irrelevant documents. Ultimately, any determination as to whether a document must be disclosed will depend on relevance, as discussed at paragraph [14] above.

3. By disclosing some documents that relate to an event or an issue, can Staff be taken to have conceded that it must disclose all documents relating to that event or issue?

25 Before turning to apply the general standard to the facts of this case, I must consider BDO's submission that by initially disclosing some documents that related to or mentioned the Compliance Reviews, Staff should be taken to have conceded that the Compliance Reviews are relevant to the allegations and that the files relating to them must therefore be disclosed in full.

26 BDO offered no authority for this proposition, and I reject it.

27 Staff's obligation to err on the side of inclusion is an important principle that promotes procedural fairness for a respondent. BDO's proposed approach could act as a disincentive for Staff to take an expansive view of relevance, because a choice to disclose one document of borderline relevance might trigger an obligation to make extensive disclosure of irrelevant documents.

28 Furthermore, any given document might have a portion that is clearly relevant to one of Staff's allegations, and a second portion that is irrelevant to the allegations. It would be illogical if the requirement to disclose the document because of the relevance of the first portion created an obligation to disclose documents that are irrelevant but that have a subject in common with the second portion.

C. Should Staff be required to disclose the contents of Staff's files relating to the OSC Compliance Reviews?

1. Introduction

29 Having established the general rule regarding Staff's obligation to make disclosure, I turn to consideration of the main issue on this motion. Specifically, should Staff be required to disclose the files relating to the OSC Compliance Reviews?

30 BDO's request differs from that more frequently seen on motions of this kind, where respondents want to learn about the investigation that led up to the enforcement proceeding. BDO is not seeking disclosure of documents relating to Staff's investigation of BDO. The requested disclosure is at least two steps removed from that investigation: one step because a compliance review of an entity is, by definition, distinct from the investigation that gives rise to an enforcement proceeding against that entity; and the second step because in the present case, Crystal Wealth, not BDO, was the subject of the Compliance Reviews.

2. Information reasonably available from Crystal Wealth

31 BDO's central submission on this motion is that the Compliance Reviews are "integral to BDO's defence as [they] will provide crucial insight into the information that was reasonably available from the Crystal Wealth Entities during the relevant period".¹¹

32 I do not accept that submission, for two reasons.

33 First, I see nothing in the Statement of Allegations that raises the question of what "was reasonably available from" Crystal Wealth and the Funds. Of the three allegations against BDO in this proceeding, set out in paragraph [8] above, the only one that has any apparent connection to the quantity of information obtained is the first; *i.e.*, whether the audit evidence that BDO did obtain was sufficient to comply with GAAS. However, apart from suggesting that such information would provide

"context" (a suggestion I did not find persuasive), BDO did not explain why an inquiry into what information was reasonably available to BDO would assist a determination of whether what BDO did obtain was adequate. Absent a concrete explanation, and an ability for Staff to respond, it is not for me to speculate.

34 Second, even if an inquiry into what was reasonably available to BDO from Crystal Wealth were a proper component of Staff's case against BDO, it is not apparent to me, and BDO did not explain, how Staff's experience in requesting information from Crystal Wealth might assist. Staff conducts compliance reviews pursuant to the statutory authority found in section 20 of the Act, and in conducting those reviews is empowered to enter a registered firm's premises, and to examine and make copies of the firm's books, records and documents. An auditor's ability to obtain and review information serves a different purpose, derives from a different source, has a different scope, is subject to different limitations, involves different considerations by the entity seeking information, and leads to different outcomes if difficulties are encountered. All of those differences would prompt different considerations by Crystal Wealth or its principals in responding to requests for information. In my view, the distinctions are numerous and fundamental, and any connection there might be is too tenuous to establish the necessary degree of relevance.

3. Overlap between BDO's audits and the Compliance Reviews

35 BDO seeks to strengthen the connection between its audit work and the work underlying the Compliance Reviews, by submitting that the Compliance Reviews were "regarding many of the same issues underlying Staff's current allegations against BDO,"¹² and that Staff was "engaged in a substantially similar exercise to the audits conducted by BDO."¹³

36 Staff disagrees. In response, Staff submits that a compliance review is primarily an operational review to assess a registered firm's compliance with Ontario securities law. A compliance review extends to such things as supervision, marketing, disclosure of fees and commissions, and responses to previously identified compliance deficiencies. While Staff will typically review the firm's financial statements to assess the firm's financial condition and its compliance with capital requirements, a compliance review is not, and does not include, an audit of the firm's financial statements; nor does it provide any assurance about those statements.

37 I prefer Staff's submission. BDO and Staff were engaged in very different exercises.

38 BDO submits, and I agree, that an evaluation of its compliance with GAAS would necessarily include consideration of its assessment as to Crystal Wealth's compliance with GAAP, since that is an essential component of an audit. It is also true that Staff, when conducting a compliance review, would likely do some work to assess compliance with GAAP, in order to support a conclusion as to the firms' compliance with capital requirements, for example.

39 However, the fact that BDO's audits considered some of the same things that Staff looked at in the Compliance Reviews does not establish that access to the Compliance Review files might assist BDO in defending the allegation that BDO failed to comply with GAAS. According to the Statement of Allegations, the standard against which BDO will be measured is GAAS, not the manner in which Staff discharged a very different, and much broader, obligation.

40 At the hearing of this motion, BDO suggested other potential defences that it might assert: "that even a nominal defect [in the audits] would have had no impact on GAAP; that the context was such that the audits were, in the ultimate conclusion, absolutely correct; that there was no harm to the public or to investors; and that the underlying thrust of all of these allegations is without merit."¹⁴ I fail to see a link between any of these potential defences and the Compliance Reviews.

4. Staff's actions in connection with the Compliance Reviews

41 This absence of a connection is further highlighted by BDO's written submissions:

...BDO is not able to understand the basis upon which OSC and BCSC Staff conducted their reviews, including, critically, the reasons that Staff did not take issue with Crystal Wealth's operations on the same issues which underlay the allegations against BDO. BDO has no insight into any decisions by OSC and BCSC Staff to conclude their reviews without further inquiries or conditions imposed upon Crystal Wealth.¹⁵

42 Any decision made by Staff as to how to proceed during or following a compliance review is dependent on a number of factors. Many of those factors (*e.g.*, available resources, competing priorities, applicable regulatory standards) are entirely unrelated to the question of whether BDO's audits complied with GAAS. The process of gaining "insight into" Staff's decisions with respect to the Compliance Reviews would be a fishing expedition that the disclosure obligation is not designed to enable, and that process would not assist in determining the sufficiency of the steps that BDO took during the audits.

43 This is consistent with the Commission's decision in *Phillips*, discussed above in paragraph [23]. The opinion of a non-expert member of Staff would have no probative value before the Commission as to whether BDO complied with GAAS. This would be so even if the Staff member's opinion were squarely on that central issue; *i.e.*, the very issue that the Commission is responsible for deciding. It would be equally if not even more the case if that opinion were with respect to a different issue; *e.g.*, whether the firm was in compliance with its capital requirements.

5. Conclusion about the Compliance Reviews generally

44 BDO's submissions on this motion imagine a more wide-ranging set of allegations than are contained in the Statement of Allegations. Any determination of relevance must be made with reference to the allegations as they are, not as they are imagined to be. At the hearing on the merits, Staff's case will be limited by the boundaries of the Statement of Allegations as drafted. Accordingly, it would be inappropriate to order disclosure based on some broader but non-existent version.

45 Within the confines of the Statement of Allegations as drafted, and for the reasons set out above, I agree with Staff's submission that documents, or portions of documents, that are contained in the Compliance Review files and that reflect Staff's commentary, opinion, analysis, guidance to field review teams, and similar content, are not relevant and need not be disclosed.

D. If Staff's disclosure obligation does extend to include the file contents of the OSC Compliance Reviews, what steps if any should Staff be required to take with respect to BCSC Staff's files relating to the BCSC Compliance Reviews?

46 BDO submits that Staff did not take sufficient steps to obtain from BCSC Staff the files relating to the BCSC Compliance Reviews.

47 I have no basis to conclude that the nature or scope of the BCSC Compliance Reviews are distinct from the OSC Compliance Reviews in any way that is related to the issues on this motion. Given my decision that the OSC Compliance Reviews are not relevant to the allegations against BDO and therefore are not subject to disclosure, the same conclusion would apply to the BCSC Compliance Reviews. Therefore, I need not consider the issue of whether Staff should be required to take any steps to obtain the BCSC Compliance Review files.

E. Should Staff be required to disclose documents that pre-date January 1, 2012?

48 BDO objects to Staff's decision not to disclose documents dated on or before December 31, 2011. Staff submits that it has erred on the side of inclusion by disclosing documents for the three years preceding each of the impugned audits. For example, while documents created in 2013 are relevant to the audit as at and for the year ending December 31, 2014, it is not clear that documents created in 2012 would be relevant. Nonetheless, Staff has disclosed such documents.

49 Staff drew the line, however, at three years. Absent a reason to believe that any documents created more than three years before the audit date would be relevant, I can see no basis to require disclosure. BDO provides no specific reason; rather, it submits that such documents would provide "relevant context". Without more, that assertion is insufficient for me to conclude that Staff's chosen cut-off date is improper.

IV. Conclusion

50 For the reasons set out above, I concluded that the Compliance Reviews are not relevant for the purposes of disclosure, and I dismissed BDO's motion. However, some parting comments are necessary with respect to the disclosure that has been made.

51 At the hearing of the motion, Staff advised that it has erred on the side of inclusion and has already disclosed all externally gathered evidence, and all documentation of communications with external third parties. Staff has not disclosed notes of internal meetings or discussions, internal guidance to field team reviewers, internal analyses generated following the Compliance Reviews, or drafts of any of the foregoing.

52 Staff also asserted that it has redacted some information on some documents it has disclosed. These redactions have been made in order to conceal information in a manner consistent with the narrower definition of "Staff work product" referred to in paragraph [23] above.

53 Staff's actions, as described, are consistent with these reasons. However, after hearing these assertions by Staff, BDO's counsel expressed skepticism as to whether Staff had in fact fully complied with Staff's own view of what should be disclosed. Those reservations were based on inferences drawn from references in documents that were disclosed. In response, Staff counsel repeated his belief that Staff had fully complied, but he was unable to be absolutely unequivocal, given that the Staff members involved with this matter have changed over time.

54 I was not directed to any basis upon which I could conclude that Staff has not made the necessary disclosure. I did express orally to Staff at the hearing my view that no matter the outcome of the motion, Staff should double-check the accuracy of Staff counsel's statements and the completeness of Staff's disclosure. If Staff has not yet done so, it should do that promptly, and should communicate with BDO's counsel as necessary.

55 I am grateful for the thorough submissions and able assistance of all counsel on this motion.

Footnotes

1 RSO 1990, c S.5

2 The settlement was approved by the Commission in June of 2018: *Clayton Smith (Re)*, 2018 ONSEC 33 (Ont. Securities Comm.) (CanLII) (*Smith Settlement*)

3 *Smith Settlement* at para 16

4 Staff asserts that it is aware of only one compliance review conducted by BCSC Staff. Given my decision on this motion, it was unnecessary for me to resolve the conflict between Staff's assertion and BDO's request.

5 (2017), 40 OSCB 8988

6 [1991] 3 S.C.R. 326 (S.C.C.)

7 *Deloitte & Touche LLP v. Ontario (Securities Commission)* (2002), 159 O.A.C. 257 (Ont. C.A.), 2002 CanLII 44980, at paras 40, 41 and 44; *Biovail Corp., Re*, 2008 ONSEC 14, 31 O.S.C.B. 7161 (Ont. Securities Comm.) at paras 15, 32, 40, 41; *Shambleau, Re* (2002), 25 O.S.C.B. 1850 (Ont. Securities Comm.) at para 16; *R. c. Taillefer*, [2003] 3 S.C.R. 307 (S.C.C.) at para 59

8 The Alberta Securities Commission reached a similar conclusion in *Re Fauth*, 2017 ABASC 3 (Alta. Securities Comm.) at para 55 (*Fauth*)

9 (2012), 35 O.S.C.B. 10957 (Ont. Securities Comm.) (*Phillips*)

10 *Phillips* at para 34, citing *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629, [2003] O.J. No. 4089 (Ont. Div. Ct.)

11 BDO's written submissions, para 5

12 BDO's written submissions, para 11

13 BDO's written submissions, para 16

14 Hearing Transcript, *BDO Canada LLP (Re)*, May 3, 2019, at 32, lines 12-17

15 BDO's written submissions, para 34

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TAB 5

2019 ONSC 2106
Ontario Superior Court of Justice (Divisional Court)

Berg et al. v. Canadian Hockey League et al.

2019 CarswellOnt 4916, 2019 ONSC 2106, 305 A.C.W.S. (3d) 708

SAMUEL BERG AND DANIEL PACHIS (Appellants / Respondents by Cross-Appeal) and CANADIAN HOCKEY LEAGUE, ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., WINDSOR SPITFIRES INC., LONDON KNIGHTS HOCKEY INC., BARRIE COLTS JUNIOR HOCKEY LTD., BELLEVILLE SPORTS AND ENTERTAINMENT CORP., ERIE HOCKEY CLUB LIMITED, JAW HOCKEY ENTERPRISES LP, GUELPH STORM LIMITED, KINGSTON FRONTENACS HOCKEY LTD., KINGSTON FRONTENACS HOCKEY CLUB, 2325224 ONTARIO INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., NIAGARA ICEDOGS HOCKEY CLUB INC., BRAMPTON BATTALION HOCKEY CLUB LTD., NORTH BAY BATTALION HOCKEY CLUB LTD, GENERALS HOCKEY INC., OTTAWA 67'S LIMITED PARTNERSHIP, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED, COMPUWARE SPORTS CORPORATION, IMS HOCKEY CORP., SAGINAW HOCKEY CLUB, L.L.C., 649643 ONTARIO INC c.o.b. as SARNIA STING, 211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB, SOO GREYHOUNDS INC., McCrimmon Holdings, LTD. and 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS., 1056648 ONTARIO INC., REXALL SPORTS CORP., EHT, INC., KAMLOOPS BLAZERS HOCKEY CLUB, INC., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., HURRICANES HOCKEY LIMITED PARTNERSHIP, PRINCE ALBERT RAIDERS HOCKEY CLUB INC., BRODSKY WEST HOLDINGS LTD., REBELS SPORTS LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP, 8487693 CANADA INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC., CLUB DE HOCKEY DRUMMOND INC., CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED, LES OLIMPIQUES DE GATINEAU INC., HALIFAX MOOSEHEADS HOCKEY CLUB INC., CLUB HOCKEY LES REMPARTS DE QUEBEC INC., LE CLUB DE HOCKEY JUNIOR ARMADA INC., MONCTON WILDCATS HOCKEY CLUB LIMITED, LE CLUB DE HOCKEY L'OCEANIC DE RIMOUSKI INC., LES HUSKIES DE ROUYN- NORANDA INC., 8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS, LES TIGRES DE VICTORIAVILLE (1991) INC., SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED, CLUB DE HOCKEY SHAWINIGAN INC., CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC., WEST COAST HOCKEY ENTERPRISES LTD., MEDICINE HAT TIGERS HOCKEY CLUB LTD., PORTLAND WINTER HAWKS, INC., BRETT SPORTS & ENTERTAINMENT, INC., THUNDERBIRD HOCKEY ENTERPRISES, LLC, TOP SHELF ENTERTAINMENT, INC., SWIFT CURRENT TIER 1 FRANCHISE INC., 7759983 CANADA INC., LEWISTON MAINEIACS HOCKEY CLUB, INC., KITCHENER RANGER JR A HOCKEY CLUB, KITCHENER RANGERS JR "A" HOCKEY CLUB, SUDBURY WOLVES HOCKEY CLUB LTD., GROUPE SAGS 7-96 INC., MOOSE JAW TIER ONE HOCKEY INC. DBA MOOSE JAW WARRIORS, KOOTENAY ICE HOCKEY CLUB LTD., LETHBRIDGE HURRICANES

HOCKEY CLUB, and LE TITAN ACADIE BATHURST (2013) INC./THE ACADIE BATHURST TITAN (2013) INC. (Respondents / Appellants by Cross-Appeal)

Sachs J., Thorburn J., and R. Reid J.

Heard: January 29, 2019; January 30, 2019

Judgment: April 3, 2019

Docket: Toronto 284/17, 584/17

Proceedings: reversing *Berg v. Canadian Hockey League* (2017), 2017 CarswellOnt 6227, 2017 ONSC 2608, Perell J. (Ont. S.C.J.); additional reasons at *Berg v. Canadian Hockey League* (2017), 2017 CarswellOnt 14108, 2017 ONSC 5382, Perell J. (Ont. S.C.J.); and varying *Berg v. Canadian Hockey League* (2017), 2017 CarswellOnt 14108, 2017 ONSC 5382, Perell J. (Ont. S.C.J.); additional reasons to *Berg v. Canadian Hockey League* (2017), 2017 CarswellOnt 6227, 2017 ONSC 2608, Perell J. (Ont. S.C.J.)

Counsel: Theodore P. Charney, Steven Barrett, Tina Q. Yang, Joshua Mandryk, for Appellants, Respondents by Cross-Appeal
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Subject: Civil Practice and Procedure; Public; Torts; Employment

APPEAL by representative plaintiff hockey players, from portion of judgment reported at *Berg v. Canadian Hockey League* (2017), 2017 ONSC 2608, 2017 CarswellOnt 6227 (Ont. S.C.J.) failing to certify common issues against defendant United States hockey clubs; APPEAL by defendant Canadian and U.S. hockey clubs from portion of this judgment certifying class; APPEAL by intervenor law foundation from judgment reported at *Berg v. Canadian Hockey League* (2017), 2017 ONSC 5382, 2017 CarswellOnt 14108 (Ont. S.C.J.) for costs to be payable by foundation, rather than players.

Per curiam:

OVERVIEW

1 On April 27, 2017, Perell J. ("the motion judge") certified a class action on behalf of Ontario Hockey League ("OHL") players who assert a claim that they were employees and as such should have received the minimum employment benefits they were entitled to under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA"). The motion judge certified the statutory claims and an unjust enrichment claim as against the OHL clubs located in Ontario ("the Canadian Defendants"). The motion judge refused to certify a claim against any American clubs (the "U.S. Defendants") and refused to certify five of the claims pleaded by the Plaintiffs on the basis that they were redundant.¹

2 On September 11, 2017 the motion judge made an order as to costs in which he awarded the Plaintiffs the full amount of the partial indemnity costs they claimed (\$1,212,065.63), but ordered that \$500,000.00 of those costs be paid forthwith and the balance of \$712,065.63 in the cause. The motion judge also awarded the U.S. Defendants costs of \$200,000.00, which he ordered be credited against the costs award made against the Canadian Defendants. As a result, the Plaintiffs received \$300,000.00 by way of costs forthwith, a large percentage of which was paid to defray disbursements. The motion judge made his order with the intention that the U.S. Defendants' costs were not to be paid by the Law Foundation of Ontario ("LFO"), in spite of the fact that the Plaintiffs had a litigation funding agreement with the LFO through the Class Proceedings Fund ("CPF"), which is responsible for adverse costs awards.

3 This is an appeal by the Plaintiffs of the motion judge's refusal to certify all of their pleaded causes of action and of his costs award. With respect to the costs award, the Plaintiffs appeal both the "in the cause" portion of the motion judge's decision and his finding that the costs order of the U.S. Defendants not be paid by the LFO.

4 The Defendants seek leave to cross-appeal the motion judge's decision to certify the action on the basis that the representative Plaintiffs have a conflict with other putative members of the class.

5 LFO seeks leave to cross-appeal the motion judge's costs award against the U.S. Defendants. First, they argue that to the extent the Plaintiffs bear any responsibility for the costs award, it is the LFO who should pay the award. However, they argue that the Canadian Defendants should pay that award and they also argue that the quantum of the award was excessive.

6 For the reasons that follow, we would allow the Plaintiffs' appeal with respect to the motion judge's refusal to certify all of their causes of action and we would allow their appeal as to costs to the extent that we agree that the costs owed to the U.S. Defendants should be paid by the LFO. We would deny the Defendants' application for leave to cross-appeal the motion judge's decision to certify the class action, and LFO's applications for leave to cross-appeal the quantum of costs payable to the U.S. Defendants and payment of those costs by the Canadian Defendants.

FACTUAL BACKGROUND

7 The factual background to this action is set out in detail in the motion judge's comprehensive and beautifully written reasons. As a result our summary will be brief.

8 The highest tier of minor hockey is known as "major junior" hockey. The national major junior league is the Canadian Hockey League ("CHL"), an umbrella organization presiding over regional member leagues: the OHL, the Western Hockey League, and the Quebec Major Junior Hockey League. There are 20 OHL clubs: 17 located in Ontario, two located in Michigan, and one located in Pennsylvania.

9 The CHL and its member leagues function as development leagues for the National Hockey League ("NHL"), which is the premier professional men's hockey league in North America. Each of the CHL leagues has a strictly defined geographic territory over which it owns the rights of all junior-aged players, who range in age from 16 to 20. Every OHL player must sign a Standard Player Agreement ("SPA").

10 In 2007, the OHL's SPA characterized player salaries as "remuneration" and as an "allowance" paid in exchange for the players' "services". The SPA was revised before the 2009-2010 season to add an express statement that the relationship between a player and the OHL is that of an independent contractor earning a "fee" in exchange for the player's "services". It stated that "nothing in this Agreement shall constitute the parties as employer/employee". After a failed unionization drive in 2012, OHL players were required to execute a new SPA for the 2013-2014 season. Among other things, the SPA was reformulated to take out independent contractor language and all reference to "service". The SPA now stated that "this Agreement is not a contract of employment between the club and the player". The language of "fee" or "allowance" became "reimbursement" and "honorarium", and players were classified as "amateur athletes".

11 The two representative plaintiffs in this action are both former OHL players. They bring this action on behalf of a class of current and former OHL players. They allege that the SPA constitutes a standard form employment contract which sets out the duties and obligations of players as employees and the duties and obligations of the clubs and the OHL/CHL as employers. They assert that they have been unlawfully denied employment status and associated benefits, including minimum wages. They advanced seven claims: (1) breach of statute; (2) breach of contract; (3) breach of the duty of honesty, good faith, and fair dealing; (4) negligence; (5) conspiracy; (6) unjust enrichment and (7) waiver of tort.

12 Parallel certified or proposed class proceedings are underway in Alberta and Québec regarding the major junior hockey players and leagues based in those provinces.

THE CERTIFICATION DECISION

13 The motion judge found that all of the causes of action pleaded by the Plaintiffs satisfied the "cause of action criterion" under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "CPA"). He also held that the "identifiable class

criterion" under s. 5 (1)(b) of the *CPA* was satisfied with a minor amendment to add a closing date without prejudice to the date being amended.

14 With respect to the "common issues criterion" at s. 5(1)(c), the motion judge held that the Plaintiffs satisfied the criterion with respect to two of their pleaded causes of action (breach of statute and unjust enrichment), but refused to certify the remaining causes of action (the Uncertified Common Issues) because they failed the "preferable procedure criterion" at s. 5(1)(d).

15 In his preferable procedure analysis the motion judge relied on *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) ("*Hryniak*") to import a proportionality component into that criterion. The motion judge began his proportionality analysis by finding that the Uncertified Common Issues were "redundant" causes of action that added nothing to the Plaintiffs' central claim that the class members were employees. He found that that the "redundant" common issues would cause enormous problems of manageability and burdensome complexity. The motion judge noted, at para. 205, that as the preferable procedure criterion is "designed to ensure that the class members get the access to justice they need, keeping in mind a genuine judicial economy of a manageable class claim", the proportionality analysis was against certification for the Uncertified Common Issues.

16 The motion judge also found that the claims against the U.S. Defendants did not satisfy the preferable procedure criterion, citing the fact (among other things) that they would cause problems of manageability, that there was a prospect of inconsistent outcomes, and that access to justice was available to the players on American clubs through claims brought in Michigan and Pennsylvania.

17 With respect to the "representative plaintiff criterion" at s. 5(1)(e) of the *CPA*, the motion judge found that the Plaintiffs satisfied the criterion and, most importantly, could represent the class without a conflict of interest. In this regard, the Defendants had argued that the Plaintiffs, as former players, were in a conflict with the class members who were current players. According to the Defendants, if the Plaintiffs were successful in certifying their action, this would create a contingent financial liability for the clubs that would cause those clubs to have to cut the benefits they were paying to the current players. The Plaintiffs, as former players, had no interest in safeguarding the benefits that were paid to current players. The motion judge rejected this argument, finding at para. 233, among other things, that "if the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest." In the case at bar, the difference alleged by the Defendants did not arise out of the resolution of the common issues, but out of something entirely extraneous to the common issues, namely, the alleged financial instability of the Defendant clubs.

18 The Plaintiffs were granted leave to appeal the motion judge's refusal to certify the Uncertified Common Issues. The Defendants seek leave to cross-appeal the motion judge's finding that the Plaintiffs were suitable representative plaintiffs. If leave is granted they seek to have that finding overturned and an order made denying certification.

JURISDICTION

19 The Divisional Court has jurisdiction to hear this appeal pursuant to s. 30(2) of the *CPA*, which states that "[a] party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court."

20 On February 23, 2018, the Plaintiffs were granted to leave to appeal the certification decision and the costs decision. The parties agree that the combined effect of Rules 61.07(1) and 61.03(8) in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*") is that if leave to appeal has been granted, a respondent may request leave to cross-appeal from the panel hearing the appeal.

THE APPEAL ON THE MERITS

Did the Motion Judge Err in not certifying the Uncertified Common Issues?

Standard of Review

21 The Plaintiffs submit that the motion judge's decision discloses errors of law that are subject to a standard of review of correctness. They rely on *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69, [2013] 3 S.C.R. 949 (S.C.C.), at para. 65 ("AIC Limited") for the proposition that any deference owed to a motion judge at certification "does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached".

22 The Defendants agree that errors of law or principle are subject to review on a standard of correctness. However, they submit that the motion judge's decision not to certify the Uncertified Common Issues was consistent with the preferable procedure analysis in Supreme Court jurisprudence and disclosed no error of law. According to the Defendants, the motion judge's decision not to certify the Uncertified Common Issues is an example of appropriate case management of a proposed class action — a decision that is entitled to special deference from this court.

Errors Alleged by the Plaintiffs

23 The Plaintiffs allege that the motion judge made four errors in principle:

1. He erred in his application of proportionality to the preferable procedure analysis;
2. He erred in relying on s. 5(1)(d) of the *CPA* to effectively strike out tenable causes of action;
3. His appreciation of the comparative analysis mandated by the Supreme Court of Canada in *AIC Limited* was incorrect; and
4. He erred in finding that the five uncertified causes of action were redundant.

The Law Governing the Preferability Criterion

24 Section 5(1)(d) of the *CPA* provides that on a certification motion the representative Plaintiff must satisfy the court that "a class proceeding would be the preferable procedure for the resolution of the common issues".

25 In *AIC Limited*, the leading decision on this criterion, the Supreme Court of Canada states (at para. 48) that in order to satisfy the preferability requirement, the representative plaintiff must show "(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members claims". The second factor requires conducting a comparative analysis between a class action and other alternative processes (including non-litigation alternatives) for resolving the class members' claims.

26 In order to determine whether a class proceeding would be the preferable procedure for the resolution of the common issues, the common issues must be considered in the context of the action as a whole. In other words, how much will the resolution of the common issues contribute to resolving the action as a whole? Will it advance the claims substantially or just in a minor way, leaving the bulk of the issues to be determined by individual trials? In answering these questions "it is important to adopt a practical cost-benefit approach . . . and to consider the impact of a class proceeding on class members, the defendants, and the court" (*AIC Limited*, at para. 21).

27 The preferability procedure analysis must also consider the extent to which a proposed class proceeding will further the three principal goals of class actions — judicial economy, behaviour modification, and access to justice. This does not mean that a particular class action must achieve all of these goals in a specific case. As put in *AIC Limited*, at para. 23:

This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve these goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation [and I would add dispute resolution] that might be realistically available to the plaintiffs".

28 The Court in *AIC Limited* points out, at para. 24, that access to justice has two interconnected dimensions:

One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance — the results to be obtained — and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

29 In *AIC Limited*, at paragraph 26, the court held that, "A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered". To help a court determine whether both of these elements were present, the Court suggested a series of questions that a court should address. They are:

- (i) What are the barriers to access to justice?
- (ii) What is the potential of the class proceedings to address these barriers?
- (iii) What are the alternatives to class proceedings?
- (iv) To what extent do the alternatives address the relevant barriers?
- (v) How do the two proceedings compare?

The Motion Judge's Decision

30 In his decision, the motion judge sets out the law governing the preferable procedure criterion, including the principles cited above. After doing so he states, at para. 187:

And one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil proceedings.

31 The motion judge then cites the Supreme Court's decision in *Hryniak* as to the need to improve access to justice by moving away from the conventional trial to "more proportional procedures tailored to the needs of a particular case".

32 At para. 188, the motion judge states that "[t]he proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the part of the preferable procedure analysis that considers whether the claimants will receive a just and effective remedy for their claims".

33 The motion judge then considered the various causes of action put forward by the Plaintiffs. He found that the action involved answering a single question — when do amateur athletes become employees of their clubs and subject to various employment standards statutes? He states that the Plaintiffs had brought six causes of action to answer this one single question (in fact, the Plaintiffs had brought seven). While these causes of action may have been properly pleaded, they were redundant and unnecessary for the Plaintiffs to get a just and effective remedy.

34 As put by the motion judge, at paras. 198-199:

In this proposed class action, if the Plaintiffs prove that as a common employer the Defendants breached the various employment standards statutes, then they will succeed on their breach of statute claim and on their unjust enrichment claim and there would be no need to prove breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy and waiver of tort.

Conversely, if the Plaintiffs fail to prove that the Defendants breached the various employment statutes, they will not be able to snatch victory from the jaws of defeat by proving breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy or waiver of tort, because all of these claims will necessarily fail with the failure of the breach of statute claim.

35 The motion judge also found, at para. 200, that the "redundant causes of action cause enormous problems of manageability". In making this comment he refers to one cause of action — conspiracy — and finds that this claim "would probably lead to the OHL, CHL, and the teams of the OHL retaining independent defence counsel because each defendant would be entitled to a separate defence that they were not co-conspirators and that each did not have the intent to injure the players." Thus, instead of one defence counsel, there would be 20 firms mounting defences.

36 The motion judge concluded his analysis, at paras. 204-206, with the following comments:

In my opinion, it is inimical to the access to justice principles of the *Class Proceedings Act, 1992* to succumb to the argument that it would be simply unjust and unfair to deny the Class Members the opportunity to prove all the claims they have that satisfy the criteria for certification without regard to whether they actually need to prove all those claims in order to achieve access to justice.

The *Class Proceedings Act, 1992* is designed to provide the class members with the access to justice that they need, and needs are different than wants. For a cause of action to be certified, the preferable procedure criterion must be satisfied and that criterion is designed to ensure that the class members get the access to justice they need, keeping in mind a genuine judicial economy of a manageable mass claim.

In my opinion, in the case at bar, only the breach of statute and unjust enrichment causes of action need be certified. I conclude that only for these causes of action, the preferable procedure criterion is satisfied.

Analysis

Was the Motion Judge's Proportionality Analysis Compatible with the Current Law on Preferable Procedure?

37 As outlined above, in *AIC Limited*, the Supreme Court summarized that in its most basic form the preferable procedure inquiry is a comparative analysis between the relative advantages of a class action over other forms of resolving the dispute that may realistically be available to the plaintiffs.

38 The motion judge's reasons on preferable procedure do not include a comparative analysis of this type. Instead, they focus on proportionality and redundancy, such that they become a comparison between a class action that includes all of the causes of action that the Plaintiffs pleaded (which the motion judge found met the cause of action criterion) and a class action with only two of those causes of action. This is not the inquiry that *AIC Limited* mandates.

39 In his analysis, the motion judge focuses on access to justice — which the Supreme Court in *AIC Limited* has confirmed is an important goal of class actions. The Court of Appeal in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901, 327 O.A.C. 156 (Ont. C.A.) held that the preferable procedure assessment must be conducted by addressing the five questions set out in *AIC Limited*. They require a judge to identify the barriers to access to justice, discuss the potential of class proceedings to address those barriers, look at alternatives to class proceedings, ask how the alternatives can address the relevant barriers, and examine how the two proceedings compare. The motion judge in his preferability analysis sets out the questions, but never addresses them.

40 According to the Defendants, the questions can be rephrased to encompass the comparative analysis the motion judge did conduct: an analysis focused on two forms of class proceedings. We disagree. To reframe the questions in the way the Defendants propose is to distort the questions beyond recognition. The intent of the questions is to focus on what advantages the proposed class action has over other dispute resolution alternatives in terms of access to justice. It is not to pare down properly pleaded, otherwise certifiable causes of action based on the certification judge's own judgment as to how the class action should be litigated.

41 The motion judge's reasons focus on the relationship between proportionality and access to justice, a relationship that was highlighted by the Supreme Court in *Hryniak*.

42 In *Hryniak*, a motion judge found that the plaintiffs' claims could be resolved without a trial at a summary judgment motion. The Supreme Court of Canada upheld that decision, finding, at para. 5, that the "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims".

43 *Hryniak* is essentially a judicial reminder that not all disputes need to be resolved through full-blown trials, and that insisting of full-blown trials can undermine, rather than promote, access to justice. The Supreme Court noted, at paras. 27-29:

There is growing support for the alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflect the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts on the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and the alternative modes of adjudication are no less legitimate than the conventional trial.

This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always with the most painstaking procedure.

There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedure used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

44 Thus, in *Hryniak*, the cry for proportionality is directed at coming up with efficient and fair *procedures* for resolving disputes. It is not a direction to use what is essentially a procedural motion such as certification to make decisions of *substance* about what properly pleaded causes of action parties are entitled to advance.

45 In his proportionality analysis, the motion judge does address the *Hryniak* question when he asks "how much procedure a litigant actually needs to obtain access to justice". He then goes on to state that the *CPA* is designed to give litigants the access to justice they "need" as opposed to "want". In his view the uncertified causes of action were unnecessary "wants". This analysis raises two concerns.

46 First, while the motion judge describes his proportionality analysis as a procedural one consistent with *Hryniak*, in fact he uses the concept of proportionality to dismiss most of the plaintiffs' causes of action. A decision to eliminate causes of action is a substantive decision, not a procedural one.

47 Second, in making the decision as to which causes of action are "needed" at the certification stage (when pleadings may not yet been closed and the merits of the action are not the focus), there is a real concern that it is the judge, rather than plaintiffs' counsel, who is making the call as to how the action should be litigated. Is this appropriate when the motion judge's knowledge of the litigation is limited by the legislatively prescribed nature of certification, in accordance with s. 5(5) of the *CPA*, as a preliminary, procedural motion that is not to determine the merits of the proceeding?

48 Section 12 of the *CPA* provides that "[t]he 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." However, *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th) 603 (Ont. C.A.), at para. 68 makes it clear that this provision is procedural and must be exercised in accordance with the *CPA*, including its direction regarding the nature of a certification motion.

49 At some stage of the proceedings a judge may be in the position to decide that a particular cause of action can be determined without the necessity of a trial. A motion judge at the summary judgment stage may be equipped with all the tools necessary to make this determination. Unlike the certification motion judge, a summary judgment motion judge has closed pleadings and a full evidentiary record, giving her the tools to gain a full understanding of the litigation.

50 It is worth noting that the two cases that the motion judge cites in support of his decision not to certify what he considered to be redundant claims were both decisions of his own. In the Alberta certification proceeding, which was decided on a similar evidentiary record in support of substantially identical claims, Hall J. certified all of the Plaintiffs' claims finding that he did not feel that he could "dispose of properly pleaded causes of action in a class action certification application": see *Walter v. Western Hockey League*, 2017 ABQB 382, 62 Alta. L.R. (6th) 85 (Alta. Q.B.), at para. 46. Hall J.'s decision was upheld on appeal: *Walter v. Western Hockey League*, 2018 ABCA 188, 69 Alta. L.R. (6th) 215 (Alta. C.A.).

Did the Motion Judge Err in finding that the Common Issues Were Redundant?

51 As already noted, according to the motion judge the Plaintiffs brought "six causes of action to answer one critical question" — a question that he describes at para. 190 as being: "[w]hen do amateur athletes become employees of their teams and subject to various employment standards statutes?" The motion judge notes, at para. 198, that "if the Plaintiffs prove that as a common employer the Defendants breached the various employment standards statutes, then they will succeed on their breach of statute claim and on their unjust enrichment claim" and there would be no need to prove any of the other claims. The motion judge held, at para. 199:

[I]f the Plaintiffs fail to prove that the Defendants breached various employment statutes, they will not be able to snatch victory from the jaws of defeat by proving breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy, or waiver of tort, because all of these claims will necessarily fail with the failure of the breach of statute claim.

52 Thus, the motion judge's analysis depends entirely upon whether the Plaintiff's breach of statute claim fails. He does not go on to consider that one possible result might be that the Plaintiffs' breach of statute claim succeeds, but the claims against the individual clubs and leagues as a common employer fails. If that were to happen, the claims against the OHL and the CHL would be dismissed, as would the claims against each of the clubs as common employers. However, the allegedly "redundant" causes of action, particularly conspiracy, could provide a remedy against the two leagues and improve the class members' chances of collecting on any judgment, thereby furthering the objective of access to justice and, to use the words of the motion judge, ensuring that the claimants receive a "just and effective remedy for their claims".

53 The five-step test set out by the Supreme Court of Canada in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385 (S.C.C.) is very different from the common law or statutory tests for making out a common employer claim. Thus, the Plaintiffs may succeed on a conspiracy claim, but fail to establish that the Defendants are common employers. If they do, they will be able to collect judgment from any members of the conspiracy, which could include all of the Defendants. Further, if the Plaintiffs are successful in proving an unlawful conspiracy, their chances of collecting on a punitive damages award are enhanced.

54 With regard to complexity and manageability, the motion judge did not advert to any specific concerns arising from the evidence about any of the Uncertified Common Issues, except with respect to the conspiracy claim. No evidence was introduced by the parties on this point, and so the motion judge's concerns about potential complexities, such as the introduction of additional counsel, was pure speculation.

55 The motion judge also found that the negligence claim was redundant. There is no issue that a plaintiff is entitled to sue concurrently in both negligence and breach of contract: *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 (S.C.C.) ("*Rafuse"). In *Rafuse*, the Supreme Court held that the plaintiffs have the right to assert a cause of action that appears to be the most advantageous to them in respect of any particular legal consequence.

56 The test for establishing a duty of care and negligent breach of that duty is different from the test for establishing a breach of employment standards legislation. Further, in this case, if the Plaintiffs were to succeed in establishing negligence, they might have access to insurance coverage that they would not otherwise have. Given the Defendants' evidence that "certification could result in the loss of several [clubs] that would fold up operations", this could have a significant impact on the claimants' ability to enforce any judgment they obtain. This too would enhance access to justice.

57 The motion judge held that the breach of contract claim and the breach of the contractual duties of honesty, good faith, and fair dealing were also redundant. His reasons provide no particulars of his analysis in this regard. First of all, it is not uncommon for breach of employment statute claims to be framed in breach of contract, based on an analysis that these statutes are an implied term of all employment contracts. Second, the terms of the players' SPAs may incorporate rights and duties which differ from the duties of an employer or the rights of an employee under a statute. No evidence was placed on the record concerning this issue before the motion judge. As the motion judge emphasized in his costs decision, the motion he was dealing with was a procedural motion. The motion judge's task was to look at whether certain minimum evidentiary and procedural requirements were met concerning the causes of action at issue, not to delve into the substance of those causes of action, which would require a merits based analysis.

58 In finding that these causes of action were redundant, the motion judge also failed to consider whether different damages are available under breach of statute and breach of contractual duties. For example, damages for breach of contract are compensatory for the loss caused by the breach (*Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3 (S.C.C.)), while damages for breach of the contractual duties of honesty, good faith and fair dealing are compensatory for what the plaintiffs' economic position would have been, had the defendants fulfilled their duties (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) ("Bhasin")). Further, a breach of the duty of good faith may support an award of punitive damages: *Bhasin*, at para. 55.

59 With respect to the waiver of tort claim, the motion judge stated, at para. 146:

I pause here to say, it is debatable that waiver of tort, which is coupled with unjust enrichment, is correctly classified as a cause of action, but for present purposes I shall treat it as a cause of action, and I also note that insofar as it provides restitutionary relief, waiver of tort is redundant to the Plaintiff's unjust enrichment claim, which does provide the remedies of constructive trust and the disgorgement of ill-gotten gains.

60 The motion judge correctly identified that waiver of tort has been the subject of much discussion and debate. As a concept it is a vehicle that permits a plaintiff to recover a disgorgement of the defendants' profits.

61 Proving a claim in unjust enrichment requires proving: (1) that the defendant was enriched; (2) that the plaintiff was correspondingly deprived; and (3) that there was no juristic reason for the enrichment. In an action for unjust enrichment, "the defendant is required to "give back" property acquired from the plaintiff, which constitutes the "corresponding deprivation". In the case of the remedy of disgorgement, the defendant is required to "give up" property acquired from any source as a result of the wrong committed against the plaintiff" (Peter W. Kryworuk & Yola S. Ventresca, *Waiver of Tort on Trial* (The Civil Litigation Summit, Law Society of Upper Canada, 2012), at p. 3-3). There is no need to prove a corresponding deprivation. Thus, it is not correct to say that waiver of tort is redundant to the plaintiffs' unjust enrichment claim.

Conclusion

62 For these reasons we find that the motion judge erred in principle when he did not certify the Uncertified Common Issues. As a result the Plaintiffs' appeal in this regard should be allowed, the motion judge's order dismissing the claims should be set aside and an order should go certifying the additional common issues set out at Schedule "A" to these reasons.

CROSS-APPEAL ON THE MERITS

Should the Defendants Be Granted Leave to Appeal the Motion Judge's Finding that the Plaintiffs Were Suitable Representative Plaintiffs?

Summary of the Position of the Defendants

63 The Defendants begin their submissions by stating that the Plaintiffs' claim is a novel one; no court in Canada or the United States has ever determined that athletes in the position of the proposed class members are employees. As a result the Defendants have never structured their programs or finances on the basis that they have an obligation to pay players as employees. This is important since the Plaintiffs are seeking retroactive relief.

64 According to the Defendants, OHL players are afforded a multitude of benefits relating to hockey development, educational pursuits, and *in loco parentis* supports not available in other hockey leagues. They state that offering these programmes costs the Defendant clubs between \$40,000 and \$50,000 per player per season in an environment where one-third of the OHL clubs lose approximately \$100,000 to \$800,000 per season.

65 The Defendants submit that given their resources (which are finite) even certifying the Plaintiffs' claim will fundamentally alter the CHL. The Defendants will not be able to afford to continue to provide the current benefits and supports while also paying the players as employees. Thus, success for the Plaintiffs would lead to either the elimination of these benefits or the elimination of many of the clubs or both. This change would be detrimental to many of the class members whose interests lie in maintaining the benefits and supports they currently receive. According to the Defendants, these class members (who are current players) do not want to be treated as employees and would not have chosen to play for the OHL without receiving the current benefits. Further, many parents would not have allowed their children to enter into an employment relationship with the Defendants if it meant replacing the relationship that currently exists.

66 The Defendants submit that the effect of this reality is that there is an irresolvable conflict between the members of the class. Further, they argue, opting out presents no solution to this conflict. If a court determines that an employment relationship exists then the provisions of the *ESA* will apply league-wide to all players.

67 According to the Defendants, this irresolvable conflict of interest among the class means that the motion judge erred in law in certifying the class action. The representative Plaintiffs cannot fairly and adequately represent the whole class as the change in relationship they propose is contrary to certain class members' interests and deliberate choices.

68 There is another minor point that the Defendants make about the representative Plaintiffs that the Plaintiffs concede: Mr. Pachis cannot act as a representative plaintiff because he does not fall within the class definition as revised by the motion judge.

Test for Leave to Appeal

69 Of the two pathways by which a party may be granted leave to appeal the interlocutory decision of a motion judge, the Defendants raise only the Rule 62.02(4)(b) test, which requires that there be "good reasons to doubt the correctness of the order in question" and the "the proposed appeal involves matters of such importance that leave to appeal should be granted".

Analysis

70 The Defendants submit that the motion judge's errors relate both to his analysis of the common issue criterion under Section 5(1)(c) of the *CPA* and the representative plaintiff criterion set out in Section 5(1)(e) of the *CPA*.

Section 5(1)(c)

71 The Defendants begin their argument on this point by referring to the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 (S.C.C.) ("Dutton"), where at para. 40 the Court states:

Third, with respect to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

72 In the case at bar, according to the Defendants, success for one class member will not mean success for all.

73 In *Dutton*, the Supreme Court also stated, at para. 39, that the question asked by s. 5(1)(c) — namely whether the claims of the class members raise a common issue — must be approached purposively: "[t]he underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis."

74 As the motion judge noted, in *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1, [2014] 1 S.C.R. 3 (S.C.C.), the Supreme Court clarified what the common success requirement outlined in *Dutton* actually meant, at paras. 45-46:

Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for the question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.

Dutton and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members. [Emphasis added.]

75 Thus, as the Federal Court noted in *Horse Lake First Nation v. R.*, 2015 FC 1149 (F.C.) at para. 61, aff'd 2016 FCA 238 (F.C.A.), "the approach described in *Vivendi* focuses on the effect of the answer to the question on each class member". In the case at bar, the resolution of the key common issue will affect the legal interests of all the class members in the same way. Either they will all succeed and be found to be employees and entitled to employment standard benefits or they will all fail.

76 The negative consequences that may be visited on class members extra-legally does not constitute "failure" within the meaning of the jurisprudence. Thus, the Defendants' allegation about the financial effects on its clubs if the action is certified (which is disputed) does not constitute a basis for finding a conflict in the class in a certification motion. The conflict must come from the answer to the question itself, not from a party's dire predictions about what will happen if the question is answered in a certain way.

Section 5(1)(e)

77 This point is reinforced when one looks at the wording of the representative plaintiff criterion. The relevant portions of that criterion are:

5 (1) . . . (e) there is a representative plaintiff or defendant who,

...

(iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. [Emphasis added.]

78 Thus, a conflict arises when one subgroup of the class will have an adverse result from the resolution of the common issue, not from some speculative consequence that is irrelevant to the resolution of the common issue. As put by the motion judge, at para. 233:

If the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest.

The Jurisprudence

79 The Defendants relied on four cases to support their position as to the alleged conflict of interest. The motion judge analyzed all of those cases and pointed out why they did not apply. For the sake of completeness I will briefly repeat that analysis.

80 In *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375, 402 A.R. 85 (Alta. Q.B.), the Alberta Court of Queen's Bench refused to certify a proposed claim seeking remedies for approximately 600 cottagers who allegedly suffered a loss in the value and enjoyment of their properties as a result of a utilities plant that diverted water out of the lake on which the cottages were built. The real objective of the litigation for the proposed representative plaintiffs was to obtain an order requiring the province to raise the water level of the lake. This would have the effect of permanently submerging portions of the lands owned by other potential members of the class who owned lower-lying properties. If the representative plaintiffs succeeded in obtaining the remedy they sought, other class members would be harmed. Thus, the resolution of the main common issue in favour of some members the class would result in failure for others members.

81 In *Asp v. Boughton Law Corp.*, 2014 BCSC 1124 (B.C. S.C.) ("Asp"), the British Columbia Supreme Court refused to certify a class action that sought orders winding up an investment vehicle for a First Nations' family. A distinct group of proposed class members opposed the relief sought, taking the position that their interests would be harmed if the trust was unwound. Again, in *Asp* the harm and the conflict resulted directly from the remedy sought.

82 In *MacDougall v. Ontario Northland Transportation Commission* (2007), 221 O.A.C. 150 (Ont. Div. Ct.), the proposed representative plaintiffs were retired non-union employees who challenged their former employer's right to amend the pension plan to use the surplus in various ways. The court held that there was a conflict in the class because at least one of the various subgroups of current and former employees in the class would be adversely affected by a decision in the plaintiffs' favour on any of the proposed common issues. The court also found a conflict between the interests of retirees and those of active unionized employees, who continued to enjoy the impugned benefits and who had been arbitrarily excluded from the plaintiff class because of a contrary position they took in the litigation. Thus, without looking beyond the four corners of the lawsuit, success for one part of the proposed class would mean failure for others.

83 In this case, the proposed failure arises from something that is irrelevant to the four corners of the lawsuit — namely, an allegation that if the Plaintiffs are successful, the Defendants will be suffer dire financial consequences.

84 Finally, the Defendants rely on *Boucher v. P.S.A.C.* (2005), 47 C.C.P.B. 5 (Ont. S.C.J.) ("Boucher"). *Boucher* is another case involving the employer's use of a pension surplus. In that case the plaintiffs alleged that the defendant employer had wrongfully appropriated the surplus by giving active employees a contribution holiday and providing recent retirees with early retirement incentives. The proposed class was comprised of retirees who had allegedly been excluded from any share in the surplus, as well as current employees and more recent retirees who had benefited from the surplus. The certification judge observed, at para. 22, that the class included different groups of individuals "who have widely different interests *vis-à-vis* the relief sought in the statement of claim". The court concluded, at para. 26, that conflicts in the class existed "both in relation to what extent and for what period the impugned modifications to the plan are attacked".

85 We agree with the Plaintiffs that no such conflicts exist in this case. No common issue will require the court to determine whether the Defendants improperly advantaged one group of class members over another, or whether one group of class members will be required to reimburse money or other benefits. The relief sought for all the class members is the same. Again, the allegation that this relief will financially harm the Defendants, causing them to be unable to continue paying benefits to certain class members is an allegation that does not arise from and is irrelevant to the resolution of the common issues.

86 In short, in all of the above cases, the subject matter of the litigation gives rise to winners and losers among the class. This is not true for the case at bar. Thus, the motion judge did not err in concluding that these authorities did not assist the Defendants.

87 The Defendants submit that the motion judge erred when he relied upon the decision in *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) ("A&P"), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.) to support his conclusion regarding the lack of conflict in the class. According to the Defendants, A&P is distinguishable and provides no guidance on the conflict that exists in the case at bar.

88 In A&P, a proposed class action was brought by three plaintiff franchisees against the franchisor, A&P. A&P argued that a conflict existed between the proposed representative plaintiffs and other class members because certification of the action would upset the existing arrangements with the franchisees and cause A&P to revisit each of these arrangements in a way that could be much less favourable for the other class members. Some putative class members gave evidence opposing the class action on the basis of a concern that they could "stand to lose much more than [we] gain" in the litigation, and that a class action could "screw up the system that we have now."

89 Winkler J. (as he then was) rejected A&P's position that the proposed representative plaintiffs could not represent the class. In doing so he made two points that are directly applicable to the case at bar.

90 First, Winkler J. made it clear that the evidence from individual class members as to the desirability of a class proceeding is not appropriate. As stated at para. 32, certification motions are not "determined through a referendum of class members". The Defendants have also adduced similar kind of evidence from current players and their parents, evidence that is directed at making it clear that they oppose the class action because it would affect their existing arrangements with the Defendant clubs.

91 Second, Winkler J. rejected, at para. 46, A&P's argument that there was a conflict because certification of the action would upset the existing arrangements of the franchisees:

In my view, this is effectively an argument that there should be no litigation at all rather than an attack on either the adequacy of the plaintiffs as representatives or the preferability of a class proceeding as opposed to individual actions . . . However, as noted in *Hollick* at para. 16, the certification analysis is concerned with the "form of the action". Arguments that no litigation is preferable to a class proceeding cannot be given effect.

92 The Defendants in this case submit that the conflict issue they have identified will not be solved by the opt out provisions of the CPA because if a finding is made that the provisions of the ESA apply to any of the contracts at issue, then that finding will be binding on all of the SPA contracts. The same would be true if an individual action were brought. Thus, in effect, the Defendants are also arguing that there should be no litigation at all.

93 Finally, A&P's position that there was a conflict was based on factors that were totally extraneous to the common issues or the relief sought in the claim. The same is true in the case at bar. The fact that the Defendants may have financial difficulties as a result of the Plaintiff's claim is an irrelevant factor when it comes to determining that claim.

Conclusion

94 For these reasons, we find that there is no good reason to doubt the correctness of the motion judge's decision that the Plaintiffs were suitable representative plaintiffs. Thus, the Defendant have failed to satisfy the first part of the test for leave to appeal. We also find that the Defendants' proposed appeal raises no issues or principles which have not been thoroughly canvassed by the jurisprudence, jurisprudence that the motion judge carefully reviewed in his reasons. There is no issue of general or public importance that goes beyond the interests of the parties.

95 In this regard, we reject the Defendants' submission that the alleged novelty of the claim should factor into our decision. There is nothing novel in principle about the claim — it is claim that a specific set of circumstances gives rise to an employment relationship. These claims are made all the time in different circumstances. What is novel are the circumstances, but this is not an issue of principle that will affect the development of the law or the administration of justice.

THE COSTS DECISION

96 On the certification motion, the Plaintiffs sought partial indemnity costs of \$1,212,065.63, inclusive of HST and disbursements of \$145,027.78. The Defendants submitted that there should either be an award of no costs (given the alleged novelty of the Plaintiffs' claim) or that the Plaintiffs' costs should be substantially reduced and awarded in the cause.

97 The motion judge found that both parties were responsible for incurring excessive costs on what should have been a procedural motion. He therefore awarded the Plaintiffs the full amount they were claiming, that is \$1,212,065.63, but found that \$712,065.63 of this amount should be payable in the cause. He held that this award was sufficient to satisfy "the access to justice imperatives of the class action regime without ignoring that the Plaintiffs should bear, at least temporarily, some responsibility for the mutation of a procedural motion."

98 The motion judge dismissed the claims against the U.S. Defendants and ordered the Plaintiffs to pay the U.S. Defendants \$200,000 from the \$500,000 payable to the Plaintiffs forthwith. This was a reduction from the \$224,362.91 sought by the U.S. Defendants as the motion judge found the amount sought by the U.S. Defendants to be beyond the reasonable expectations of the Plaintiffs. He noted that the U.S. Defendants' request for costs included \$52,691.05 in legal fees and \$171,671.86 in disbursements, almost \$150,000.00 plus HST of which was paid to the Defendants' U.S. law expert.

99 He held, at para. 46, that "the fair and appropriate way of approaching the matter is to credit the [U.S.] Defendants' award against the amount due to the Plaintiffs". He remarked that this result was "akin to a *Bullock* or *Sanderson* Order where the unsuccessful defendant directly or indirectly pays the costs of the successful co-defendant." He further found that "[a]pplying this approach to the circumstances of the immediate case means that the Law Foundation is not out of pocket."

100 The Plaintiffs obtained leave to appeal the motion judge's costs order.

101 The Plaintiffs appeal both the "in the cause" portion of the costs awarded to them, and the failure of the motion judge to make the U.S. Defendants' costs payable by the LFO.

102 The Plaintiffs obtained financial support from the LFO.

103 LFO submits that the *Law Society Act*, R.S.O. 1990, c. L.8 ("LSA") requires costs to the U.S. Defendants be paid by the LFO, and not the Plaintiffs (as ordered by the motion judge). However, LFO claims the motion judge's statement that his order was "akin to a *Bullock* or *Sanderson* Order" meant that the costs of the U.S. Defendants should be paid by the Canadian Defendants. In any event, LFO claims the amount of costs payable to the U.S. Defendants was excessive.

104 The Canadian Defendants seek leave to appeal the motion judge's costs order payable by the Canadian Defendants to the Plaintiffs, but at the hearing, abandoned their motion.

ANALYSIS AND CONCLUSIONS REGARDING THE COSTS DECISION

105 The issues on the appeal of the costs order are:

- a. Should the Defendants have been ordered to pay a larger portion of the Plaintiffs' costs upfront instead of "in the cause"?
- b. Who should pay the costs of the U.S. Defendants? and
- c. Should the costs order submitted by the U.S. Defendants be reduced?

106 A costs award should be set aside on appeal "only if the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303 (S.C.C.), at para. 27.

107 A successful party is ordinarily entitled to partial indemnity costs: *Vester v. Boston Scientific Ltd.*, 2017 ONSC 2498 (Ont. S.C.J.), at para. 22.

108 The motion judge correctly noted that, as set out in Rule 57 of the *Rules*, the purpose of cost awards is to: (1) indemnify successful litigants for the cost of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements.

Payment of a Portion of the Plaintiffs' Costs in the Cause

109 The decision to order a portion of the plaintiffs' costs in the cause is entitled to substantial deference, as a costs order is a discretionary decision entitled to significant deference on review: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 25; *Nova Chemicals Corp. v. Dow Chemical Co.*, 2017 FCA 25 (F.C.A.), at para. 6; *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597, 95 O.R. (3d) 365 (Ont. C.A.), at para. 27; *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161 (Ont. C.A.), at para. 68.

110 In *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 6354 (Ont. S.C.J.), the motion judge held that the successful plaintiffs should receive only a portion of their costs forthwith because they expended resources on issues beyond those required to meet the certification criteria. He reasoned, at para. 138:

[A] defendant should not have to pay for legal services tacked on to the certification and leave motion that should more properly be paid for if the plaintiff is successful in the litigation. Costs in the cause has the virtue that sometimes it is fair that a party should recover costs for an interlocutory motion only if that party ultimately succeeds in the action.

111 In *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2016 ONSC 878 (Ont. Div. Ct.), the plaintiffs' motion for leave to appeal was dismissed. This Court affirmed that it is within a motion judge's discretion to delay payment of a portion of the costs in the cause to reflect resources that the plaintiffs expended on issues beyond those required for certification.

112 In the instant case, at paragraph 20 of his costs decision, the motion judge notes that:

The Plaintiffs concede that the amount of their claim for costs is extraordinarily large, but they attribute the enormous costs of the certification motion to the Defendants' concede nothing, contest everything, Churchillian resistance to the certification motion.

113 However, the motion judge held, at para. 50, that the Plaintiffs contributed to taking the certification motion "into territory that was outside the boundaries of a certification motion." He reasoned, at para. 58:

Should the Plaintiffs succeed at the common issues trial, then the payment of the costs has simply been postponed. Should the Plaintiffs fail at the common issues trial, then the Plaintiffs will not recover their costs.

114 The motion judge therefore did not reduce the amount of partial indemnity costs payable. Rather, he ordered costs in the amount of \$500,000 payable forthwith for the certification motion, "having regard to the awards in comparable class actions . . . for the certification motion". He ordered the Plaintiffs to pay the U.S. Defendants' costs of \$200,000 which sum was to be deducted from the \$500,000 payable forthwith. He also ordered the balance of \$712,065.63 payable to the Plaintiffs in the cause.

115 The motion judge's finding that the parties engaged in "a massive foray into the merits" beyond what was needed to address the certification motion requirements was a factual determination. The timing of payment recognizes that, while the plaintiffs were successful, they expended a good deal of their resources on issues that went beyond the procedural requirements of certification and waded into the substance of the dispute, but that those costs may well be appropriate to address the common issues on the merits.

116 Moreover, there is no evidence that this order fails to satisfy the access to justice imperatives given that the Plaintiffs were granted the full amount of costs they sought and the motion judge's finding that "the Plaintiffs should bear, at least temporarily, some responsibility for the mutation of a procedural motion."

117 Lastly, the decision is consistent with Rule 57.01(1)(e) and other cases where costs were incurred in respect of arguments that extended beyond the scope of the motion at issue.

118 The motion judge recognized that it was within his discretion to order a portion of costs payable in the cause and he reasoned that the Defendants should not be required to pay these costs associated with litigating the common issues if the Plaintiffs ultimately fail at the common issues trial.

119 For these reasons, the appeal of the decision to order a large portion of the Plaintiffs' costs payable "in the cause" is dismissed.

Who Should Pay the U.S. Defendants' Costs?

120 The motion judge ordered the Plaintiffs to pay the U.S. Defendants' costs in the amount of \$200,000 to reflect the fact that they shared "some of the responsibility for the excesses of the certification motion". This sum was to be credited against the Plaintiffs' costs award of \$500,000 payable by the Canadian Defendants to the Plaintiffs. He noted that both the Canadian and U.S. Defendants were represented by the same counsel.

121 He refused to give the Plaintiffs recourse to the CPF administered by LFO, for the purpose of paying the costs order to the U.S. Defendants.

122 The motion judge held, at para. 46:

In my opinion, the fair and appropriate way of approaching the matter is to credit the American Team Defendants' award against the amount due to the Plaintiffs, and I so order. The result is akin to a *Bullock* or *Sanderson* Order where the unsuccessful defendant directly or indirectly pays the costs of the successful co-defendant. Applying this approach to the circumstances of the immediate case means that the Law Foundation is not out of pocket. In my opinion, it is fair and appropriate that the American Team Defendants be paid their costs but it is also fair and appropriate to attribute the payment to the Canadian Team Defendants who together share some of the responsibility for the excesses of the certification motion.

123 The Plaintiffs and LFO claim that the motion judge erred in principle in ordering the Plaintiffs to pay the costs of the U.S. Defendants, as the *LSA* precludes the court from making such an order. LFO did not take the position before the motion judge that it should not be responsible for the payment of any adverse order as to costs made against the Plaintiffs.

124 Section 59.4(1) of the *LSA* provides that, "a defendant may apply to the LFO board for payment from the Class Proceedings Fund in respect of costs award made in the proceeding in the defendant's favour against a plaintiff who has received financial support from the Fund in respect of the proceeding."

125 When the Class Proceedings Committee approves financial support from the CPF, the CPF becomes financially responsible for adverse costs awards against the plaintiff by operation of section 59.4 of the *LSA*. The impact on the funds available in the CPF is not a relevant consideration.

126 Section 59.4(3) of the *LSA* stipulates that a defendant who has the right to apply for payment of a costs award from the CPF "may not recover any part of the award from the plaintiff." As such, once the application for funding has been approved, there is no legal authority or mechanism to deny payment of an adverse costs award from the CPF.

127 In *Das v. George Weston Limited*, 2018 ONCA 1053 (Ont. C.A.), Doherty J.A. held, at paras. 250-251, that the CPF is there to promote access to justice and cannot be used to reduce the amount payable to a successful defendant. The purpose of these provisions in the *LSA* is to protect class representatives from personal exposure to costs in actions where financial support has been granted by the CPF. Such protection is important for promoting the purposes of the *CPA*.

128 In this case, the motion judge purported to "attribute the payment" of the U.S. Defendants' costs to the Canadian Defendants. He did so by ordering that the amount payable by the Canadian Defendants to the Plaintiffs in costs be reduced by

the amount of costs he awarded to the US Defendants. The clear effect of this order was to make the Plaintiffs responsible for the payment of the U.S. Defendants' costs, something that is contrary to the provisions of the *LSA*.

129 For these reasons, we find the motion judge made an error in principle in ordering costs the Plaintiffs to pay the U.S. Defendants' costs when the *LSA* does not permit the court to do so. This ground of appeal is granted and the U.S. Defendants are to have their costs paid by the LFO, not the Plaintiffs.

130 We do not agree with the additional submission of the LFO that it should be granted leave to appeal to obtain an order that the U.S. Defendants' costs be paid by the Canadian Defendants, and not the LFO, on the basis that the motion judge expressed an intention to have the unsuccessful defendant pay the costs of the successful defendant and simply erred in executing this intention.

131 The judge hearing an appeal of a costs decision is accorded a high degree of deference as costs are a matter of discretion. Leave to appeal costs should be granted sparingly and only in obvious cases. There must be "strong grounds" upon which an appellate court could find that a judge exercised his or her discretion on a wrong principle: see *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2015 CarswellOnt 8853, 386 D.L.R. (4th) 313 (Ont. Div. Ct.).

132 The fact that the motion judge referred to his order as "akin to a *Bullock* or *Sanderson* order" may simply have been reference to one award being offset against another to ensure that all parties were sanctioned for excesses of litigation.

133 In any event, we accept the Canadian Defendants' argument that this case does not meet the requirements for such an order as the Canadian Defendants did not try to shift liability onto the U.S. Defendants; the Plaintiffs, not the Canadian Defendants, added the U.S. Defendants as parties to the litigation; different causes of actions were asserted against the Canadian and U.S. Defendants; and the Plaintiffs' funding arrangement clearly requires costs payable by the Plaintiffs to be paid by LFO.

134 For these reasons, as noted above, the Plaintiffs' appeal to have the U.S. Defendants' costs paid by the LFO is granted. LFO's application for leave to appeal that order on the basis that the Canadian Defendants should pay is denied.

Was the Quantum of Costs Sought by the U.S. Defendants Excessive?

135 LFO also applied for leave to appeal the quantum of the costs order made in favour of the U.S. Defendants. In doing so, their submissions concerning the quantum of costs awarded to the U.S. Defendants focused on the amount paid to the U.S. Defendants' expert, which, as already noted, comprised \$150,000.00 of the amount that they claimed.

136 In assessing the quantum of the U.S. Defendants' costs, the motion judge referred to the non-exhaustive criteria to assist courts in determining whether an expert's fee is fair and reasonable or whether it is excessive as set out in *Hamfler v. 1682787 Ontario Inc.*, 2011 ONSC 3331 (Ont. S.C.J.), at para. 17:

1. Did the evidence of the expert make a contribution to the case, and was it relevant to the issues?
2. Was the evidence of marginal value or was it crucial to the ultimate outcome at trial?
3. Was the cost of the expert or experts disproportionate to the economic value of the issue at risk?
4. Was the evidence of the expert duplicated by other experts called by the same party? Was the report of the expert overkill or did it provide the court with the necessary tools to properly conduct its assessment of a material issue?

137 The Defendants' U.S. law expert filed two reports (the second to respond to further issues raised by the Plaintiffs' expert). The Defendants' U.S. expert addressed issues of U.S. law pleaded by the Plaintiffs under multiple U.S. statutes addressing jurisdictional principles such as comity and the recognition and enforcement of Canadian judgments in the United States. The motion judge dismissed all claims against the U.S. Defendants, in part, because he concluded that states' laws regarding whether amateur athletes are employees are unsettled. In doing so he relied on the evidence of the Defendants' U.S. law expert.

138 The motion judge held that the Plaintiffs' criticism of the U.S. Defendant's fee of approximately \$150,000.00 fee in comparison to the Plaintiffs' expert's fee of \$34,000.00 is "somewhat unfair when it is noted that the Plaintiffs are seeking \$116,000.00 for experts' fees and a media campaign that is challenged by the Defendants as inappropriate."

139 He noted, however, that both sets of Defendants were represented by the same counsel.

140 The motion judge determined that:

Doing the best that I can based on the information provided to me, I do regard the fee claim of the [U.S.] Defendants as beyond the reasonable expectations of the Plaintiffs and unfair and unreasonable, I reduce the claim from \$224,362.91 to \$200,000 all inclusive. This sum should be credited against the Plaintiffs' award.

141 The motion judge's decision as to the quantum of costs payable is entitled to substantial deference. He articulated the information available, the appropriate legal principles to be applied and the reasons for reducing the amount payable to the U.S. Defendants and his reasons therefore. His reasons on quantum disclose no error in principle nor is his decision on costs clearly wrong. There is no issue raised that goes beyond the interest of the parties.

142 For these reasons leave to appeal the quantum of costs is denied.

CONCLUSION

143 For the above reasons:

- The Plaintiffs' appeal regarding the motion judge's failure to certify the Uncertified Common Issues is allowed;
- The motion judge's decision dismissing these claims is set aside and an order shall go certifying the additional common issues set out as Schedule "A" to these reasons;
- The Plaintiffs' costs appeal is dismissed except with respect to the order respecting the payment of the U.S. Defendants' costs. That order shall be set aside and an order shall go that the U.S. Defendants costs shall be paid by the LFO. As a consequence, the Canadian Defendants shall forthwith pay the Plaintiffs a further \$200,000.00; and
- LFO's application for leave to appeal the costs order is dismissed.

144 Failing agreement the parties may make submissions in writing on the question of costs. The Plaintiffs shall make their submissions within 10 days of the release of these reasons and the Defendants and LFO shall have 10 days thereafter to make their submissions.

Player's appeal allowed; clubs' appeal dismissed; foundation's appeal allowed.

Appendix

Schedule "A" — Additional Common Issues

Breach of Contract

Are the minimum wage, overtime pay, holiday pay, and/or vacation pay requirements under the Applicable Employment Standards Legislation in Ontario express or implied terms of contract between the Class Members and any or all of the Defendant Clubs, the OHL, and/or the CHL?

Did any or all of the Defendant Clubs, the OHL, and/or the CHL breach any of the contractual obligations found to exist above?

Negligence

Did any or all of the Defendant Clubs, the OHL, and/or the CHL owe a duty of care to the Class Members to:

- a. Ensure that Class members are properly classified as employees;
- b. Advise Class members of their entitlements under the Applicable Employment Standards Legislation;
- c. Ensure that Class Members' hours of work are monitored and accurately recorded; and
- d. Ensure that Class Members are compensated in accordance with their entitlements under the Applicable Employment Standards Legislation?

Did any or all of the Defendant Clubs, the OHL, and/or the CHL breach any of the duties of care found to exist above?

Breach of Duty of Honesty, Good Faith, and Fair Dealing

Did any or all of the Defendant Clubs, the OHL, and/or the CHL owe a duty, in contract or otherwise, to the Class Members, to act in good faith and to deal with them in a manner characterized by candour, reasonableness, honest and/or forthrightness in respect of its obligations to:

- a. Ensure that Class Members are properly classified as employees;
- b. Advise Class Members of their entitlements under the Applicable Employment Standards Legislation;
- c. Ensure that Class Members' hours of work are monitored and accurately recorded; and
- d. Ensure that Class Members are compensated in accordance with their entitlements under the Applicable Employment Standards Legislation?

Did any or all of the Defendant Clubs, the OHL, and/or the CHL breach their good faith duties in any of the respects found to exist above?

Conspiracy

Did any or all of the defendants conspire to violate the Applicable Employment Standards Legislation? If so, when, where, and how?

Waiver of Tort

Are any or all of the Defendant Clubs, the OHL, and/or the CHL liable to the Class Members in waiver of tort?

Footnotes

1 The following claims were not certified by the motion judge: (a) breach of contract; (b) negligence; (c) breach of duty of honesty, good faith, and fair dealing; (d) conspiracy; and (e) waiver of tort ("Uncertified Common Issues").

TAB 6

2005 CarswellOnt 2742
Ontario Superior Court of Justice

Boucher v. P.S.A.C.

2005 CarswellOnt 2742, [2005] O.J. No. 2693, 140 A.C.W.S. (3d) 244, 18 C.P.C. (6th) 391, 47 C.C.P.B. 5

N. ROBERT BOUCHER, MARK KRAKOWSKI, JOE PACHOLIK, and ANN HOWITT, as Plaintiffs, representing the class members of the Pension Plan of the Public Service Alliance of Canada currently receiving pension benefits (Plaintiffs) and THE PUBLIC SERVICE ALLIANCE OF CANADA IN ITS CAPACITY AS THE PLAN ADMINISTRATOR OF THE PENSION FUND OF THE PUBLIC SERVICE ALLIANCE OF CANADA (Defendant)

Charbonneau J.

Heard: May 24, 2005

Judgment: June 29, 2005^{*}

Docket: 03-CV-26252

Counsel: Douglas G. Menzies for Plaintiffs

David A. Stamp, Derek Leschinsky for Defendant

Subject: Civil Practice and Procedure; Corporate and Commercial

MOTION by retired employees to certify class proceeding against employer about pension fund.

Charbonneau J.:

1 The plaintiffs bring a motion for an order certifying this action as a class action pursuant to the provisions of the *Class Proceedings Act*, 1992, S.O. C.6 ("the Act"). The proposed representative plaintiffs seek to represent a class which:

includes members of the Public Service Alliance of Canada Pension Plan who retired from employment prior to December 31st, 2001, and who are entitled to a pension benefit or deferred pension benefit, together with spouses or dependent children entitled to an immediate or deferred pension, as a result of the death of a retired member, and the estate or any beneficiaries of a member deceased since December 31st, 2001.

The nature of the action

2 The four (4) plaintiffs are former employees of the Public Service Alliance of Canada ("PSAC"). They retired at different dates and are presently receiving certain pension benefits granted to them at the time of their retirement by virtue of the provisions of the pension plan of the PSAC in force at the relevant time.

3 PSAC is also the administrator of the plan, through its executive committee and is being sued "in its capacity as the plan administrator of the pension fund of the Public Service Alliance of Canada". However, in the body of the Statement of Claim, the plaintiffs also make certain allegations against PSAC as employer.

4 The plaintiffs allege that a substantial surplus accumulated in the pension plan fund between 1995 and 2002. The plaintiffs further allege that the defendant wrongfully appropriated the surplus by taking a contribution holiday, allowing employees to pay a portion of their contribution from surplus, providing early retirement incentive payments to certain employees, making pay equity payments, and providing enhanced pension benefits to new retirees by improving the method of calculating the three

best year's average and introducing the Rule of 80 in place of the Rule of 85. The plaintiffs allege that all of that constituted an appropriation of the benefit of the surplus by the defendant for its use as employer. The plaintiffs further allege that they were totally excluded "from any consideration or payment out of the surplus" [Paragraphs 5, 6, 7, 8 and 13 of the Statement of claim].

5 The plaintiffs also allege that the retirees do not have adequate representation on the Joint Pension Advisory Committee.

6 The Statement of Claim goes on to state as follows in the following paragraphs:

30. The Plaintiffs state, and the fact is, that in law and in equity the surpluses that have accumulated over the years in the PSAC Pension Plan represent the cumulative effects of over-contributions, better than predicted investment returns, and lower than predicted Plan liability **to all of which factors the Plaintiffs have contributed, and, in terms of reduced Plan liabilities, they still contribute.**

31. The Plaintiffs state, and the fact is, that in law and in equity any surpluses that accumulate either should be paid out to the Plaintiffs and the active members by way of a return of contributions with interest or accumulated investment returns, or used to enhance pension benefits or provide for other benefits for retirees, or shared with the retirees in the same proportion that the retirees pension contributions, together with accumulated investment returns and interest, have contributed to the creation of the surplus.

32. The Plaintiffs state, and the fact is, that the method selected by the Defendant to reduce the surplus which the actuaries determined in 1995 existed and which by virtue of the pension legislation had to be reduced, unjustly, unfairly and illegally appropriated the sacrifice of the Plaintiffs and active members from previous years, who had created the surplus, to provide the employer and current active members with a pension contribution holiday in various amounts, in various percentages and in various of the years between 1996 and the present.

33. The Plaintiffs state, and the fact is, that there can be in law or equity, no just reason to permit current active employees of PSAC to accumulate pension entitlements without making any contributions. This is particularly repugnant to those of the plaintiffs who have been retired for a significant number of years, and whose current pension entitlement, even with full indexation, represents a tiny portion of what current active members will derive on their retirement.

34. The Plaintiffs state, and the fact is, that there can be in law or equity, no reason to justify the employer unilaterally resiling from its historical pattern of direct pension contribution, all the more so since the employer, in contrast to the active employees, is not a member and therefore not an owner of the assets and' surplus of the Pension Plan.

35. The Plaintiffs state, and the fact is, that the employer has unilaterally, and without justification treated the Pension Plan assets as a source of funds for the employer's own needs. On a number of occasions between 1995 and the present the employer has availed itself of pension funds for the purpose of paying out amounts it owed to its employees by way of pay equity awards plus interest. As well, over the same time period, the employer availed itself of the Pension Plan funds for the purpose of paying to certain employees early retirement incentives and payments.

36. The Plaintiffs state, and the fact is, that the Defendant in its capacity as administrator of the Pension Plan, owes a fiduciary obligation to the members of the Pension Plan (current active contributors as well as the Plaintiff retirees) to fairly administer the Plan for the benefit of the members.

37. The Plaintiffs state, and the fact is, that the Defendant is in breach of its fiduciary obligations owed to the members of the Pension Plan, and to the Plaintiffs in particular by appropriating trust monies for its own benefit qua employer for the purposes of making the pay equity and early retirement incentive payments detailed above.

7 The plaintiffs claim various remedies including:

a) declaration that they were entitled to share in the surplus in accordance with their contribution

a) a declaration that they will be entitled to share in any future surplus in proportion to their surplus

- b) a declaration that the defendant wrongfully appropriated or permitted to be wrongfully appropriated for its benefit as employer a portion of the surplus
- c) a declaration that the defendant wrongfully permitted employees to participate in the surplus by permitting elimination or reduction of their contributions to the pension fund
- d) damages in the amount of 9 million dollars or such greater or lesser amount found to be the proportionate share of the plaintiffs in the surplus (...) including those portions wrongfully appropriated (...)
- e) pre-judgment interest on the amount awarded
- f) a mandatory injunction requiring the defendant to cure the inadequate representation of the plaintiffs on the PSAC and prevent the defendant from acting in conflict of interest in view of his dual role as employer and plan administrator.

The Statutory Framework

8 The test for the certification of a class proceeding is set out in s.5 of the *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 notifying class members of the proceeding, and
 - (i) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Analysis

9 The plaintiffs' motion is to say the least confusing. Many of their submissions are made in the alternative or as mere possible avenues of how they propose to deal with the class action depending on various contingencies. It is presented as a work in progress.

10 It must be said at the outset that the onus is on the plaintiffs to establish the criteria set by section 5. It is not for the court to sort out the plaintiffs' material and try to somehow salvage a class proceeding out of them.

11 The plaintiffs' motion fails for a number of reasons some of which are the following:

1. The plaintiffs have not defined a class.
2. The plaintiffs seek to represent various groups of individuals who have conflicting interests.

3. A class proceeding is not the preferable procedure to deal with the governance claim as this could be adequately dealt with by way of a standard proceeding by way of action or notice of application.
4. The litigation plan proposed by the plaintiffs is unworkable.

Identifiable class

12 The plaintiffs have failed to clearly define the class.

13 The second requirement of the test for certification is that there must be an identifiable class of two or more persons. The class definition serves three (3) purposes:

- (a) It identifies the persons who have a potential claim against the defendant
- (b) It defines the parameters of the lawsuit so as to identify those persons bound by the result of the action
- (c) It describes who is entitled to notice.

See *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.)

14 At the certification stage, there is no need to know the identity of each class member nor the exact number of class member. It is sufficient if there are at least two and the class definition is such that any individual coming forward will be easily and objectively identifiable to the class.

15 The plaintiffs propose the following definition for the class:

The proposed class includes members of the Public Service Alliance of Canada Pension Plan who retired from employment prior to December 31st, 2001, and who are entitled to a pension benefit or deferred pension benefit as a result of the death of a retired member, and to the estate of any beneficiaries of a member deceased since December 31st, 2001.

16 This definition was offered during submissions at the court's urging in view of what appeared to be an utterly confused proposition in both the statement of claim and the plaintiffs' factum.

17 The evidence indicates that there were 215 retirees entitled to benefits under the Plan as at January 1, 2004. The exact number of retirees as of December 31, 2001 would be somewhat less but that number could be easily identified from PSAC's records. As of January 1, 2004, there were also 32 former employees entitled to a deferred vested pension.

18 The pension plan is a defined benefit pension plan so that any employee is entitled to receive at his or her normal retirement date a pre-defined and guaranteed pension allowance. In the normal course of events, if a member retires early, the pension amount would be reduced by a pre-established formula. For the first years of the plan, PSAC used assets from the Plan fund in order to purchase an annuity from an insurance company. This practice was discontinued in 1993. The retirees who received such annuities are referred to as annuitant retirees.

19 The proposed class definition is unacceptable because it is open-ended. It only defines a portion of the members who constitute the whole class. It is noteworthy that the plaintiffs' definition of the class varied from document to document prepared by the plaintiffs. In the statement of claim, the plaintiffs state that the claim is "on behalf of all members of the pension plan of the Public Service Alliance of Canada", (paragraph one). In the litigation plan, (called plan of administration) the plaintiffs "propose to limit participation in the class to those who have retired in the year 2000 or earlier". However, the plaintiffs then proposed a totally different class by making the following confusing proposal:

The plaintiffs accordingly propose a division of the plaintiffs into active and passive participants: the active participants would be those who retired in the year 2000 or earlier with at least ten years of pensionable service and pension contributions

prior to any pension contribution holiday. The passive members of the class would be those who would financially benefit from any distribution scheme (see following discussion under that heading) but who are still active members or who have retired since the year 2000, and whose allegiances and interests in the plaintiffs' side of the litigation may be taken to be compromised or indeed antithetical to those of the active participants.

20 In their factum, the plaintiffs proposed yet another different class definition. Again, the class is defined as including a number of individuals but with the possibility of including other individuals, should certain facts be found to exist.

21 With so many permutations in the class definition, it will be impossible to easily identify who are legitimate members and it will be an impossible task to decide who should be notified of the class proceedings.

22 One of the reasons for the plaintiffs' confusion is the fact that they are attempting to represent groups of individuals who have widely different interest vis-à-vis the relief sought in the statement of claim.

23 For obvious reasons, a class definition may not be expressed as "includes" certain individuals. During submissions, I suggested that at the very least the word includes would have to be deleted. However, this would not be a rational class definition in relation to the overall common issues the plaintiffs seek to have resolved by their action.

Conflicting Interests

24 The plaintiffs propose to represent claimants who have clearly conflicting interest depending on what factual situations is found to exist and/or what impugned modification to the plan the plaintiffs choose to prioritize. In their factum, the plaintiffs describe two groups, which groups are necessarily made up of individuals differently situated vis-à-vis the relief sought by the claim:

The Plaintiffs say that the class may be divided into two groups. The first group includes the active participants, those who retired on or before December 31st, 2000, who the Plaintiffs say will accrue benefits from the action that will likely outweigh or, at the very worst, balance off any obligations to repay. The second group includes passive participants, who are active members still, but who might, because of a long history of contribution to the pension plan, be entitled to benefit from the class action or, at the very least, may obtain benefits that would set off against amounts that they might otherwise have to be required to repay.

25 The two groups are comprised of the following groups:

- (a) The annuitants: members retired before 1995 receiving benefits by way of an annuity and who have not benefited from either the retirement enhancements or the contribution reductions. Plaintiff Ann Howitt is an annuitant.
- (b) The non-sharing group: members who received pension benefits directly from the plan but received no benefit from either impugned variations to the plan. Plaintiff Joe Pacholik is part of this group.
- (c) The early retirement group: members who receive pension benefits directly from the plan and participated in early retirement enhancements.
- (d) The contribution reduction group: retired members with pension benefits who participated in the contribution reductions.
- (e) The fully sharing group: retired members who participated in both impugned variations to the plan. Plaintiffs Robert Boucher and Mark Krakowski are part of this group.
- (f) The non-sharing deferred group: members who have yet to retire but have a deferred pension with the plan and who did not benefit from the contribution reductions.

- (g) The sharing deferred group: members who have yet to retire but have a deferred pension with the plan and have benefited from the contribution reductions.
- (h) The beneficiary group: individuals receiving benefits in respect of a deceased member. Some are annuitants and some are receiving benefits directly from the plan.
- (i) The spousal group: former spouses of retired plan members.
- (j) The current employees.

26 I agree with the respondent's submissions that numerous conflicts exist amongst the various groups both in relation to what extent and for what period the impugned modifications to the plan are attacked.

27 The plaintiffs submitted there is a good possibility the various members of the class would come to an agreement as to how the surplus would be shared and possibly even as to what amount the members of the fully sharing group would have to reimburse. However, there exists no such agreement at this time. The class action may not be allowed to proceed on a mere hope of the conflicts resolving themselves along the way.

28 It is noteworthy that both the retired members and the current employees would have an equal interest in the governance issue. For that common issue, defining the class by referring to only retired members receiving benefits as of a given date, would arbitrarily exclude many individuals who share the same interest.

The Litigation Plan

29 The plan falls short of providing essential elements which should be addressed in any litigation plan as outlined by Nordheimer J. in *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 (Ont. S.C.J.).

- (i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence;
- (ii) the collection of relevant documents from members of the class as well as others;
- (iii) the exchange and management of documents produced by all parties;
- (iv) ongoing reporting to the class;
- (v) mechanisms for responding to inquiries from class members;
- (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries;
- (vii) the need for experts and, if needed, how those experts are going to be identified and retained;
- (viii) if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues, and;
- (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided.

30 This is not a simple action which can be certified by a run of the mill litigation plan. Here, the plan must address how the plaintiffs will deal with the difficult and complex litigation issues the action is certain to create. In particular here, the plan does not address realistically how the plaintiffs intend to deal with the complex and divergent interests of the proposed class members.

The Governance Issue

31 Somewhat distinct from the various claims pleaded by the plaintiffs for distribution of the surplus in the pension plan, the plaintiffs also seek a mandatory injunction to compel the defendant to seek an amendment to the plan's constitution in order to give the plan members a larger role in the governance of the plan.

32 In *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.), the Supreme Court of Canada required the motion judge to look at all other reasonably available procedures of resolving any class action claim keeping in mind the three objectives of the *Act*, namely judicial economy access to justice and behaviour modification.

33 I find that the governance claim could be as efficiently, if not more efficiently, dealt with by way of an individual proceeding. In all likelihood, the material facts not being in dispute the proceeding could be by notice of application pursuant to Rule 14.05(3)(g) and (h).

Conclusion

34 For all of the above reasons, the motion is dismissed. Counsel may provide me with brief written submissions on costs. If so inclined, the defendant to provide submissions within twenty (20) days and the plaintiffs to reply within twenty (20) days thereafter.

Motion dismissed.

Footnotes

- * Additional reasons at *Boucher v. P.S.A.C.* (2005), 2005 CarswellOnt 5677 (Ont. S.C.J.).

2006 CarswellOnt 1658
Ontario Superior Court of Justice (Divisional Court)

Boucher v. P.S.A.C.

2006 CarswellOnt 1658, 25 C.P.C. (6th) 219, 51 C.C.P.B. 18

N. Robert Boucher et al. (Plaintiffs/Appellants) and The Public Service Alliance of Canada (Defendant/Respondent on appeal)

Matlow, Jennings, Cusinato JJ.

Judgment: February 16, 2006

Docket: Ottawa 05-DV-1128

Proceedings: affirming *Boucher v. P.S.A.C.* (2005), 18 C.P.C. (6th) 391, [2005] O.J. No. 2693, 47 C.C.P.B. 5, 2005 CarswellOnt 2742 (Ont. S.C.J.) [Ontario]

Counsel: Douglas G. Menzies for Plaintiffs/Appellants

Subject: Civil Practice and Procedure; Corporate and Commercial

APPEAL by employees from judgment reported at *Boucher v. P.S.A.C.* (2005), 18 C.P.C. (6th) 391, [2005] O.J. No. 2693, 47 C.C.P.B. 5, 2005 CarswellOnt 2742 (Ont. S.C.J.), dismissing employees' motion to certify action as class proceeding; MOTION by employees for admission of fresh evidence.

Per curiam:

1 As we stated in open court the appellant's motion for an order allowing the admission of fresh evidence is dismissed. It does not satisfy any of the tests of the admission of fresh evidence on appeal. The subject of the fresh evidence was addressed in the evidence tendered to the motion court judge and it cannot be said that the fresh evidence could not reasonably have been obtained then to by the use of reasonable diligence.

2 The appeal is also dismissed. We are not persuaded that the record reveals any error in the motion court judge's determination of the facts, his application of the law or his analysis of the issues. Indeed, we agree with his ultimate disposition of the motion.

3 The respondent is entitled to costs in the total sum of \$16000.00 payable within 30 days.

Appeal dismissed; motion dismissed.

TAB 7

2004 CarswellOnt 423
Ontario Superior Court of Justice

Caputo v. Imperial Tobacco Ltd.

2004 CarswellOnt 423, [2004] O.J. No. 299, [2004] O.T.C. 112, 128 A.C.W.S. (3d) 874,
22 C.C.L.T. (3d) 261, 236 D.L.R. (4th) 348, 42 B.L.R. (3d) 276, 44 C.P.C. (5th) 350

**DAVID CAPUTO, LUNA ROTH, LORI CAWARDINE and DAVID
GORDON HYDUK, as Estate Trustee of the Estate of RUSSELL WALTER
HYDUK (Plaintiffs) and IMPERIAL TOBACCO LIMITED, ROTHMANS,
BENSON & HEDGES INC., RJR-MACDONALD INC. (Defendants)**

Proceedings under the Class Proceedings Act, 1992

Winkler J.

Heard: January 12-16 and 19, 2004

Judgment: February 5, 2004

Docket: 95-CU-82186CA

Counsel: Kirk Baert, Richard Sommers, Q.C., Robert Hart, Q.C., Robyn Matlin for Plaintiffs
Lyndon A.J. Barnes, Deborah Glendinning for Defendant, Imperial Tobacco Canada Limited
Earl A. Cherniak, Q.C., Susan Wortzman for Defendant, RJR-Macdonald Inc.
Steven Sofer, Marshall Reinhart for Defendant, Rothmans, Benson & Hedges Inc.

Subject: Civil Practice and Procedure; Torts

APPLICATION by proposed representative plaintiffs for certification of action as class proceedings.

Winkler J.:

Nature of the Motion

1 This intended class proceeding is the first piece of major tobacco litigation seeking damages for personal injuries in Canada. The plaintiffs seek to certify a class pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c.6 ("CPA"), which is broadly defined to include all residents of Ontario, whether living or deceased, who have ever smoked cigarette products manufactured, marketed, or sold by the defendants. They also seek to include in the proposed class all persons having derivative claims under the *Family Law Act*, R.S.O. 1990, as amended. On the plaintiff's estimate, there are more than 2.4 million persons, not including former smokers, *FLA* claimants, deceased persons or persons under the age of 15 in the proposed class. The defendants give a larger estimate, stating that the class size is greater than 15 million persons, including 6.4 million current, former and deceased smokers, and 9 million *FLA* claimants. To put this in perspective, the defendants' estimated class size numbers almost one-half of the Canadian population and more than the present population of the Province of Ontario.

Background

2 The action was commenced in 1995. There are four proposed representative plaintiffs, including the estate of one individual who died after the action was commenced. These plaintiffs allege personal injuries caused by their use of the defendants' cigarette products. Each claims personally, apart from the claims asserted on behalf of the proposed class, one million dollars in damages. There are additional claims for aggravated, punitive and exemplary damages. In addition, the plaintiffs seek to have the court issue a mandatory order requiring the defendants to create and fund a treatment center for those class members addicted to nicotine.

3 The three defendant multinational corporations control almost 100% of the Canadian cigarette products market. The defendant Imperial Tobacco, a subsidiary of Imasco Ltd., dominates this market with a 70% share. The defendant Rothmans, Benson & Hedges is owned by Philip Morris Companies, the world's largest tobacco company. RJR-Macdonald was, at the time this action commenced in 1995, a subsidiary of R.J. Reynolds Tobacco Company.

4 The plaintiffs' claims are based on the assertion that the defendants designed, manufactured and placed into the stream of commerce an inherently defective and dangerous product in the form of cigarettes. The plaintiffs describe cigarettes as nicotine drug delivery devices, which are promoted and marketed under various brand names, belonging to various product categories, such as "light," "extra-light," "ultra-light," "mild," "ultra-mild," "filtered," etc. It is alleged that the defendants promoted and marketed these products with the knowledge that their products were addictive. The addictive quality allegedly leads to continued use of the products which in turn causes injury to the smokers who are unable to stop using the product. The plaintiffs claim that the defendants had full knowledge of the harmful nature of the product, which was not only undisclosed, but rather was deliberately suppressed by the defendants.

5 The plaintiffs claim that the facts pleaded give rise to nine causes of action, including negligence, strict liability, products liability, breach of a duty to inform, deceit, negligent misrepresentation, unfair business practices, breach of implied warranty, and conspiracy, all of which are compensable in damages and suggest a claim for punitive damages. The defendants deny these allegations and assert that some causes of action are improperly pleaded while others, they state, are not pleaded at all. Further, the defendants contend that certain of the causes of action advanced by the plaintiffs are not known to the law of Ontario. Although no statement of defence has been delivered at this point, the defendants submitted in argument that, in any event, there are numerous defences, including voluntary assumption of risk, expired limitation periods and issues of contributory negligence to be considered.

Positions of the Parties

6 The plaintiffs assert that they have satisfied the five necessary elements for certification as a class proceeding, as set out in the *CPA*. In their submission, the pleadings disclose a cause of action; there is an identifiable class; there are common issues; a class proceeding would be the preferable procedure; and finally, that there are plaintiffs capable of representing the class's interests in the proceeding.

7 The defendants do not contend that there is no cause of action asserted within the meaning of the *CPA*. They do however, take issue with several of the claims asserted. The thrust of their argument in opposition focuses on three points. They submit that the class is overly broad, that the action as framed does not have a sufficient element of commonality and that in any event, a certified class proceeding would be completely unmanageable, a fact that they say is demonstrated by the plaintiffs' failure to provide a workable litigation plan.

8 In other words, the defendants assert that a class proceeding would not be the preferable procedure because of the vast number of individual issues that must be decided in respect to each of the millions of putative class members, leaving the proceeding hopelessly unmanageable and complex. Further they assert that the plaintiffs have failed to establish the necessary ingredients for certification because they have not produced a litigation plan showing, with sufficient particularity, that the claims of class members can be litigated to finality within the confines of the class proceeding.

9 The defendants further state that certification of the action as a class proceeding cannot benefit the plaintiffs or the proposed class in this case. They propose that rather than a class proceeding, individual trials are the preferable procedure by which tobacco litigation seeking damages for personal injury ought to be pursued. Further, the defendants submit that proposed class members who began smoking after 1972 are in a different position than those who commenced before that time because of the existence of express warnings regarding the health risks inherent in smoking.

10 In substance, therefore, the defendants' position is that the proposed class proceeding lacks the core element of commonality that is necessary to obtain certification.

Analysis

11 While I do not accept all of the defendants submissions, I have concluded that the motion for certification must be dismissed. The action as presently framed, and in light of the evidentiary record before the court, is not suitable for certification as a class proceeding. My reasons follow.

12 It is well settled that a class proceeding certification motion is procedural only and does not constitute a determination of the merits of the proceeding. Nevertheless, the record on this strictly procedural motion exceeds 66 volumes and has taken over eight years to assemble. The complexity of the action is manifest.

13 Nonetheless, it is not the case that complexity alone is a sufficient basis to deny certification of an action as a class proceeding. Regardless of the complexity, if the action meets the five part test set out in s. 5(1) of the *CPA*, it must be certified as a class proceeding by the court:

- 5(1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,
- (a) the pleadings or 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 of the class members raise common issues;
 - (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
 - (e) there is a representative plaintiff or defendant who,
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Cause of Action

14 The plaintiffs each claim:

- (a) Damages in the sum of one million dollars;
- (b) Aggravated, punitive and exemplary damages;
- (c) A mandatory order for the creation and funding of nicotine addiction rehabilitation centers for those addicted to nicotine . . .

15 I have distilled the underlying factual allegations supporting these claims, from paras. 17-37 of the Amended Statement of Claim and the Particulars, as follows:

Addiction

The plaintiffs claim they are addicted to the cigarette products that the defendant tobacco companies designed, manufactured and distributed. More specifically, the plaintiffs allege that they are addicted to the nicotine contained in

these products. They claim that the consumption of such products creates "reinforcing behaviour," which compels addicted individuals to consume more.

Intentional Concealment

The plaintiffs claim that, at all material times, the defendants were aware or should have been aware of the addictive nature of the nicotine in their products. They allege that the defendants carried out extensive research, establishing that nicotine was highly addictive and caused cancer. However, the defendants concealed and misinformed the general public about this research. The plaintiffs further claim that the defendants denied the validity of research from governmental and private agencies, which established the addictive effects of nicotine. Instead, the defendants maintained their position that nicotine was not addictive and was not the reason people continued to purchase their products.

Intentional Manipulation

The plaintiffs claim that the defendants have developed or adopted methods to manipulate the nicotine content of their products. They state that the defendants hold numerous patents in respect of the alteration of nicotine levels in their products; thus, the defendants are allegedly able to control the amount of nicotine in their products, artificially raising nicotine levels in their products above the levels that naturally occur in tobacco plants. The plaintiffs further state that the defendants have manipulated the nicotine in their low tar cigarettes, raising the nicotine dose to the smoker and ensuring addiction. Moreover, they allege that the defendants are aware that the actual levels of nicotine and tar consumed by smokers are greater than those measured by conventional measurement techniques and those reported to consumers.

Awareness and Denial

The plaintiffs claim that the defendants were aware, at all material times, of the serious and frequently fatal health consequences associated with the consumption of their products; these include cancer, respiratory and cardiovascular disease. Moreover, they allege that the defendants have denied these health consequences.

Targeting Minors and Young Adults

The plaintiffs claim that the defendants engaged in advertising, media, and public relations campaigns designed to increase their sales, which explicitly or implicitly denied all health-related consequences of consuming their products. Further, they allege that the defendants targeted children and young adults, as the defendants' own research indicated that 90% of smokers begin to smoke before age 18 and that it was unlikely for a person to start smoking after the age of 19.

16 The plaintiffs assert that these factual claims give rise to nine causes of action: negligence, strict products liability, products liability, breach of duty to inform, deceit, negligent misrepresentation, breach of implied warranty, conspiracy and unfair business practices.

17 The defendants assert that there can be no causes of action founded in strict products liability, breach of implied warranty, conspiracy and *FLA* claims prior to 1978. The plaintiffs conceded on the motion that there can be no *FLA* claims prior to 1978.

18 The determination of whether a cause of action has been disclosed on a certification motion utilizes the principles to be applied on a motion to strike a pleading under r. 21. Accordingly, the jurisprudence applicable to r. 21 motions is equally applicable to s. 5(1)(a) of the *CPA*. In that respect, the Court of Appeal for Ontario has determined that "the court should not, at this stage of the proceedings, dispose of matters of law that are not fully settled in the jurisprudence". (See *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.)).

19 The defendants contend that there can be no cause of action based on strict product liability, as pleaded by the plaintiffs at para. 40 in their Amended Statement of Claim. They argue that strict liability is not a recognized cause of action in Ontario and that it should therefore be struck. I agree. As Dambrot J. stated in *Andersen v. St. Jude Medical Inc.*, [2002] O.J. No. 260 (Ont. S.C.J.):

While academics and the Law Reform Commission have long argued that strict liability ought to be part of the tort law of Canada, their recommendations have neither been enacted in Ontario nor adopted by the courts. In fact, in four decisions since 1971, the Ontario Court of Appeal has declined to do so, but rather has preferred to subsume product liability under traditional negligence principles, requiring proof of negligence.

20 The defendants further submit that there is no viable cause of action based on breach of implied warranty, which was set out at paras. 53-4 in the Amended Statement of Claim. Warranties are a contract-based claim. According to the doctrine of privity of contract, where a retailer sells goods to the ultimate consumer, the consumer cannot sue the manufacturer on implied warranties. (*Dunlop Pneumatic Tyre Co. v. Selfridge & Co.*, [1915] A.C. 847 (U.K. H.L.)).

21 In this case, the plaintiffs do not allege that the defendant manufacturers sold their products to them and thus the defendants submit that, as they are not the vendors vis à vis the plaintiffs, there can be no claim for breach of implied warranty based on the common law. Further, although not specifically pleaded by the plaintiffs, the defendants contend that the *Sale of Goods Act*, R.S.O. 1990, c.S.1 offers no assistance in maintaining the claim. Section 15 of that Act sets out the circumstances where implied warranties may exist between the buyer and seller. However, a party cannot advance a claim for breach of implied warranty under this section unless there is a privity of contract between the parties (see *Mann-Tattersall (Litigation Guardian of) v. Hamilton (City)*, [2000] O.J. No. 5058 (Ont. S.C.J.)).

22 I cannot accede to the defendants' submissions regarding the breach of implied warranty claim. They turn on the doctrine of privity of contract. While it may have been the case that the law regarding privity of contract was settled for a number of years, it is also the case that a number of exceptions have been developed to this doctrine. Indeed, following its decision in *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.), the Supreme Court of Canada has enunciated a two part test to determine when a new exception should be created. As stated by Iacobucci J. in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108 (S.C.C.) at para. 32:

In terms of extending the principled approach to establishing a new exception to the doctrine of privity of contract relevant to the circumstances of the appeal, regard must be had to the emphasis in *London Drugs* that a new exception first and foremost must be dependent upon the intention of the contracting parties. Accordingly, extrapolating from the specific requirements as set out in *London Drugs*, the determination in general terms is made on the basis of two critical and cumulative factors: (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

23 Clearly, the application of these factors depends on the evidence adduced at trial. At this stage of the proceeding, and given the test enunciated in *Fraser River*, it is not plain and obvious to me that the plaintiffs cannot succeed in establishing that an exception to the doctrine of privity may apply in the circumstances of this case. Further, given the possibility that an exception may be created in the proper circumstances, it cannot be said that the law is "fully settled" as contemplated in *Falloncrest Financial Corp.*

24 The defendants also argue that a claim of conspiracy should be struck where the unlawful acts are independently actionable and have already been pleaded. Therefore, the defendants contend that the conspiracy claim merges with the specific torts pleaded and "adds nothing," unless special damages are claimed with respect to the conspiracy, citing *Graye v. Filliter* (1995), 25 O.R. (3d) 57 (Ont. Gen. Div.). The defendants argue that the plaintiffs allege numerous acts in support of the conspiracy claim and that each act is invoked to support at least one of the other causes of action advanced. As the plaintiffs do not allege any special damages, the defendants contend that the claim is superfluous and should be struck.

25 I cannot accede to this submission. First, I am not certain that *Graye*, when read in its entirety, stands for the proposition advanced by the defendants. Secondly, there appears to be binding authority to the contrary as to how this issue ought to be

dealt with at this stage of the proceeding. In considering a similar argument regarding a plea of conspiracy, Wilson J. stated in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.) at para. 49 that:

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.

and at para. 54 that:

... 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.

26 Nordheimer J. considered the same issue in *Private Equity Management Co. v. Vianet Technologies Inc.* (2000), 48 O.R. (3d) 294 (Ont. S.C.J.). Although he acknowledged that there may be a conflict between *Hunt* on the one hand and certain Ontario authorities on the other with respect to the tenability of pleadings sounding in conspiracy, he held that:

... when faced with a decision of the Supreme Court of Canada that appears to be directly on point and a decision of the Court of Appeal that only alludes to another possible outcome, I am bound to follow the decision of the Supreme Court of Canada until the issue is clarified.

27 Given the test enunciated in *Falloncrest Financial Corp.* with respect to issues of law that arise on pleadings motions, Nordheimer J.'s approach appears to be the proper course. The Ontario cases may be adopted in the future as the correct position but, until then, it cannot be said that the law is "fully settled" on the point. This remains an issue to be determined at trial. Accordingly, it is not appropriate to strike this cause of action at this time.

28 In the result, the pleadings disclose a cause of action such that the requirement of s. 5(1)(a) is satisfied.

Identifiable Class

29 Throughout the course of this proceeding, the plaintiffs have proffered constantly changing class descriptions. In their Amended Statement of Claim, they originally sought to certify a class of "addicted" persons who suffered injury as a result of their addiction. The class was defined as follows:

Persons who due to the conduct of the defendants, their agents, servants or employees, have become addicted to the nicotine in the defendants' products, namely cigarettes, or who have had such addiction heightened or maintained through the consumption of said products, and who have as a result of said addiction suffered loss, injury and damage, persons with *Family Law Act* claims in respect to the claims of such addicted persons, and estates of such addicted persons.

30 The plaintiffs subsequently amended the proposed class in their factum on this motion, describing it as follows in para. 4:

(a) all residents of Ontario, whether living or now deceased,¹ who have ever smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the defendants; and

(b) persons with *Family Law Act* claims in respect of such smokers and former smokers, and the estates of such smokers and former smokers.²

31 The defendants, in their factum at para. 20, criticized this class definition as follows:

Class membership is not defined by reference to time or amount smoked or where the class members currently reside, where the tort was committed or where or whether damage has been suffered. The class includes virtually every living or dead person who has ever resided in Ontario and smoked even one cigarette.

32 In response to this criticism, the plaintiffs amended the proposed class in their reply factum at para. 61:

- (a) all Ontario residents who claim personal injury as a result of consumption of the defendants' cigarette products; and
- (b) persons with derivative claims pursuant to the *Family Law Act*, R.S.O. 1990, c.F.3.

33 They further amended the proposed class during the argument of this motion:

- (a) all current residents of Ontario, whether living or now deceased, who ever purchased and smoked cigarette products manufactured, tested, marketed, distributed, sold or otherwise placed into the stream of commerce by the defendants, from January 1, 1950 to the date of the certification order herein; and
- (b) persons with *Family Law Act* claims in respect of such smokers and former smokers, and the estates of such smokers and former smokers.

34 As stated above, they also indicate that the estates claims are prescribed by s. 38(3) of the *Trustee Act*, which creates a two-year limitation period from death. The plaintiffs further concede that there is no cause of action for the derivative *FLA* claims prior to 1978.

35 The *CPA* mandates in s. 5(3) that each party to a motion for certification shall provide the parties' best information about the number of members in the class. The plaintiffs state, based upon a review of Statistics Canada's 1994 *Survey on Smoking in Canada* that the class size exceeds 2.4 million persons. The defendants estimate the number of persons in the class on or about the date the action was commenced, the same date as chosen by the plaintiffs. The defendants' evidence of class size is adduced through Mr. McCormick, a professional economist, who deposed that in addition to approximately 2 million smokers, the proposed class would include more than 2 million Ontario residents 15 years of age or over, who were former smokers as of January 1995, more than 2 million individuals who died prior to 1995 and approximately 9 million *FLA* claimants. Thus, the defendants state in their factum that a "ballpark estimate" of the size of the class, using both the plaintiffs' and defendants' evidence, would be between 5.5 and 6.4 million smokers or former smokers and up to 9 million *FLA* claimants, although there would be some overlap between the *FLA* claimants and primary class members.

36 Given the magnitude of the numbers submitted by the parties, it is unnecessary for the court to make a finding on the exact number of class members for the purposes of this motion. It is undisputed on the evidence that the potential class comprises at least 2.4 million members without counting the deceased members, former smokers, minors or those with *FLA* claims alone.

37 I use the words "potential class" advisedly because the plaintiffs have experienced considerable and continuing difficulty in arriving at an acceptable class definition. The proposed class is currently defined geographically to include all residents of Ontario, living or deceased, who have ever smoked cigarette products manufactured and sold by the defendants. This includes all persons who have ever smoked, regardless of how much they smoked, persons who have quit smoking, and all of the *FLA* claims associated with these persons. The temporal boundary of 1950, which was inserted into the class definition during the plaintiff's argument, is purely arbitrary as it is based on the year that one of the plaintiffs, Russell Hyduk, started to smoke.

38 The purpose of the class definition was set out in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, [1998] O.J. No. 4913 (Ont. Gen. Div.):

- (a) It identifies those persons who have a potential claim for relief against the defendants;
- (b) It defines the parameters of the lawsuit so as to identify those persons who are bound by its result;
- (c) It describes who is entitled to notice pursuant to the Act.

39 Although *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) holds that the plaintiffs can arbitrarily restrict the causes of action asserted in order to make a proceeding more amenable to certification (at 201), the same does not hold true with respect to the proposed class. Here the plaintiffs have not chosen to restrict the causes of action asserted but rather attempt to make the action more amenable to certification by suggesting arbitrary exclusions from the proposed class. This is diametrically opposite to the approach taken by the plaintiffs in *Rumley*, and one which has been expressly disapproved by the Supreme Court in *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.). There, McLachlin C.J. made it clear that the onus falls on the putative representative to show that the "class is defined sufficiently narrowly" but without resort to arbitrary exclusion to achieve that result. As stated at para.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, 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*. (Emphasis added.)

40 The plaintiffs do appear to be relying on *Hollick* in one respect, however, in their appeal to the court to fashion a class that is certifiable as an exercise of discretion. The court's discretion to alter the class definition was addressed in *Hollick*, also at para. 21., where McLachlin C.J. stated that "where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition the definition of the class be amended."

41 The plaintiffs prevail upon me to amend the class definition to redefine the class in any way necessary to render this action certifiable. In my view, this approach is not what McLachlin C.J. was advocating in *Hollick*. As I read her reasons, the court may either reject certification where the class is not properly defined or otherwise grant a conditional certification on the basis that the plaintiffs will have to provide an acceptable definition to the court. In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. That is not the case here. What the plaintiffs suggest is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.

42 In this case, it is clear that the plaintiffs are having difficulty in reaching any definition that meets with even their own approval let alone the approval of the court. Further, none of the solutions proffered by the plaintiffs to create an acceptable definition could achieve that result without resort to arbitrary exclusions that *Hollick* holds are improper. As an example, one suggestion the plaintiffs made was to drop the *FLA* claimants. Another was to drop the estate claims. Still another is to limit the class to only current residents. Yet another is to redefine the class in terms of purchasers as opposed to smokers.

43 There were other suggested definitions. All had the same fatal defect. They contained arbitrary exclusions of "some people who share[d] the same interest in the resolution of the common issue" as the people who would remain in the class.

44 The plaintiffs have had numerous opportunities to amend their proposed class. The court should not be asked to exercise its discretion in order to produce a more certifiable class when the plaintiffs have not or cannot do so on a principled basis. Moreover, even if I were inclined to produce a class definition appropriate for certification, I could not do so in these circumstances. There is an insufficient evidentiary record upon which any such class definition could be based. As stated in *Hollick*, at para. 25, "the class representative must show some basis in fact for each of the certification requirements", other than the cause of action.

45 In my view, the present action is an amalgam of potential class proceedings that make it impossible to describe a single class sharing substantial "common issues", the resolution of which will significantly advance the claim of each class member,

which is the test to be applied according to *Hollick*. Moreover, this is not a case where the creation of subclasses will address the primary class definition deficiency. Subclasses are properly certified where there are both common issues for the class members as a whole and other issues that are common to some but not all of the class members. This is not the case here. Rather, the plaintiffs have melded a number of potential classes into a single proceeding. The result is an ambitious action that vastly overreaches and which, consequently, is void of the essential element of commonality necessary to obtain certification as a class proceeding. Simply put, the reason that no acceptable class definition has been posited is that no such definition exists.

Common Issues

46 The third element in the test for certification is that the claims of the class members raise common issues. Although s. 5(1)(c) is silent as to the quality of the common issues that must be present, in *Hollick*, McLachlin C.J. stated at para.18 "an issue will not be common in the requisite sense unless the issue is a substantial ingredient of each of the class members' claims". Further, the common issues must be such that their resolution will "significantly advance the action". (*Hollick* at para. 32).

47 The plaintiffs and the defendants have diametrically opposed views with respect to whether common issues are raised by the claim pleaded. The plaintiffs submitted that there are seven substantial common issues which in turn give rise to over 60 incidental common issues. The defendants on the other hand state that none of the common issues submitted by the plaintiffs meet the *Hollick* threshold and thus should be rejected.

48 Having made the submission that the plaintiffs common issues should be rejected, the defendants did not proffer any alternative common issues during the hearing. This is not surprising given the defendants contention that the action as framed is still inherently individualistic and unsuitable for certification as a class proceeding.

49 The substantial common issues advanced by the plaintiffs were set out at para.80 of their factum as follows:

- (a) are the defendants liable to members of the class for damages relating to addiction and/or other injuries, and death;
- (b) are members of the class entitled to
 - i. a global assessment of damages in respect of monies expended by them on the purchases of defendants' cigarette products, from the defendants, from the date class members sought, but were unable, to cease using defendants' cigarette products;
 - ii. a global assessment of damages in respect of monies expended by them on the defendants' health reassurance cigarette products marketed as "filtered", "light", "extra light", "ultra light", "ultra mild" and similarly described terms, from the defendants, from the date class members switched to such cigarette products;
 - iii. a global assessment of punitive and exemplary damages in respect of the defendants' alleged intentional, wanton, reckless, and reprehensible conduct directed at the class as a whole;
 - iv. equitable relief;
- (c) should the court impose sanctions or determine other relief in respect of evidence suppression and concealment; in respect of class claims; and
- (d) [have limitation periods] begun to run, or are there special circumstances that would toll its running in respect of class claims, given the defendants' past and ongoing tortious conduct?

50 In my view, the majority of the foregoing proposed common issues proceed on a theory of aggregation that is fundamentally misconceived. First, the claim for damages for addiction, other injuries and death cannot proceed as a common issue through to a determination of liability. Although deficient in other respects, the record before the court makes it apparent that, regardless of the common issues asserted and potentially resolved through a single trial, individual issues will remain to be decided before

the liability of the defendants to individual class members can be ascertained. Regardless of the conduct of the defendants, they are entitled to a fair procedure, whether by way of a class proceeding or otherwise.

51 Moreover, the plaintiffs have not put any evidence before the court on this motion that indicates that that liability could be determined as a common issue. Cogent evidence of that fact would be a prerequisite to granting certification of the common issue asserted by the plaintiffs regarding liability to the class as a whole. This principle was enunciated by the Court of Appeal for Ontario in *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.) where Feldman J.A. stated at para. 52 "[i]n my view, the motions judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification."

52 The plaintiffs assertion that there are common issues regarding aggregate damages in respect of monies expended by the class are equally flawed. Section 24(1) of the *CPA* speaks to the requirements that must be met prior to an assessment of aggregate damages in a class proceeding. It provides:

24. (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

53 The plaintiffs asserted common issues regarding monies expended by the class run afoul of both 24(1)(b) and 24(1)(c). There will be individual issues to be determined at the conclusion of a common issue trial. Further, the issues as framed contemplate the need for proof by individual class members. The plaintiffs also propose, in paras. 97-100 of their factum, to have the common issues trial judge determine whether an aggregate assessment of pecuniary damages for cigarette-related injuries including nicotine addiction, lung cancer, oral cancers, respiratory disease and cardiovascular disease can be made on the basis of epidemiological, economic and other expert evidence. This damages assessment would have to be based largely on statistical evidence.

54 This latter proposition contravenes both s. 24 and the procedures governed by the *CPA*. In *Bywater* this court rejected a claim for an aggregate assessment on the grounds that the action involved a claim for damages for personal injuries, property damage and *FLA* claims. These required proof by individual class members and proof of causation. In the final analysis, each claim was fact driven and idiosyncratic in nature. That case involved exposure to smoke in a sub-way fire. As stated at para. 19:

All of the usual factors must be considered in assessing individual damage claims for personal injury, such as: the individual plaintiff's time of exposure to smoke; the extent of any resultant injury; general personal health and medical history; age; any unrelated illness; and other individual considerations . . . [t]he property damage claims of class members must be assessed individually as the underlying facts will vary from one class member to the next.

55 The circumstances there were starkly similar to those in the present case. This case is equally unsuited to an aggregate assessment concerning the damages claimed. There are numerous, and significant, individual issues pertinent to the issue of liability and damages that must be determined. As stated by Feldman J.A. in *Chadha* at para. 49:

... s.24 of the Class Proceedings Act is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage.

56 Moreover, the plaintiffs contention that the common issues judge should identify the common issues is ill conceived. That task must be completed at the certification stage and not left for later. As the phrase implies, the judge presiding over the

"common issues trial" is there in the role of arbiter of issues that have already been set out. That role is to make findings with respect to issues certified for trial, rather than to decide what issues are to be resolved. Setting the issues for trial is the role of the motions judge on certification.

57 Nonetheless, there are three issues proposed by the plaintiffs that appear, at first impression, to be amenable to resolution on a class wide basis in general terms. The issues identified in paragraph 54 above as (b)(iii) regarding punitive damages, (c) relating to conduct of the defendants and (d) with respect to limitation periods, are all resolvable after inquiry into the conduct of the defendants and without participation from the class members. This is particularly so with regard to punitive damages. As stated by McLachlin C.J. in *Rumley* at para. 34:

In this case, resolving the primary common issue 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 the whether punitive damages are justified . . . "an award of punitive damages is founded on the conduct of the defendant, unrelated to its effect on the plaintiff." (Internal citation omitted).

58 However, as McLachlin C.J. went on to say, "[c]learly, the appropriateness and amount of punitive damages will not always be amenable to determination as a common issue." This is the situation in the present circumstances with respect to the remaining three issues. The proposition is that the assessment or determination of each will be made on a class wide basis. Obviously there must be an identifiable class in existence for whom the assessment or determination applies. Here there is no such class.

59 In short, for these reasons I reject the plaintiffs common issues.

60 In *Hollick* the Supreme Court of Canada stated at para. 20 that ". . . implicit in the 'identifiable class' requirement is the requirement that there be some rational relationship between the class and the common issues.", and later in the same para. that, "it falls to the putative representative to show that the class is defined sufficiently narrowly." In the present case I have concluded that the plaintiffs have failed to meet this requirement of establishing an identifiable class as required by the Act and reinforced by the Supreme Court. Absent a properly defined class, it is not appropriate, nor is it feasible, for me to craft common issues. Any such attempt in these circumstances would be to engage in mere speculation. Accordingly, I decline to exercise my discretion to state common issues with respect to this proceeding.

Preferable Procedure

61 Notwithstanding that I would dismiss the motion for lack of an identifiable class and common issues, in my view, the proceeding also fails the fourth element of the test for certification, namely, whether certification of this action as a class proceeding would be the preferable procedure for the resolution of the "the class members' claims". (*Hollick* at para. 29). The test to be applied in determining whether a class proceeding is the preferable procedure is set out at para. 28 in *Hollick*

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".

62 To paraphrase McLachlin C.J., a two-part test is to be applied on a preferable procedure determination. As such, it is not enough for the plaintiffs to establish that there is no other procedure which is preferable to a class proceeding. The court must also be satisfied that a class proceeding would be fair, efficient and manageable. Both parts of the test must be considered in the context of the three goals of the *CPA*, judicial economy, access to justice and behavioural modification of tortfeasors.

63 The defendants assert that individual proceedings are preferable to a class proceeding in the present factual matrix. I am not persuaded that such is the case. The time, and doubtless many lawyer hours, spent on simply getting this action before the court on a certification motion, let alone an examination of the positions taken in the expert evidence filed by the defendants, is indicative that an individual attempting to pursue litigation would likely find his or her resources taxed beyond sustainable limits.

64 In like fashion, I am unable to accede to the defendants' submission that an "admission" such as that set out in their factum at para. 107 would render individual proceedings preferable. Paragraph 107 reads:

The defendants acknowledge that there are significant health risks associated with smoking. Accordingly, there is no issue on this motion as to whether tobacco products are capable of causing or contributing to disease. The only causation issue will be whether or not a potential class member can establish whether his or her individual disease was caused or contributed to by the use of tobacco products.

65 In my view, the supposed "admission" is of little use to any plaintiff in an individual proceeding. It would not advance any particular proceeding to a significant degree and in any event, an admission made on this motion in the absence of a certification order does not bind the defendant to the class members. (*Bywater* at paras. 13-14; See also *Griffith v. Winter*, [2003] B.C.J. No. 1551 (B.C. C.A.) at para. 20; *Dalhuisen (Guardian ad litem of) v. Maxim's Bakery Ltd.*, [2002] B.C.J. No. 729 (B.C. S.C. [In Chambers]) at para. 8) As stated in *Bywater*:

[para13] Here, the defendant admits liability for the cause of the fire. This admission, it contends, eliminates the common issue of liability. Since this, it asserts, is the only common issue, the certification motion must fail.

[para14] I cannot accede to this submission. This is not to in any way detract from the commendable and timely admission of fault by the defendant. However, an admission of liability in the air does not advance the litigation or bind the defendant in respect of the members of the proposed class. Without a certification order from this court no public statement by the defendant, and no admission in its defence to the nominal plaintiff, binds the defendant in respect of the members of the proposed class.

66 It is clear that, were it possible to do so, resolving the claims of class members in single class proceeding would be preferable to any other procedure.

67 Nonetheless, as stated above, the plaintiffs must additionally demonstrate that a class proceeding will be "fair, efficient and manageable". However, in as much as the defendants cannot simply assert to any effect that there are other procedures that would be preferable without an evidentiary basis, neither can the plaintiffs satisfy the onus with argument alone. It must be supported by some evidence. As stated in *Hollick* at para. 25 "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".

68 In respect of this aspect of the preferable procedure element, the plaintiffs' evidence must establish that a class proceeding will be "fair, efficient and manageable" and capable of achieving the goals of the *CPA*. In my view, the plaintiffs have failed to satisfy this onus on the evidentiary record proffered in support of this motion.

69 It is self evident that the scope and complexity of a proceeding bears directly on its manageability and the steps that will have to be taken to ensure that it proceeds in a fair and efficient manner. With respect to issues regarding the "fairness" of a class proceeding, it is most often the case that the defendants raise concerns. Here, however, the magnitude of the potential class leaves me with concerns as to whether the proceeding would be fair to either the proposed class members or the defendants.

70 While the opt out provision in the *CPA* permits individual claimants to attempt to pursue their own individual litigation if this action were certified as a class proceeding, for the reasons stated above, such pursuit is unlikely. Accordingly, the members of any certified class may well perceive that a court approved class proceeding offers the best prospect for recovery of any possible claim they may have. In that case, those who choose to remain in the class are in essence captive to the litigation until its conclusion. In the result, it is incumbent on the court to ensure that a proceeding will be capable of achieving a resolution for the class members so that the decision to remain accords the benefits envisioned by the legislature in enacting the *CPA*. In that regard, the legislature chose to impose the requirements set out in s. 5(1) prior to certification as, in part, "safeguards" to ensure that plaintiffs were not disadvantaged. As stated in the *Report of the Attorney General's Advisory Committee on Class Action Reform* (1990), "safeguards must provided to protect those involved, whether as representative plaintiff, as defendants or as class members".

71 The *Report* continues on to state that "[this concern arises] from the fact that a class action is brought by an individual representative plaintiff on behalf of a group of absent class members. These absent plaintiffs are not necessarily present before the court and lack any real ability to determine the course of litigation which may affect their individual rights." Accordingly the court must carefully scrutinize any prospective class proceeding before granting certification. This is particularly so where the manageability of a proceeding is suspect on the face of the record.

72 Here, notwithstanding the inability of the plaintiffs to define an acceptable class in relation to the causes of action alleged, it appears that any class would be comprised of at least several million people. The eight remaining legal bases for asserting claims allegedly arise from multiple fact situations spanning at least 50 years, during which prevailing circumstances changed dramatically. The legal principles underlying the claims asserted require inquiry into the circumstances of each individual class member in order even to ascertain liability, let alone damages. This would be necessary on a procedural basis to ensure that the defendants are treated fairly but would also be necessary from the perspective of the members of the class so that each would receive fair compensation. Further, even if the defendants were to only contest a portion of the individual claims, and each dispute could be concluded in one day, simple mathematics indicate that such a process would require the equivalent of 1,000 years of litigation, if it were to be conducted sequentially.

73 In my view, a class proceeding based on the present action would not be "fair, efficient and manageable" and, therefore, it does not meet the fourth element of the test for certification.

Representative Plaintiffs with a "Workable" Litigation Plan

74 The final element in the test for certification is that there be a representative plaintiff who "would fairly and adequately represent the interests of the class.". There are four proposed representative plaintiffs: David Caputo, Luna Roth, Lori Carwardine and the Estate of Russell Hyduk. Although the choice to posit arbitrary exclusions from the class definitions in obvious disregard for the persons so affected causes me concern, I am satisfied that, on balance, the proposed representative plaintiffs are capable of fairly and adequately prosecuting an action on a representative basis. In the present case the first problem, however, lies in the fact that there is no identifiable class for them to represent. Further, they have not provided a workable litigation plan for the class they propose in any event. Accordingly, the last element in the test is not met.

75 The Act mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class . . ." McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

76 Here the plaintiffs have tailored the proposed class proceeding in such a way as to attempt to remove the overburden of individual issues. They have endeavored to achieve this through the use of aggregate assessments combined with an argument that the common issues trial judge should bear the burden of both determining whether individual issues exist and fashioning a method for their resolution. This approach is unacceptable. It is apparent that individual issues exist and that they must be dealt with in order for the class members to obtain relief even if a common issues trial were to be decided in their favour. Consequently, by neglecting to address the presence of individual issues and an acceptable method for dealing with them, the plaintiffs have a proposed litigation plan, such as it is, that is "unworkable".

77 The court now has a number of large class proceedings under case management. My experience with these cases is that even where liability is not an issue because of a global settlement, the sheer volume of work required to process claims on behalf of class members is gargantuan. Any shortcomings in the process will detrimentally affect the class members. Here, with a proposed class of somewhere between 2.4 and 15 million, substantial resources will be required to move a class proceeding forward if certified. Further, as noted in the *Report of the Attorney General's Advisory Committee*, certification makes class

members captive to the proceeding. Mindful of this, and in light of the other considerations above, the litigation plan produced by the plaintiffs is unacceptable.

78 In my view, in a proceeding of this size and complexity, a proper litigation plan should reflect a clear acknowledgement of the massive undertaking involved. Thus, the plan should contain, at a minimum, information as to the manner in which individual issues will be dealt with, details as to the knowledge, skill and experience of the class counsel involved, an analysis of the resources required to litigate the class members claims to conclusion, and some indication that the resources available are sufficiently commensurate given the size and complexity of the proposed class and the issues to be determined. In respect to the latter point, I do not wish to be taken as holding that only large firms can prosecute class actions nor that the proposed representative plaintiffs must be themselves sufficiently wealthy to finance litigation. Rather, the plan should satisfy the court as to how the resources available to the plaintiffs can be brought to bear to ensure that the litigation can be conducted in such a way so as to protect the interests of the class members. The detail required with respect to each of these elements is relative to the nature of the action. With respect to the financing of the action, it is to be kept in mind that the purposes of certain sections of the *CPA*, and related legislation, is to permit proposed representative plaintiffs to commence and maintain class proceedings through means not available in ordinary litigation.

79 In consideration of the foregoing, and given the paucity of information proffered in the certification motion record, the plaintiffs have not met the requirement of providing a "workable" litigation plan to the court. Were it the case that this was the only defect, I would normally be inclined to grant a conditional certification, subject to the plaintiffs producing an acceptable litigation plan. However, in this case, the other deficiencies are such that, without changing the entire theory of the case, it is not possible for the plaintiffs to satisfy the requirement.

Conclusion and Disposition

80 In my view, the action as advanced is not appropriate for certification as a class proceeding. The best estimates of the number of class members is a range between 2.4 and 15 million persons. The plaintiffs proceed on the basis that tobacco is inherently dangerous and therefore the class should include everyone who smokes or has ever smoked in Ontario, whether alive or deceased, and regardless of individual differences pertaining to smoking habits or the effects of smoking on any particular individual class member. It is apparent on any careful analysis of the proposed class in the context of the conduct complained of and the allegations set out in the Amended Statement of Claim, that the plaintiffs have combined at least five, and possibly more, classes, not to mention innumerable subclasses, into one globally defined class for the purpose of seeking certification. In adopting this strategy, the plaintiffs have presented an action lacking a core of commonality that would permit the court to approve, or frame, common issues that would significantly advance the proceeding.

81 Moreover, there must be a rational connection between the class and the common issues. These must in turn emerge from the causes of action asserted, which similarly must have a basis in the class. Thus, if there is no class which is defined sufficiently narrowly, it is impossible for the court to craft common issues. In the present case, the plaintiffs have not provided the court with any principled or evidentiary basis for varying the class definition they propose. Therefore, this is not an appropriate case for the court to exercise its discretion to amend the class definition on its own motion for the purpose of granting certification.

82 The defective class definition cannot be remedied by the plaintiffs' attempt to construct common issues regardless. The issues of significance proposed by the plaintiffs cannot be accepted for the purposes of certification because they rely on either a mistaken assumption with respect to class definition or an ill conceived theory of aggregation. Any assistance that the court might, in its discretion, provide with respect to framing common issues is foreclosed by the deficiencies in the evidentiary record and the flawed class description.

83 In like fashion, the action does not meet the "preferable procedure" element of the test for certification as a class proceeding. There are obvious individual issues flowing from the causes of action asserted in the Amended Statement of Claim. The Supreme Court has held that the certification analysis must take into account the fairness, efficiency and the manageability of the proceeding as a whole, including those individual issues that might exist. As McLachlin C.J. stated in *Hollick* at para. 30, "I cannot conclude . . . that the drafters intended the preferability analysis to take place in a vacuum." Individual issues cannot be

ignored. Similarly, their presence or importance in the certification analysis cannot be diminished by a creative, but ultimately flawed, assertion that obvious individual issues can be dealt with as though they were in fact common to the class as whole.

84 The presence of these numerous individual issues and the corresponding lack of commonality lead me to the conclusion that even if there were a class to work with, a class proceeding would not be the preferable procedure for dealing with these claims. In other words, a class proceeding such as the one proposed by the plaintiffs could not be manageable, efficient and fair. The plaintiffs litigation plan provides no assistance to the court in this respect. In my view, it does not contain the minimum level of information necessary to establish that it is workable as required under the *CPA*.

85 In essence, the plaintiffs seek certification of an amorphous group of people comprised of individuals of different ages, covering different decades, who knew different things concerning the risks inherent in smoking and who began to smoke for different reasons. They smoked different products, in different amounts, received different information about the risks of smoking, quit smoking or continued to smoke for different reasons and developed or failed to develop different diseases or symptoms associated with different risk factors. The only apparent common element in this action is that all of the proposed class members allegedly smoked cigarettes at one time or another.

86 The plaintiffs have not met the test for certification. The motion must be dismissed. However, I do not intend that these reasons should stand for the proposition that no class proceeding relating to tobacco use can ever be certified under the *CPA*. My reasons for refusing certification relate to defects in this particular action, not such litigation in general. As always, and to reiterate the words of McLachlin C.J. in *Hollick*, the "question of whether an action should be permitted to be prosecuted as a class action is necessarily one that turns on the facts of the case."

87 Counsel may make brief submissions, in writing, as to costs.

Application dismissed.

Footnotes

1 Subject to s. 38(3) of the *Trustee Act*, R.S.O. 1990, c.T.23, which provides a 2 year limitation period.

2 Also subject to s.38(3) of the *Trustee Act*.

TAB 8

2001 CarswellOnt 1697
Ontario Superior Court of Justice (Divisional Court)

Chadha v. Bayer Inc.

2001 CarswellOnt 1697, [2001] O.J. No. 1844, [2001] O.T.C. 470, 105 A.C.W.S. (3d) 808, 147
O.A.C. 223, 15 B.L.R. (3d) 177, 200 D.L.R. (4th) 309, 54 O.R. (3d) 520, 8 C.P.C. (5th) 138

**Avininder Chadha and Renu Chadha, Plaintiffs/Respondents
and Bayer Inc., Bayer Corporation and Harcros Pigments Inc.,
Defendants (Bayer Inc. and Bayer Corporation, Appellants)**

O'Driscoll, Somers, Thomson JJ.

Heard: May 15-16, 2000
Judgment: May 14, 2001
Docket: Toronto 459/99

Proceedings: reversing (1999), 36 C.P.C. (4th) 188 (Ont. S.C.J.)

Counsel: *J.L. McDougall, Q.C., Kent E. Thomson*, for Appellants/Defendants
Joel P. Rochon, Vincent Genova, Douglas Lennox, for Plaintiffs/Respondents

Subject: Civil Practice and Procedure; Torts

APPEAL by suppliers of iron oxide from judgment reported 1999 CarswellOnt 2080, 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.) granting motion for certification of class action proceeding.

O'Driscoll J. (dissenting):

I. Nature of the Proceedings

1 The Appellants/Defendants appeal to the Divisional Court pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 (the Act):

s. 30(2)

A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

2 On March 25, 1999 and June 1, 1999, Sharpe J. heard an application for certification brought by the Respondents/Plaintiffs under s. 2(2) and s. 5(1) of the Act.

3 On July 6, 1999, for written reasons now reported: (2000), 45 O.R. (3d) 29 (Ont. S.C.J.), Sharpe J. certified this action as a "class proceeding" under the following provisions of the Act:

s. 2(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

.....

s. 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.

4 Sharpe J. defined the class as:

2. THIS COURT DECLARES that the "Class" in this proceeding is described as follows:

All homeowners or other end users in Canada who have suffered loss or damages as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition, in the pigment market; in particular, all homeowners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Inc. and Northern Pigment Company or where applicable, their corporate predecessors, between 1985 and 1992.

5 Sharpe J. defined the single common issue as:

6. THIS COURT DECLARES that the common issue for the Class is as follows:

Are the Defendants liable to the members of the Plaintiff class for conspiracy to fix the price of iron oxide, and if so, what is the appropriate measure of damages?

6 On October 6, 1999 and December 10, 1999, Lane J. heard an application brought by the Appellants/Defendants under s. 30(2) of the Act (supra) seeking leave to appeal to the Divisional Court.

7 On December 10, 1999, Lane J. granted leave to appeal under s. 30(2) of the Act for reasons which are now reported: (2000), 48 O.R. (3d) 415 (Ont. Div. Ct.).

II. Background and Chronology

8 The reasons of Sharpe J. summarize the claim as follows:

[3] The statement of claim alleges that from 1984 to 1992, the defendants and Norpico held between 90 and 100% of the Canadian market for iron oxide, a substance used to colour certain concrete building materials. It is further alleged that the defendants and Norpico entered into a price-fixing agreement in 1985 that had the effect of increasing the price of iron oxide. The plaintiffs allege that this agreement was in place until 1991 and that it amounted to a conspiracy to unduly prevent or lessen competition within the meaning of section 45(1)(c) of the *Competition Act* R.S.C. 1985 c. C-44. The plaintiffs allege that as the ultimate owners of buildings containing building products that contain iron oxide, they

have suffered damages by virtue of the increased cost of the iron oxide attributable to the alleged price-fixing conspiracy. The record before me indicates that, assuming the plaintiffs can make out a claim and show that the increased cost of the concrete bricks flowed through to them as the ultimate purchasers, the claim would be for \$70 to \$112 on a \$150,000 home.

[4] The statement of claim also alleges a cause of action for abuse of dominant position pursuant to s. 79 of the *Competition Act* (supra).

9 The Appellants/Defendants Factum contains the following:

2. This case concerns an attempt by the plaintiffs to recover damages, on their own behalf and on behalf of more than 1.1 million others located throughout Canada, alleged to have been caused by reason of collusion among certain suppliers of iron oxide in Canada. Iron oxide is used to colour some concrete building materials, including bricks, mortar, roofing tiles and paving stones. Neither the plaintiffs nor anyone else on whose behalf this action has been commenced have actually purchased iron oxide, either from the Bayer defendants or at all. Rather, this case is asserted on behalf of an extraordinarily large number of "end users", so-called "indirect purchasers", who own structures (including houses or commercial buildings) that contain building materials which in turn contain small amounts of iron oxide manufactured or distributed by the defendants between 1985 and 1992.

3. In short, the class proposed is comprised of purchasers who are indirect purchasers far removed from the conspiracy alleged in the Statement of Claim.

The Defendants

7. Bayer Corporation is incorporated under the laws of the state of Indiana. It is a wholly-owned subsidiary of Bayer AG, which is located in Leverkusen, Germany. Bayferrox® iron oxide pigments are manufactured by Bayer Corporation in New Martinsville, West Virginia and by Bayer AG in Germany. Bayer Inc. is a Canadian subsidiary of Bayer AG, which is located in Toronto with additional locations in Montreal and Sarnia. Bayer Inc. distributes coatings, pigments (including iron oxide) and paint components in Canada. It does not distribute bricks or any other concrete building materials.

Affidavit of Ronald Wettlaufer, Appeal Book, Vol. 1, Tab 11, paras. 3-4.

The Representative Plaintiffs

8. Avininder Chadha and Renu Chadha are the representative plaintiffs. They own a house in Richmond Hill, purchased new in 1987. The house is constructed of red brick with coloured mortar and is surrounded, in part, with interlocking paving stone. The plaintiffs offered no evidence as to whether their brick, paving stones or mortar contain iron oxide, and no credible evidence that they have suffered loss or damage as a result of the activities complained of in this proceeding. The only evidence of the plaintiffs having suffered loss or damage is the following unsupported and conclusory assertion of Avininder Chadha:

I verily believe that the inflated cost of the bricks and paving stones used for our home construction have been artificially inflated due to the price-fixing conspiracy described in this Affidavit.

Affidavit of Avininder (Bob) Chadha, Appeal Book, Vol. 1, Tab 9, para. 26

[The Appellants/Defendants complain that this portion of the affidavit is in violation of rule 39.01(4). Sharpe J. held at para. 27: "In my view, that is sufficient factual basis to qualify him as a representative plaintiff".]

9. Based on the plaintiffs' own estimates of damages and class size, the average claim of members of the class, if proven, is in the range of \$15 to \$80.

Affidavit of Jeffrey Raphael, Appeal Book, Vol. 1, Tab 10, paras. 22, 24 and 25

10. The representative plaintiffs had no direct contact with any of the defendants. They did not purchase iron oxide or any other products from the Bayer defendants. Rather, they purchased a completed home "from Greenpark" in January, 1987 which contained bricks and paving stones.

Letter from Paroian, Raphael, Courey, Cohen & Houston to Fraser Milner dated March 16, 1999, Appeal Book Vol. 2, Tab 20

11. There are two types of bricks: concrete and natural clay. Clay bricks usually contain no iron oxide. Some concrete bricks, but not all, contain iron oxide. Iron oxide constitutes only approximately 5% of the price of concrete bricks which contain it. Approximately 90% of the bricks manufactured in Ontario are clay and contain either no iron oxide or only a trace amount of iron oxide.

Affidavit of Ronald Wettlaufer, Appeal Book, Vol. 1, Tab 11, paras. 6-11

12. Similarly, not all concrete paving stones contain iron oxide. Paving stones can be coloured using a variety of substances including inorganic pigments such as chrome oxide and cobalt blue. Not all paving stones are coloured. In those instances where paving stones are coloured using iron oxide, the price of the iron oxide constitutes only 8-15% of the selling price of the paving stones.

Affidavit of Ronald Wettlaufer, Appeal Book, Vol. 1, Tab 11, para. 19

13. During the relevant period in this proceeding, there were over 15 producers of bricks in Canada. Bayer Inc. sold iron oxide pigment to only 4 of them. There were also between 25 and 31 manufacturers of paving stones. Bayer Inc. sold iron oxide pigment to only 3 of them. Sales were also made to manufacturers of bricks and paving stones by other suppliers of pigments who are not alleged to have participated in the conspiracy upon which the plaintiffs rely to assert their claim.

Affidavit of Ronald Wettlaufer, Appeal Book, Vol. 1, Tab 11, paras. 10-12

14. There is no practical mechanism for identifying the purchasers of concrete brick houses or other structures which, during the relevant period, were coloured with iron oxide pigment supplied by the defendants....

15. There is also no practical mechanism to determine whether the plaintiffs were economically injured on a classwide basis...
.....

17. ...In summary, the plaintiffs' task in proving their claim in damages is insurmountable and the amount of their damages is too speculative, remote and uncertain to be quantifiable. Any inquiry into alleged damages will involve an assessment of unique and individualized issues involving more than 1.1 million claimants based on a variety of marketplace considerations.

Investigation by the Competition Bureau

18. A complaint was made to the Competition Bureau concerning an alleged price fixing agreement between Bayer Corporation, Bayer Inc. and Northern Pigment Company. The complaint was investigated thoroughly by the Competition Bureau which, among other things, interviewed customers of the defendants. The inquiry was discontinued. Section 22 of the Competition Act provides for a discontinuance of an inquiry where "the [Commissioner] is of the opinion that the matter being inquired into does not justify further inquiry."

Affidavit of Randal T. Hughes, Appeal Book, Vol. 2, Tab 16, paras. 2-5 and Exhibit "A"

The Respondents'/Plaintiffs' Factum states the following:

8. John Giovanelli ("Giovanelli") worked as a key marketing executive for Bayer Canada for several years, most recently as Senior Account Manager/Product Manager. Giovanelli is not only a corporate "insider" but is also a "whistleblower" and has filed an extensive affidavit recounting the conspiracy to fix prices between Bayer and Norpico.

Affidavit of John Giovanelli, sworn February 2, 1999, Appeal Book, Vol. 2, Tab 14, para. 1, 2 and 6.

.....
12. Giovanelli has given evidence of his involvement in a price fixing agreement with his counterpart at Norpico. Giovanelli was directed in 1985 through his superiors at Bayer USA to enter into the price fixing agreement. Some months earlier, Bayer and Norpico had entered into confidential co-producer agreements which formed [the] basis for the price-fixing agreement. The price fixing agreement was in effect from 1985 to 1991.

Affidavit of John Giovanelli, sworn February 2, 1999, Appeal Book, Vol. 2, Tab 14.

13. The particulars of the price fixing agreement are described in detail in the, as yet, unchallenged affidavit of Giovanelli. The strategy was simple: Bayer and Norpico agreed not to increase market share and further agreed to artificially boost the price of pigment by approximately 25 to 40 cents per pound.

Affidavit of John Giovanelli, sworn February 2, 1999, Appeal Book, Vol. 2, Tab 14.

10 Lane J.'s endorsement granting leave states in para. 2:

[2] The parties are agreed and I accept that the motion involves matters of importance beyond the parties themselves. It is the first certification order involving anti-trust law and claims under the Act; and the first to involve a claim by an indirect or downstream purchaser of goods.

11 Earlier, on June 22, 1998, Sharpe J. heard an application brought by the Appellants/Defendants under rule 21 alleging that the action should be dismissed as it did not disclose a cause of action.

12 On June 29, 1998, Sharpe J., quoting *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), 979-80, 990-92 held that "it cannot be said with the degree of certainty necessary at this stage of the proceedings that a party in the position of the plaintiffs has no right of action".

13 Sharpe J.'s reasons for dismissing the motion under rule 21 are reported: (1999), 82 C.P.R. (3d) 202 (Ont. Gen. Div.).

14 The Appellants/Defendants did not appeal Sharpe J.'s decision of June 29, 1998.

III. Standard of Review

15 In *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.), 677, the Court of Appeal for Ontario said:

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

16 Before his appointment to the Court of Appeal for Ontario, Sharpe J. was designated as the class proceedings judge for the Toronto Region.

17 Paragraph 20 of the Respondents' factum states:

It is submitted that the Divisional Court ought to approach any review of Mr. Justice Sharpe's decision with the deference owed to his considerable expertise in this particular area, especially in light of the procedural and discretionary nature of the decision being appealed.

IV. Grounds of Appeal

Did Sharpe J. err in finding that a class action is the "preferable procedure" for claims brought by indirect purchasers?

19 The Motions Court Judge addressed this matter as follows:

[6] For purposes of the certification motion, the defendants do not contest that the plaintiffs can satisfy the Court that they have a possibility of being able to prove a price-fixing agreement at trial. They assert, however, that the claim fails to disclose a cause of action on the ground that the plaintiffs must also be able to satisfy the Court that there is a reasonable prospect they can establish that damages resulted to them and their fellow class members. In support of that submission, the defendants now rely on two decisions of the Supreme Court of the United States not cited on the Rule 21 motion. In the first, *Hanover Shoe Inc. v. The United Shoe Machinery Corp.*, 392 U.S. 481 (1968), the Court dealt with a defence raised in a treble damages suit under the *Sherman Act* for alleged monopolization in the shoe machinery industry. The plaintiff was a shoe manufacturer that had direct dealings with the defendant, a supplier of shoe manufacturing machinery. The defendant sought to plead that the plaintiff had sustained no damages as it would have passed on to its customers any allegedly excessive costs. The Supreme Court held that the "passed on" defence was not available to the defendants. The Court held that the difficulties in demonstrating the effect of added costs on subsequent parties would be difficult, if not insurmountable, and that allowing the defence would undermine the incentive to immediate buyers to bring treble-damage actions. (See pages 492-494).

[7] *Hanover Shoe* was followed in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (U.S. Ill. 1977).
.....

[10] Second, while the decisions of the Supreme Court of the United States deserve serious consideration by this Court, they are plainly not binding. Moreover, it appears that the two decisions relied on are based significantly upon policy considerations relating to the enforcement of American antitrust laws. Those policies may well differ from the values underlying Canadian competition law. One need look no further than the treble damage remedy which played a significant role in the Supreme Court decisions referred to above. It may well be the case that the Canadian courts will reach the same conclusion, but as the point is a novel one with a significant factual component, I find that it would be inappropriate to make that determination without affording the plaintiffs the ordinary right of proceeding to trial.

[22] Section 5(1)(d) requires the plaintiff to establish that "a class proceeding would be the preferable procedure *for the resolution of the common issues*" (my emphasis). The defendants submit that a class action is not the preferable procedure on the ground that the circumstances of each individual member of the proposed class would have to be scrutinized with a view to determining whether that individual had a claim and whether any damages could be established. In my view, this argument overlooks the specific wording of section 5(1)(d) which requires only that a class action be the preferable procedure for the resolution of the common issues. If the plaintiffs are successful in establishing a price fixing conspiracy and in establishing that damages from such conspiracy flowed through to the ultimate owners of buildings containing the products containing the pigments supplied by the defendants, it will be for the trial judge to determine whether it is necessary to have individual hearings to assess and distribute damages. As I have already indicated, the Act contains provisions which contemplate damage assessment and distribution in cases of this kind without such individual hearings. In any event, for the purposes of the preferable procedure test, I have no difficulty in finding that a class proceeding is the preferable procedure for resolution of the common issues. This is not a case like *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.); or *Rosedale Motors Inc. v. Petro-Canada Inc.*, [1998] O.J. No. 5461 (Ont. Gen. Div); where it was simply not possible to resolve the common issues without scrutinizing the individual circumstances of each member of the proposed class. Here, there is an allegation of a general price-fixing agreement which is alleged to have a price impact upon the ultimate consumers of the product in question. If those issues are to be litigated at all, it seems apparent that a class proceeding is the preferable procedure. It would advance the goal of modification of behaviour as discussed earlier.

With respect, I agree with the analysis and the conclusions of Mr. Justice Sharpe and find no error on "matters of general principle" (*Anderson v. Wilson*, supra).

Did Sharpe J. err in finding that behaviour modification should be the "primary" basis for certification?

21 The Motions Court Judge said:

[17] Three important objects have been identified as underlying the Act: (1) judicial economy, (2) improved access to the courts for those whose actions might not otherwise be asserted, and (3) modification of behaviour of actual or potential wrongdoers who might otherwise be tempted to ignore public obligations: *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.). If the present action is to be certified, among these three objects, the primary one to be served would be behaviour modification. Certification would provide access to the courts in circumstances where the claims might not otherwise be asserted. However, it is apparent from the nature and size of the claim of any individual that the goal of providing a procedure to ensure that victims of wrongdoing are actually compensated is secondary. Similarly, as it is unlikely that any claim would come before the court absent a class action, judicial economy would not be significantly enhanced.

.....

[19] ...Given the nature and size of the individual claims, few class members would have any reason to opt out of the class. If there are class members with claims of sufficient size or significance to warrant opting out, it is likely that the objectively precise criteria of the class definition will suffice. It seems unlikely that damages will be assessed on an individual basis. The *Act* contemplates aggregate assessment of monetary relief, and distribution of awards in an average, proportional or even *cy pres* basis: ss. 24, 26. Those statutory provisions specifically contemplate cases where it may be "impractical or inefficient to identify the class members entitled to share in the award" (s. 24(3)); and cases where "not all class members can be identified." (s. 26(5)). As the *Act* specifically contemplates providing a remedy despite the impracticality or inefficiency of identifying class members at the stage of assessment and distribution of damages, it would surely be wrong to frustrate that statutory policy by insisting on a class definition that avoided impracticality or inefficiency of identifying class members at the certification stage.

22 The Ontario Law Reform Commission Report on Class Actions (1982), page 143-4:

Proponents of the view that behaviour modification is not a proper role for class actions or other kinds of civil litigation frequently justify their position on the basis that the objective of deterrence should be pursued only through criminal or quasi-criminal enforcement.... Such a restriction would unquestionably be beneficial to defendants, since in criminal proceedings they could be convicted and fined only if the prosecution succeeded in proving its case beyond a reasonable doubt.

.....

Even where a criminal sanction is available, and a conviction is obtained, there is evidence to the effect that the fines levied in criminal proceedings do not serve to deprive defendants of the fruits of their wrongful conduct or to require them to internalize the costs of the injuries imposed upon individual victims; accordingly, in many cases a conviction may do no more than impose a "licence fee" upon wrongful conduct, which remains sufficiently profitable to justify continued wrongdoing.

23 With respect, I agree with the Motions Court Judge and find no merit in this ground of appeal.

Did Sharpe J. err in approving a "circular" class definition?

25 The words of Sharpe J. at para. 19 of his reasons (earlier quoted): "Given the nature and size of the individual claims.... at the certification stage" are also applicable to this ground of appeal. Sharpe J. went on to say:

[20] I conclude that, given the nature of the claim asserted in this action, the objects of the *Class Proceedings Act, 1992*, and the provisions of the Act dealing with the assessment and distribution of damage awards in cases of this nature, the

alleged impracticality or inefficiency of identifying individual class members is not a bar to certification. As the proposed class definition provides an objectively precise class definition, I find that the requirements of s. 5(1)(b) have been met. It will be for the trial judge to determine if damages are to be awarded, and if an award is to be made, how such damages are to be assessed and distributed.

- 26 In *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060 (Ont. S.C.J.), Winkler J. said:

[28] For example, a products liability case, an action arising from a mass disaster or other similar situations represent what may be categorized as "objective" or objectively determinable claims. The harm alleged is not dependent on the plaintiff having certain characteristics but rather arises from the existence of a state of affairs outside the norm, the facts of which are sufficient to establish on the "plain and obvious" test that a cause of action exists. Hence, the evidence of the class, to adopt the words of Sharpe J. in *Taub* [(1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), 381], may be "inherent in the claim itself".

- 27 A "conspiracy" is exactly the sort of case which lends itself to treatment as a common cause in a class proceeding. In *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), 201; affirmed by the Divisional Court (1999), 46 O.R. (3d) 315 (Ont. Div. Ct.); reversed in part on other grounds by Ont. C.A. October 31, 2000: (2000), 51 O.R. (3d) 236 (Ont. C.A.). Winkler J. certified claims for conspiracy in *Carom v. Bre-X* and said at p. 201 (44 O.R. (3d)):

The plaintiff alleges a single conspiracy. The facts of this conspiracy would necessitate repetitious proof in each individual claim. The plaintiff, in order to be successful, must establish the fact of the conspiracy, its breadth and scope, the participants, the acts committed in furtherance of the conspiracy and whether it was directed at the plaintiffs or conducted in a manner that disregarded whether the plaintiffs would suffer harm. The proof required will be time-consuming and costly to provide, even if done once in a common issue trial. This would be greatly exacerbated if necessary in each individual case. Hence in the present circumstances, the trial of the common issues arising from the claim in conspiracy will advance all three goals of the CPA, namely judicial economy, access to justice and behaviour modification of wrongdoers, notwithstanding that more than one of the individual issues set out in s. 6 of the Act may be present.

- 28 With respect, I agree with the Motions Court Judge and find no merit in this ground of appeal.

Did Sharpe J. err in approving a class that exposes the defendants to multiple liability?

- 30 In my view, this ground of appeal is answered by the following paragraphs of the Respondents'/Plaintiffs' factum:

66. The prospect of inconsistent results does not arise in an action for price fixing. This is because the trial judge, if he or she finds the Appellants liable for price fixing, will then make a finding of fact as to the total amount of the unjust profits obtained by the Appellants through the conspiracy.

67. Based on the overall damages assessment, the trial judge will determine the percentage of those unjust profits that have been extracted from the Respondents so that he or she can decide what proportion of the unjust profits should be awarded to the Respondents as compensation.

68. If the Respondents are owed something less than 100% of the unjust profits, the proportion of those profits which are not distributed to the Respondents as compensation will remain with the Appellants. At that point, if some other "future litigant" comes forward, he or she will be entitled to claim only the undistributed unjust profits. Under this model of allocation of damages, the Appellants liability for the price fixing conspiracy will be capped (although in this action, it is increasingly unlikely that a future litigant will come forward due to the expiry of the limitation periods. Specifically, the limitation period under the *Competition Act* is two years.)

69. Future litigants therefore, may be able to come forward to claim their share of the undistributed unjust profits held by the Appellants, but they cannot increase the total size of the "pot" out of which damages are to be awarded.

.....

72. If the prospect of multiple liability in this action ever does arise, then this is something more properly dealt with by the trial judge, and not by this appeal court, at the dawn of the proceeding.

73. In *Crown Oil Corp. v. Lapidus Popcorn Inc.*, it was argued that certification of an indirect purchaser class action [should be denied] because certification might lead to inconsistent verdicts. The California Court of Appeal held:

It is not the function of this court to give advisory opinions on how to avoid a potential multiple recovery. We, as others, are confident that when the threat of double recovery occurs, the trial court will fashion relief accordingly.

Crown Oil Corp. v. Lapidus Popcorn Inc., 177 Cal. App. 3d 604, 223 Cal. Rptr. 164 (U.S. Cal. Ct. App. 1 Dist. 1986), appeal dismissed, 479 U.S. 879 (U.S. S.C. 1986).

Did Sharpe J. err in making damages a common issue?

32 The Act places clear limits on the procedural rights of both parties to a class action. Here, the Appellants/Defendants are precluded from conducting endless futile cross-examinations. The Act states:

24. — (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

(a) monetary relief is claimed on behalf of some or all class members;

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and

(c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

33 In Newberg on Class Actions, 3rd ed. (1992), Vol. 2, c. 10, s. 10-17, we find at 10-43:

When aggregate damages for the class are awarded, the litigation is ended from the defendant's standpoint except for payment of the judgment or appeal therefrom. A third stage of litigation remains to determine the distribution of the classwide damage award. This stage is a nonadversary proceeding. The entire aggregate damages recovery may be able to be distributed to class members without undue difficulty or expense. When all or part of the common fund is not able to be fairly distributed to class members, then the court may determine to distribute the unclaimed funds with a cy pres or price reduction approach.

34 I agree with para. 89 of the Respondents'/Plaintiffs' factum:

89. ...Here the measure of damages is not dependant upon the individual idiosyncrasies of class members. Rather, the damages in this case are subject to a rational determination by means of accepted economic formulae and statistics.

35 In *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (U.S. Cal. Sup. Ct. 1967), a Los Angeles taxi company was accused of illegally tampering with its fare meters, thereby deliberately overcharging its customers over a four (4) year period. A class action was commenced on behalf of the aggrieved passengers. The defendant taxi company insisted that the class action could only go forward if all of the alleged injured passengers could be found, and called to trial to prove damages. The California Supreme Court recognized that if the defendants were given such a right then they would effectively be immunized from suit. Rather than allow this to happen the court chose to allow aggregate damages assessment coupled with a cy pres distribution of those damages. The court stated:

[16] Moreover, absent a class suit, recovery by any of the individual taxicab users is unlikely. The complaint alleges that there is a relatively small loss to each individual class member. In such a case separate actions would be economically unfeasible. Joinder of plaintiffs would be virtually impossible in this case. It is more likely that, absent a class suit, defendant will retain the benefits from its alleged wrongs. A procedure that would permit the allegedly injured parties to recover the amount of their overpayments is to be preferred over the foregoing alternative.

36 In the U.S.A., courts have held that an aggregate damage assessment does not interfere with any substantive rights of the defendant. In *Newberg* (supra); s. 10.05:

Aggregate computation of class monetary relief is lawful and proper. Challenges that such aggregate proof affects substantive law and otherwise violates the defendant's due process or jury trial rights to contest each member's claim individually, will not withstand analysis.

37 In my view, with respect, Sharpe J. did not err as alleged under this ground of appeal.

Did Sharpe J. misapply ss. 24, 25 and 26 of the Act?

39 In my view, ss. 24, 25 and 26 of the Act were intended by the Legislature to allow for damages to be treated as a common issue in a class proceeding. Sharpe J. noted that s. 26(4) of the Act envisaged occasions when damages may be assessed and awarded on an aggregate basis where individual class members cannot be identified or located.

40 The Report of the Attorney General's Advisory Committee on Class Action Reform, February 1990, page 43:

Every class proceeding will not necessarily be for monetary relief, some will inevitably seek injunctions, equitable relief and so on. However, where monetary relief is sought by the class and liability is not in issue (eg. Liability is admitted) special methods of establishing the quantum may be appropriate. It may be impractical, for example, to require thousands of class members to individually prove their claims as they would in an ordinary proceeding. In such a case the court should be permitted to determine the total aggregate of the defendant's liability if to do so can be reasonably achieved.

41 In my view, the Plaintiffs'/Respondents' action is appropriate for aggregate damage assessment because:

- (1) The Respondents'/Plaintiffs' are seeking monetary relief
- (2) IF the Appellants are found liable for price fixing as part of a common trial issue then "liability is not in issue", and
- (3) The "total aggregate of the defendant's liability...can be reasonably achieved."

As counsel for the Respondents'/Plaintiffs' set out in their Factum at para. [87]:

This case turns upon questions of unjust profits, price fixing, and the impact of the Appellants' alleged behaviour on competitive markets, it is also exactly the sort of case that is amenable to an aggregate assessment.

42 With respect, I find no error by the Motions Court Judge with regard to this ground of appeal.

43 Counsel for the Respondents'/Plaintiffs' opened and closed their Factum with quotations; in my view, each is relevant:

The question is whether a Defendant may sin with relative impunity and retain his ill-gotten gains so long as he takes care to restrict his depredations to a large number of small amounts.

Professor Ziegel, *A Practical Approach to Consumer Class Actions in Civil Litigation in Canada* (1975), Western Institute for Legal Research and Reform.

[3] [4] Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amends for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (U.S. S.C. 1931), a decision of the United States Circuit Court of Appeals for the First Circuit.

V. Result

44 Counsel for the Appellants/Defendants have not persuaded me that the order of Sharpe J., dated July 6, 1999, is anything other than correct. Therefore, the appeal is dismissed.

VI. Costs

45 When asked for their submissions as to costs, each counsel replied: "We are not seeking costs." No order as to costs before Lane J. or on the appeal.

VII. Postscript

46 On November 2, 2000, counsel for the Respondents/Plaintiffs forwarded to each member of the Court a copy of the decision of the Court of Appeal for Ontario, dated October 31, 2000, in *Carom v. Bre-X*, (*supra*). On February 9, 2001, counsel for the Respondents/Plaintiffs forwarded to each member of the Court a copy of the decision of Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, unreported, dated December 4, 2000 [(2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.)].

47 In a letter to all members of the Court, dated February 15, 2001, counsel for the Appellants/Defendants took the view that it was improper for opposing counsel to have forwarded to the members of the Court a copy of the judgment of Cumming J. in *Vitapharm* because the decision was "neither relevant nor dispositive".

48 In preparing these reasons for judgment, I read the reasons of the Court of Appeal in *Carom v. Bre-X*, (*supra*) and the reasons of Cumming J. in *Vitapharm*. However, neither set of reasons affected the outcome of this appeal.

Somers J. (Thomson J. concurring):

I. Nature of the Proceedings

1 This is an appeal by the Defendants Bayer Inc. and Bayer Corporation ("Appellants") pursuant to the Endorsement of the Honourable Mr. Justice Lane dated October 7, 1999 and his Order dated December 10, 1999. Lane J. granted leave to appeal from the Order of the Honourable Mr. Justice Sharpe dated July 6, 1999, certifying this action as a class proceeding pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "Act").

2 In his Order, Sharpe J. (as he then was) defined the class in this proceeding as follows:

All homeowners or other end users in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in

general restrict and inhibit competition, in the pigment market; in particular, all homeowners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Inc. and Northern Pigment Company or where applicable, their corporate predecessors, between 1985 and 1992.

3 Sharpe J. set out the following common issue for the class:

Are the Defendants liable to the members of the Plaintiff class for conspiracy to fix the price of iron oxide, and if so, what is the appropriate measure of damages?

4 In his reasons for judgment, now reported as *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29 (Ont. S.C.J.) ("certification judgment"), Sharpe J. summarized the claim as follows at pp. 31-32:

In this proposed class action, the plaintiffs allege a conspiracy between the defendants to fix the price of iron oxide pigment used in various construction materials. The plaintiffs claim that they and other owners of buildings which include building products containing iron oxide pigment have sustained damages as a result of the alleged conspiracy. The alleged conspiracy involved an agreement between Bayer Corporation, Bayer Inc. and Norpico [Northern Pigment Company]. The defendant Harcros Pigments Inc. purchased the assets of Norpico and the action against Harcros has been dismissed on consent.

The statement of claim alleges that from 1984 to 1992, the defendants and Norpico held between 90 and 100 per cent of the Canadian market for iron oxide, a substance used to colour certain concrete building materials. It is further alleged that the defendants and Norpico entered into a price-fixing agreement in 1985 that had the effect of increasing the price of iron oxide. The plaintiffs allege that this agreement was in place until 1991 and that it amounted to a conspiracy to unduly prevent or lessen competition within the meaning of s. 45(1)(c) of the *Competition Act*, R.S.C. 1985, c. C-34. The plaintiffs allege that as the ultimate owners of buildings containing building products that contain iron oxide, they have suffered damages by virtue of the increased cost of the iron oxide attributable to the alleged price-fixing conspiracy. The record before me indicates that, assuming the plaintiffs can make out a claim and show that the increased cost of the concrete bricks flowed through to them as the ultimate purchasers, the claim would be for \$70 to \$112 on a \$150,000 home.

5 Avininder Chadha and Renu Chadha, the Plaintiffs ("Respondents"), estimate that the alleged conspiracy affected approximately 1.1 million Canadians.

6 I have had the opportunity of reviewing the reasons for judgment of my brother O'Driscoll J. and need not add anything to his summary of the facts.

II. Standard of Review

7 In *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at 677, application for leave to appeal dismissed, [1999] S.C.C.A. No. 476 (S.C.C.) ("Anderson"), Carthy J.A., writing on behalf of the Ontario Court of Appeal, said the following with respect to the standard of review applicable to certification decisions:

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

8 MacPherson J.A., writing for the Ontario Court of Appeal in *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) reiterated this principle at paras. 36 and 37 of his judgment when he stated that judges assigned to hear certification motions "...develop an expertise which should be recognized and respected by appellate courts."

III. Grounds of Appeal

9 Before discussing the grounds of appeal, it is helpful to set out the requirements for certification of an action as a class proceeding under the Act:

s. 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.

10 Section 5(5) of the Act states that "[a]n order certifying a class proceeding is not a determination of the merits of the proceeding." However, I agree with the statement of Sharpe J. in *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 389 (Ont. Gen. Div.) at 391 that "[t]he certification motion is intended to screen claims that are not appropriate for class action treatment, at least in part to protect the defendant from being unjustifiably embroiled in complex and costly litigation."

Do the pleadings disclose a cause of action?

11 On an earlier motion, the Appellants moved to strike all or portions of the Statement of Claim as disclosing no cause of action pursuant to Rule 21 of the *Rules of Civil Procedure*. Sharpe J., in a decision now reported as *Chadha v. Bayer Inc.* (1998), 82 C.P.R. (3d) 202 (Ont. Gen. Div.) ("Rule 21 judgment"), struck out the plea of abuse of dominant position, but dismissed the balance of the motion. The Appellants did not appeal this decision.

12 In *Anderson, supra*, at p. 679, the Ontario Court of Appeal confirmed that the test to be applied under s. 5(1)(a) of the Act is analogous to that used to determine whether a pleading discloses a cause of action pursuant to Rule 21. This "plain and obvious" test was set out by Wilson J. in *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 977 and 979-80. Therefore, I agree with the statement of Sharpe J. at p. 34 of his certification judgment, *supra*, that the Appellants are bound by the determination on the Rule 21 motion to strike "...to the extent they now contend that the statement of claim discloses no cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act*."

Did Sharpe J. err in finding that a class proceeding is the preferable procedure for resolving the common issues in this case?

13 At p. 38 of his certification judgment, *supra*, Sharpe J. stated that "...the specific wording of s. 5(1)(d)...requires *only* that a class action be the preferable procedure for the resolution of the common issues." [Emphasis added.] In my opinion, Sharpe J. erred in interpreting s. 5(1)(d) of the Act restrictively, contrary to the express provisions of the Act and prior judicial authority calling for a broader interpretation of the "preferable procedure" requirement. In doing so, Sharpe J. failed to consider all the factors that are relevant to the determination of whether a class proceeding is the "preferable procedure" and placed undue emphasis on certain factors.

14 I recognize that the Act does not require that the trial of the common issue(s) resolve all matters at issue in the litigation or even all issues respecting liability. In fact, ss. 11, 24, and 25 of the Act specifically provide for the resolution of individual issues respecting liability or damages once the common issues have been resolved. Nor does the Act require that common issues predominate over individual issues. However, this does not mean that one need only consider the proposed common issues

when determining if the "preferable procedure" requirement is met. O'Brien J. explicitly rejected such an approach in *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.), at 461 and 467 ("Abdool") when he stated:

I do not accept the submission that any complex, multiple-party lawsuit is entitled to certification merely because that is the "preferable procedure" for resolving common issues which may be involved in the litigation.

In my view, some consideration must be given to individual issues involved in the litigation, the purposes of the Act, and the rights of the parties seeking, and opposing, certification.

.....

I believe the preferable approach would be to consider the matter with a view to the aims of the legislation, the requirements contained in ss. 5 and 6 of the Act, and the relative merits of other procedures available under the rules for dealing with the common issues raised. The court should also consider the relative importance of common and individual issues as one of the factors in determining whether to certify or not.

15 Similarly, in *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Ont. Gen. Div.), at 181-82 ("Bywater"), Winkler J. stated as follows:

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

16 Therefore, the following factors should be considered when applying s. 5(1)(d) of the Act: the nature of the proposed common issue(s); the individual issues which would remain after determination of the common issue(s); the factors listed in s. 6 of the Act; the complexity and manageability of the proposed action as a whole; alternative procedures for dealing with the claims asserted; the extent to which certification furthers the objectives underlying the Act; and the rights of the plaintiff(s) and defendant(s).

17 As Winkler J. stated in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.) at 239, rev'd. on other grounds, (2000), 51 O.R. (3d) 236 (Ont. C.A.):

A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

The Class Proceedings Act is a Procedural Statute and Does Not Create Any New Causes of Action

18 When determining if the "preferable procedure" requirement is met, one must consider the impact that certification would have on the rights of the defendants as well as those of the plaintiffs. The Act must be applied in a manner which is fair to all the parties to the litigation. As Winkler J. stated in *Ontario New Home Warranty Program v. Chevron Chemical Co.* (1999), 46 O.R. (3d) 130 (Ont. S.C.J.) at 143:

...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.

19 The Act is solely procedural in nature and does not create any new causes of action. Therefore, the Respondents have a duty to establish on balance that they have suffered loss or injury caused by the actions of the Appellants. If they are unable

to do so, they are not entitled to compensation. This applies to both their statutory claim under s. 36(1) of the *Competition Act* and their common law claims for conspiracy and infliction of economic injury by unlawful means.

20 Section 36(1) of the *Competition Act* states:

Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part VI, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damages proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section. [Emphasis added.]

21 Similarly, in their common law claims for conspiracy and infliction of economic injury by unlawful means, the Respondents seek compensatory damages, the purpose of which is to compensate plaintiffs for losses actually incurred. On the Appellants' earlier Rule 21 motion, the Respondents agreed that their common law claim for civil conspiracy falls to be determined under the law as stated by the Supreme Court of Canada in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452 (S.C.C.). This requires the Respondents to establish, among other elements, that they have suffered actual damage. See Sharpe J.'s Rule 21 judgment, *supra*, at p. 204. Moreover, the Respondents allege at para. 25(e) of their Statement of Claim that "[t]he Plaintiffs and the Class suffered damages as a result of the Defendants' conduct, being the increase in the purchase price of products containing these pigments over the price of an open, competitive market." As for their claim for infliction of economic injury by unlawful means, at para. 27 of their Statement of Claim "...the Plaintiffs plead that the Defendants' actions were unlawful and intentionally caused them economic harm." Finally, at para. 28 of their Statement of Claim, "[t]he Plaintiffs plead that as a result of the Defendants' illegal actions, the Plaintiffs and class were harmed by having to pay higher prices, and were deprived of the benefits of a free and open competition for the purchase of products containing pigments."

22 A number of issues must be resolved before liability can be imposed on the Appellants. Specifically, the Respondents must establish on balance that they have suffered loss or injury as a result of the actions of the Appellants. In the instant case, this can only be done on an individual, not a classwide, basis. As the Appellants stated at paras. 15 and 16 of their factum:

There is also no practical mechanism to determine whether the plaintiffs were economically injured on a classwide basis. For plaintiffs to establish such economic injury, they must show that at each sale through the chain of distribution — iron oxide to building materials manufacturers (or to distributors that sold to manufacturers), building materials manufacturers to builders (or to distributors that sold to builders), builder to original purchaser, original purchaser to subsequent purchaser and so on — each seller passed on to each subsequent purchaser all or part of the alleged overcharge. ... To the extent that the alleged overcharge was not passed on through the entire chain of distribution to particular end users, then those users have not suffered any loss or damage and have no proper claim against the Bayer defendants in this proceeding.

Determination of damages [and liability] is particularly difficult where, as here, the product actually purchased by each member of the proposed class of plaintiffs — personal homes or buildings — is unique and non standardised, and the purchase price in any given case is typically the subject of negotiation — offer and counter-offer between individual vendors and purchasers in the context of a complex and unique set of factors.

23 The Respondents face insurmountable problems of proof with respect to the "pass on" issue given the large number of parties in the chain of distribution and the multitude of variables affecting the end purchase price of a building. See the *Chain of Distribution — Iron Oxide Pigment* illustration included as an Appendix to these reasons. These problems of proof are compounded by the fact that the product in question, iron oxide, is used merely as a small component in another product or series of products and the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings,

which are highly individualized end products. Assuming that the Respondents can establish that the Appellants engaged in a conspiracy that increased the price of iron oxide, they will still have to establish on balance that this price increase was "passed on" to them. This they are unable to do on a classwide basis. For a discussion of the problems of proof involved in actions such as the one at bar, see C.S. Coutroulis and D.M. Allen, "The Pass-On Problem in Indirect Purchaser Class Litigation" (Spring 1999) *The Antitrust Bulletin* 179.

24 Section 24 of the Act, dealing with the aggregate assessment of monetary relief, cannot resolve these problems of proof since damages are only assessed once liability has been established. Similarly, the submission of the Respondents at para. 3(g) of their factum that "...the *Class Proceedings Act* was expressly designed by the Ontario Legislature to provide procedures which would allow the claims of victims of a price fixing conspiracy to be assessed on an aggregate basis" is erroneous. It is not "claims" or the *entitlement* to damages which can be assessed on an aggregate basis under the Act, but rather the *quantum* of damages which can be so assessed.

25 Nor can statistical evidence adduced by experts resolve the problems of proof present in this case. First, s. 23 of the Act deals with the admissibility and use of statistical evidence "[f]or the purposes of determining issues relating to the *amount or distribution of a monetary award* under this Act...". [Emphasis added.] It does not render otherwise inadmissible statistical evidence admissible for other purposes, such as determining liability.

26 Moreover, as the United States Supreme Court noted at pp. 742-43 of its decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (U.S. Ill. 1977):

... "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization. As we concluded in *Hanover Shoe*, 392 U.S., at 492, attention to "sound laws of economics" can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.

27 This is particularly so in the case at bar where the end purchase price of a building depends on a multitude of subjective factors, such as the bargaining skills of the purchaser as compared to those of the vendor. This Court takes judicial notice of the fact that multiple variables such as regional differences and delivery costs have an impact on the market for newly constructed buildings and, consequently, on the end purchase price of a building. These problems of proof cannot be overcome through the creation of sub-classes. This is not the type of case in which the "pass on" problem can be resolved on a classwide basis using economic formulae. See the judgment of Winkler J. in *Parsons v. Canadian Red Cross Society* (2000), 51 O.R. (3d) 261 (Ont. S.C.J.), in which he discussed the problems associated with using probability calculations, a form of statistical evidence, to determine entitlement to compensation in class proceedings arising out of the contamination of the Canadian blood supply with the Hepatitis C virus. Also see the article by C.S. Coutroulis and D.M. Allen, *supra*.

28 The case at bar is not analogous to *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695 (U.S. Cal. Sup. Ct. 1967) ("Daar"), as the Respondents contend at para. 82 of their factum. In *Daar*, a taxi company in Los Angeles was accused of tampering with its fare meters illegally, thereby deliberately overcharging its customers over a four year period. A class action was commenced on behalf of aggrieved passengers. Unlike the case at bar, there was no issue of "pass on" in *Daar* because the plaintiffs were the "direct purchasers". Provided that the plaintiffs in *Daar* could establish that the company had adjusted and set the meters to register rates in excess of those approved by the authorities, the defendant's liability would be established. All the members of the proposed class were overcharged. There were no outstanding individual issues to resolve in *Daar* other than those relating to the assessment and distribution of damages. In other words, each plaintiff's *right* to recover was based on questions of law and fact that were common to the class. That is not the situation in the present case, for the reasons elaborated upon earlier.

The Proposed Common Issues and the Number and Nature of Individual Issues to be Determined in This Action

29 In the case at bar, the only common issues which can be dealt with by means of a class proceeding are, in essence, whether the Appellants conspired, in law and in fact, to fix the price of iron oxide; the duration and extent of this alleged conspiracy; and the effect of this alleged conspiracy on the price of iron oxide pigment. In fact, at p. 38 of his certification judgment, *supra*, Sharpe J. noted that "[t]he defendants do not dispute that the question of whether they entered a price fixing agreement is a common issue."

30 However, in *Controltech Engineering Inc. v. Ontario Hydro*, [1998] O.J. No. 5350 (Ont. Gen. Div.) at para. 16, aff'd., [2000] O.J. No. 379 (Ont. Div. Ct.) and *Rosedale Motors Inc. v. Petro-Canada Inc.* (1998), 42 O.R. (3d) 776 (Ont. Gen. Div.) at 787, Sharpe J. held that "...a common factual core to the claims..." of the proposed plaintiffs is not enough in and of itself. As the Ontario Court of Appeal stated in *Anderson*, *supra*, at p. 683, for the purposes of s. 5 of the Act, a common issue "...need only involve a matter, that if determined, would move the litigation forward." [Emphasis added.] Also see the Ontario Court of Appeal decision in *Carom v. Bre-X Minerals Ltd.*, *supra*, at para. 41.

31 I have concluded that even if the Respondents succeed in establishing the existence of a conspiracy which resulted in an increase in the price of iron oxide, this would not advance the litigation in a legally material way. Rather, such a resolution would signal "...but the beginning ... of the liability inquiry" (*Abdool*, *supra*, at p. 475, *per* Moldaver J., as he then was). Each plaintiff would still be required to establish, on an individual basis, that he or she suffered loss or injury that was caused by the acts of the Appellants.

32 This is because the Appellants will only be liable to the Respondents if the latter succeed in proving that the artificially inflated price of iron oxide was passed on to them through the various links in the chain of distribution. This "pass on" issue cannot be resolved on a classwide basis because each claim involves different intermediaries and factors, as discussed earlier. This is not a situation such as the one in *Kansas v. UtiliCorp United Inc.*, 497 U.S. 199 (U.S. Kan. 1990) (in which the Supreme Court of the United States nonetheless held that only the direct purchaser had a cause of action under s. 4 of the *Clayton Act*) where there was a "perfect and provable pass-on of the allegedly illegal overcharge" because government regulation, rather than market forces, determined the amount of overcharge that the direct purchaser passed on to the end purchaser. This problem of "tracing" the price increase, if any, through the levels of distribution at issue in the instant case is compounded by the fact that the purchase price of the end product, namely homes and other structures, depends on a number of variables unique to each claim.

33 As Winkler J. stated in *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.) at 73:

The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. *In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member.* Each [class member's] experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such a class action would be completely unmanageable. [Emphasis added.]

The Objectives of the Class Proceedings Act and the Manageability of the Proposed Action

34 This brings me to a consideration of the extent to which certifying the action in issue would further the purposes underlying the Act. In *Abdool*, *supra*, this court held at p. 472 that the three main objectives of the *Class Proceedings Act, 1992* — access to justice, judicial economy and behaviour modification — "...should be considered and weighed when determining whether the requirements of s. 5(1)(d) of the Act have been met...".

35 At p. 472 of *Abdool*, *supra*, Moldaver J. described the goal of judicial economy as "...resolving a large number of disputes in which there are common issues of fact or law within a single proceeding, avoiding inconsistent results, and preventing the court's resources from being overwhelmed by a multiplicity of proceedings." The British Columbia Court of Appeal in *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 (B.C. C.A.), at 362; additional reasons at (1998), 105 B.C.A.C. 158 (B.C. C.A.); leave to appeal refused *Campbell v. Flexwatt Corp.* (1998), 228 N.R. 197 (note) (S.C.C.), noted that a court "...must do something in the nature of a cost/benefit analysis in deciding whether to certify a proceeding."

36 Given that I have concluded that certifying this action as a class proceeding would not "move the litigation forward", other than in a theoretical sense, it is clear that certification in this case would not further the goal of judicial economy. As was the case in *Tiemstra v. Insurance Corp. of British Columbia* (1997), 38 B.C.L.R. (3d) 377 (B.C. C.A.) at 379, "...an adjudication of the common issue in the plaintiff's favour would not materially improve the position of the members of the proposed class in resolving their individual claims."

37 Moreover, I have concluded that the proposed class action is unmanageable. One must remember that manageability is to be assessed in the context of the entire action, not just the common issue trial. The action would become a "monster of complexity" and cost. It would "...inevitably break down into a long series of individual trials dealing with many complex issues and many parties.... Any potential judicial efficiency [would] be lost through this process": see *Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 (B.C. S.C. [In Chambers]) at 341.

38 As a result, I reiterate the statement of Donald J.A., writing for the British Columbia Court of Appeal in *Tiemstra v. Insurance Corp. of British Columbia*, *supra*, at p. 382, that "[t]here is no point in pursuing a complicated procedure for little or no benefit."

39 Certifying this action as a class proceeding would also undermine judicial efficiency in that certifying a class of indirect or end purchasers while excluding parties in the chain of distribution exposes the Appellants to the possibility of subsequent litigation on the same issues with substantial numbers of other parties and the possibility of either inconsistent results or judgments awarding the same damages to different parties. While this problem could theoretically be rectified by defining the class as including both direct and indirect purchasers of construction products containing iron oxide, as was the case in the Respondents' original Statement of Claim, this would further complicate already "hopelessly complex" proceedings.

40 Sharpe J. acknowledged at p. 36 of his certification judgment, *supra*, that "[i]f the present action is to be certified, among these three objects [underlying the Act], the primary one to be served would be behaviour modification." With respect to the two other objectives of the Act, Sharpe J. stated as follows at this same page:

Certification would provide access to the courts in circumstances where the claims might not otherwise be asserted. However, it is apparent from the nature and size of the claim of any individual that *the goal of providing a procedure to ensure that victims of wrongdoing are actually compensated is secondary*. Similarly, as it is unlikely that any claim would come before the court absent a class action, judicial economy would not be significantly enhanced. [Emphasis added.]

41 Therefore, it appears that certification of the present action would serve primarily the goal of behaviour modification. This also militates against certification. In *Abdool*, *supra*, Moldaver J. stated at p. 476 that "...since the type of transaction giving rise to the various claims is now governed by the provisions of the *Securities Act*..., this alone would suffice to modify the future behaviour of the defendants." In the case at bar, there is a specialized statutory authority, the Competition Bureau, that is responsible for the administration and enforcement of the very provisions of the *Competition Act* the Respondents allege the Appellants violated. Therefore, it cannot be said that a class proceeding would be the preferable procedure for the resolution of the common issues when the primary object of the action would be to modify the behaviour of the Appellants and potential wrongdoers. There is another procedure, better-suited to achieving this goal.

42 In fact, the affidavit evidence presented discloses that a complaint was lodged with the Competition Bureau "...concerning the [alleged] co-producer and price fixing agreements between Bayer Canada and Northern" (Affidavit of John Giovanelli, Appeal Book, Vol. 2, Tab 14, para. 48). The Director of Investigation and Research of the Competition Bureau decided to discontinue the inquiry into this matter (Affidavit of Randal T. Hughes, Appeal Book, Vol. 2, Tab 16).

43 However, I do not endorse the categorical position of the Appellants set out at para. 30 of their factum that "[i]ndirect purchasers should not be entitled to assert a cause of action by way of a class proceeding in a case involving alleged antitrust violations [because a]...class proceeding is not the preferable procedure for resolution of such claims."

44 In light of my conclusions with respect to the application of s. 5(1)(d) of the Act to the case at bar, it is neither necessary nor advisable to determine whether a class of indirect purchasers could ever assert claims involving alleged antitrust violations. See the comments of Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) at para. 44. There may well be claims by indirect purchasers involving alleged antitrust violations which can be advanced by means of a class proceeding. However, it is not appropriate to certify this particular action as a class proceeding.

Did Sharpe J. err in defining the common issue as he did?

45 For the reasons enunciated above, I have also come to the conclusion that Sharpe J. erred in defining the single common issue as:

Are the Defendants liable to the members of the Plaintiff class for conspiracy to fix the price of iron oxide, and if so, what is the appropriate measure of damages?

46 Liability cannot be a common issue in this case because of the myriad of individual issues raised by the "pass on" problem. The Respondents are unable to establish loss and causation, and therefore liability, on a *classwide* basis in the instant case. As Sharpe J. stated in *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.) at 381, aff'd., (1999), 42 O.R. (3d) 576 (Ont. Div. Ct.), "[m]ost class proceedings arise from situations where the fact of wide-spread harm or complaint is inherent in the claim itself. Obvious examples are claims arising from mass disasters such as subway or air crashes or claims based on allegations of harm from wide-spread pollution." This is not one of those cases.

Did Sharpe J. err in approving a "circular" class definition which defines the class in terms that depend upon the merits of the individual claims?

47 In his Order, Sharpe J. certified the following class:

All homeowners or other end users in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition, in the pigment market; in particular, all homeowners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Inc. and Northern Pigment Company or where applicable, their corporate predecessors, between 1985 and 1992. [Emphasis added.]

48 In his Endorsement granting leave to appeal in this case, now reported as *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 478 (Ont. S.C.J.), Lane J. stated at p. 480: "I am of the view that the decision [of Sharpe J.] is in conflict with the other Ontario decisions referred to on the central point of the definition of the class and that it is desirable for that reason that leave be granted."

49 I have concluded that the class definition approved by Sharpe J. is flawed because it refers to those "who have suffered loss or damage" as a result of the Defendants' conduct. In *Hollick v. Metropolitan Toronto (Municipality)* (1999), 46 O.R. (3d) 257 (Ont. C.A.), leave to appeal granted, [2000] S.C.C.A. No. 41 (S.C.C.), the Ontario Court of Appeal confirmed at p. 263 of its decision that "...when the court is considering s. 5(1)(b) it is not appropriate to define that class in terms that depend upon the merits; e.g., those who have suffered injury." Similarly, in *Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.) at 169, Sharpe J. stated:

I agree with Winkler J. in *Bywater*, and with Newberg, *Class Actions*, 3rd ed. at p. 6-61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

50 Before Lane J., the Respondents submitted that the class definition is not circular because the most important part of the definition follows the words "in particular" and it is objective. I agree with the comments of Lane J. at p. 480 of his Endorsement, *supra*, to the effect that "...the definition was approved with both parts and must be construed that way."

51 Moreover, the class definition would still be flawed even if I were to expunge the first part, up to the words "in particular". To define the class as "all homeowners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Inc. and Northern Pigment Company or where applicable, their corporate predecessors, between 1985 and 1992" would remedy the circularity of the current definition, but would constitute an over-inclusive class definition. A class definition was rejected as "over-inclusive" in *Mouhteros, supra*, at p. 68.

52 In my opinion, the difficulties involved in producing a workable class definition are further evidence that a class proceeding is not the preferable procedure in this case. It is possible that the class definition could be reworked. However, it is unnecessary to do so in light of the other barriers to certification in this case.

Did Sharpe J. err in accepting the affidavit of Avininder Chadha?

53 Although the Appellants did not argue this point as a ground of appeal, it is my opinion that Sharpe J. erred in accepting as sufficient the affidavit of the proposed representative plaintiff, Avininder Chadha. Under s. 35 of the Act, "[t]he rules of court apply to class proceedings." This includes the rules pertaining to affidavits. Rule 39.01(4) of the *Rules of Civil Procedure*, dealing with evidence on motions and applications, states: "An affidavit for use on a motion may contain statements of the deponent's information and belief, if the source of the information and the fact of the belief are specified in the affidavit."

54 At para. 26 of his affidavit, Mr. Chadha deposes that he and his wife purchased a new, two-story brick dwelling from Greenpark in or about January 1987, and that this home is surrounded, in part, with interlocking paving stones. However, at no point in his affidavit does Mr. Chadha depose that the bricks, paving stones or mortar in his home contain iron oxide manufactured by the Defendants. Moreover, the only evidence of the Plaintiffs having suffered loss or damage is the following unsupported and conclusory statement at para. 26 of Mr. Chadha's affidavit: "I do verily believe that the inflated cost of the bricks and paving stones used for our home construction have been artificially inflated due to the price-fixing conspiracy described in this Affidavit." I would have struck out this portion of the affidavit on the basis that it fails to state the source of Mr. Chadha's belief, the matter in issue is a contentious one, and this defect cannot be saved through the application of rule 1.04. See *Cameron v. Taylor* (1992), 10 O.R. (3d) 277 (Ont. Gen. Div.). Had this been done, it is my opinion that there would no longer be a sufficient factual basis to qualify Mr. Chadha as a representative plaintiff under s. 5(1)(e) of the Act. Specifically, I would not be satisfied that Mr. Chadha is a member of the proposed class as required under s. 2(1) of the Act or that he "would fairly and adequately represent the interests of the class" as required under s. 5(1)(e)(i) of the Act.

55 The deficiencies in Mr. Chadha's affidavit illustrate the practical problems involved in establishing the "pass on" of any alleged overcharge though the chain of distribution, down to the ultimate purchaser, in this case.

Did Sharpe J. apply sections 24, 25 and 26 of the Act incorrectly?

56 I conclude that Sharpe J. also applied ss. 24, 25 and 26 of the Act incorrectly. Section 24 of the Act provides that the aggregate assessment of monetary relief can only be used where:

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

57 For the reasons set out earlier, I am of the opinion that liability cannot be a common issue in this case. As a result, I am of the view that the Respondents cannot avail themselves of s. 24 of the Act because the requirements in (b) and (c) are not met.

58 The Attorney General's Advisory Committee on Class Action Reform stated as follows at p. 43 of its 1990 Report (M.G. Cochrane, Chairman):

However, where monetary relief is sought by the class *and liability is not in issue* (eg. liability is admitted) special methods of establishing the quantum may be appropriate. It may be impractical, for example, to require thousands of class members to individually prove their claims as they would in an ordinary proceeding. In such a case the courts should be permitted to determine the total aggregate of the defendant's liability if to do so can be reasonably achieved. [Emphasis added.]

59 Rather, it is s. 25 of the Act which applies to cases, such as the one at bar, where after a determination of the common issues, individual issues remain with respect to the entitlement to damages.

60 This distinction was recognized and applied by Winkler J. in *Bywater, supra*, at pp. 178-79, when he stated:

The plaintiff urges that an aggregate damages assessment applying to all class members be made a common issue. Section 24 of the Act permits of an aggregate determination of damages where appropriate....

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

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

IV. Result

61 I adopt the following statement made by the Ontario Law Reform Commission in its *Report on Class Actions*, Vol. 1, 1982 at p. 140:

While...the Commission is of the view that class actions can serve a useful function, we do recognize, of course, that *not every wrong can be remedied in the courts; some individuals may justifiably be denied access by means of a class action where the overall costs of pursuing their claims in this fashion outweigh any benefits that might accrue to them or to society.* [Emphasis added.]

62 I have come to the conclusion that this is such a case. It follows that in my opinion the appeal must be allowed and the Order of Sharpe J. certifying this action as a class proceeding set aside.

V. Costs

63 At the conclusion of submissions both counsel indicated that they would not be seeking costs. Accordingly, no costs would be awarded.

Appeal allowed.

2003 CarswellOnt 49
Ontario Court of Appeal

Chadha v. Bayer Inc.

2003 CarswellOnt 49, [2003] O.J. No. 27, 119 A.C.W.S. (3d) 378, 168 O.A.C. 143, 223
D.L.R. (4th) 158, 23 C.L.R. (3d) 1, 31 B.L.R. (3d) 214, 31 C.P.C. (5th) 40, 63 O.R. (3d) 22

**AVININDER CHADHA and RENU CHADHA (Plaintiff/
Appellants) and BAYER INC., BAYER CORPORATION and
HARCROSS PIGMENTS INC. (Respondents/Defendants)**

Austin, Rosenberg, Feldman J.J.A.

Heard: June 3, 2002

Judgment: January 14, 2003 *

Docket: CA C37224

Proceedings: affirming *Chadha v. Bayer Inc.* (2001), 200 D.L.R. (4th) 309, 54 O.R. (3d) 520, 15 B.L.R. (3d) 177, 147 O.A.C. 223, 8 C.P.C. (5th) 138 (Ont. Div. Ct.)**Proceedings: reversing *Chadha v. Bayer Inc.* (1999), 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.)**additional reasons at *Chadha v. Bayer Inc.* (1999), 1999 CarswellOnt 3040, 43 C.P.C. (4th) 91 (Ont. S.C.J.)

Counsel: *Paul J. Pape*, for Appellants

J. L. McDougall, Q.C., *Kent E. Thomson*, for Respondents

Subject: Civil Practice and Procedure

APPEAL by representative plaintiffs in class action from judgment reported at (2001), 2001 CarswellOnt 1697, 200 D.L.R. (4th) 309, 54 O.R. (3d) 520, 15 B.L.R. (3d) 177, 147 O.A.C. 223, 8 C.P.C. (5th) 138 (Ont. Div. Ct.), allowing appeal from judgment reported at 1999 CarswellOnt 2080, [1999] O.J. No. 2497, 45 O.R. (3d) 29, 36 C.P.C. (4th) 188 (Ont. S.C.J.), which granted motion for certification.

Feldman J.A.:

1 The appellants are representative plaintiffs in a class action. The respondents were the major manufacturers and suppliers to the Canadian market of iron oxide pigments used to colour concrete bricks and paving stones which were incorporated into the construction of homes, buildings and landscaping. The bulk of their sales were for the construction of new homes. It is alleged that during the period between 1985 to 1991, the respondents engaged in a price-fixing scheme, thereby illegally increasing the price of concrete bricks and paving stones coloured by iron oxide pigment.

2 The appellants purchased a new home during that period from a new home developer. Their home contains some coloured concrete bricks and paving stones. They believe that they were indirect purchasers of bricks and stones containing the respondents' iron oxide pigments. The appellants allege that they suffered damage by overpaying for their home.

3 The issue under appeal is the propriety of certification of the class action. The issue turns on the efficacy and method of proof of whether all indirect purchasers of the respondents' product overpaid for their homes as a result, and thereby suffered damage. The majority of the Divisional Court held that damage, a necessary component of the cause of action of each plaintiff, could not be proved on a class-wide basis; rather, damage must be proved individually for each plaintiff, making the class action process not the preferable process. The dissenting judge essentially adopted the reasons of the motion judge. For the reasons which follow, I would uphold the conclusion reached by the majority of the Divisional Court and dismiss the appeal.

I. FACTS AND HISTORY OF THE PROCEEDING

4 The motion for certification is based on s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 which provides:

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.

5 The Statement of Claim of the appellants describes the details of a conspiracy by the respondents who were manufacturers and distributors of iron oxide pigments for use in making bricks, paving stones and other building materials, and who, between 1984 and 1992, held between 90% and 100% of the Canadian market for iron oxide. The alleged conspiracy to fix and thereby raise the price of iron oxide pigments in Canada was carried out between 1985 and 1991. The appellants plead that they purchased a new house in Ontario which was built in 1988 with bricks containing iron oxide pigment supplied by the defendants. The pleading alleges that as a result of the respondents' price-fixing conspiracy, the purchase price of products containing pigments was increased over what it would have been had there been an open competitive market, and that the appellants and the rest of the members of the class suffered damages as a result by overpaying for their homes. There is no dispute by the appellants that their cause of action includes proof of damage. Under the heading "Effects of the Illegal Activities," para. 28 of the Statement of Claim reads:

The Plaintiffs plead that as a result of the Defendants' illegal actions, the Plaintiffs and class were harmed by having to pay higher prices and were deprived of the benefits of a free and open competition for the purchase of products containing pigments.

6 The members of the class are described in the Statement of Claim as follows:

All persons in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition in the pigment market; *in particular all persons who purchased either directly or indirectly*, bricks or other construction products containing iron oxide pigment or black pigment manufactured or distributed by one or more of the Defendants (or, where applicable, their corporate predecessors), between 1985 and 1992 [emphasis added].

7 The appellants subsequently revised the definition of the proposed class to exclude direct purchasers of the respondents' products, and to include only the ultimate end-users of the products after they had been incorporated into construction, particularly home owners. In his Order, the motion judge certified the class with the following description:

All homeowners or other end users in Canada who have suffered loss or damage as a result of the Defendants' agreement to wrongfully increase or maintain the price of iron oxide and black pigment and otherwise unduly lessen competition, and in general restrict and inhibit competition in the pigment market; in particular, all home owners or other end users of bricks, interlocking or other construction products containing iron oxide pigment or black pigment manufactured or distributed by Bayer Canada and Northern Pigment Company or where applicable, their corporate predecessors between 1985 and 1992.

8 The respondents first moved before Sharpe J. under Rule 21 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to strike the claim on the basis that the pleading disclosed no cause of action. Because the appellants, as indirect purchasers, did not buy any iron oxide pigment directly from the respondents, but only purchased an end-product that incorporated bricks made with the respondents' product, it was argued that the appellants could not be the object of an unlawful conspiracy by the respondents to affect the price of their product. The Rule 21 motion was dismissed on the basis that, although the cause of action was a novel one, it was not plain and obvious that it could not succeed.

II. THE CERTIFICATION MOTION

9 The appellants then brought their motion for certification of the action as a class proceeding. On that motion, affidavit material was filed by both sides. The record disclosed that if the appellants could prove their claims and show that the increased cost of the coloured bricks was passed through to them as homebuyers, the magnitude of each claim would be between \$70 and \$112 on a \$150,000 home.

10 The respondents again raised the issue, this time under s. 5(1)(a) of the *Class Proceedings Act*, that the appellants' claim raised no cause of action, relying on authority from the United States Supreme Court (*Illinois Brick Co. v. Illinois* (1977), 431 U.S. 720 (U.S. Ill. 1977)), which precludes class action claims by indirect purchasers for damages for conspiracy to fix prices. The motion judge held, as he had on the earlier motion, that the pleading did disclose a cause of action, rejecting the American authorities as inapplicable in Canada.

11 The second issue before the motion judge was whether there was an identifiable class. The problem raised by the respondents was that potential members of the class could have great difficulty self-identifying because, as home-owners, they would not know whether their home was built with materials which contained the iron oxide pigments. The motion judge described the problem as follows: "[t]he question is whether the impracticality or inefficiency of applying the definition to actually identify the members of the class on an individual basis renders it unacceptable." He approached the issue by considering the three important objectives of the *Class Proceedings Act*: (a) judicial economy; (b) improved access to the courts for actions that may not otherwise be asserted; and (c) behaviour modification for actual or potential wrongdoers. He held that in this case, the primary object of certification was behaviour modification and that because of the small size of any individual award, compensation for the appellants and therefore access to justice for individual claims would be a secondary goal, making the ability of potential plaintiffs to self-identify of less concern to the court.

12 The third issue addressed by the motion judge was identifying and articulating three common issues. The first common issue was whether the respondents had entered into a price-fixing agreement. He defined the remaining common issues as follows:

Are the defendants liable to the members of the plaintiff class for conspiracy to fix the price of iron oxide, and if so, what is the appropriate measure of damages?

13 The fourth matter addressed by the motion judge under s. 5(1) of the *Class Proceedings Act* was whether a class proceeding was the preferable procedure "for the resolution of the common issues." The motion judge concluded that it was. It is that conclusion and the basis for that conclusion, combined with the identification of liability as a common issue, that form the main focus of the appeals to the Divisional Court and to this court. The majority of the Divisional Court reversed the decision of the motion judge, concluding that liability could not be a common issue and that a class action was not the preferable procedure for determining the issues between the respondents and the members of the plaintiff class.

14 Finally, the motion judge held that the appellants were representative plaintiffs. Although the appellants could not confirm that the bricks in their home contained the respondents' iron oxide pigment, or that they had overpaid for their home as a result, the motion judge found that there was a sufficient factual basis to qualify them as representative plaintiffs.

III. THE APPEAL TO THE DIVISIONAL COURT

15 The majority of the Divisional Court found that the motion judge had erred in his interpretation of s. 5 (1)(d) of the *Class Proceedings Act* in the determination of whether a class action is the "preferable procedure." The motion judge had stated that " . . . the specific wording of s. 5(1)(d) . . . requires only that a class action be the preferable procedure for the resolution of the common issues." Somers J., writing for the majority of the Divisional Court, rejected limiting the preferable procedure analysis to the resolution of the common issues. Instead he took a broader approach, including considering the individual issues and whether a class action is the preferable procedure to advance the interests of all the parties in accordance with the objectives of the *Class Proceedings Act*.

16 The Divisional Court then focused on the nature of the causes of action asserted by the appellants and the requirements for establishing those causes of action. The appellants' causes of action are based on a breach of s. 36(1) of the *Competition Act*, R.S.C. 1985, c. C-34, as well as the common law torts of conspiracy and infliction of economic injury by unlawful means. All causes of action require that the appellants establish that they suffered actual loss. In particular, s. 36(1) provides:

36.(1) Any person who has suffered loss or damage as a result of

- (a) conduct that is contrary to any provision of Part VI, or
- (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to *the loss or damage proved to have been suffered by him*, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section [emphasis added].

The appellants' claim is that they suffered loss by paying higher prices for their houses, built using bricks containing the respondents' product.

17 The Divisional Court disagreed with the motion judge that such a loss could be proved on a class-wide basis. The court concluded that proof that the appellants had suffered such loss by overpaying for their houses could only be established on an individual basis. The appellants would have to prove that any overcharge by the respondents to the direct purchasers of the iron oxide pigment was passed on through the chain of manufacture and distribution of the bricks to the ultimate purchaser of a home which was built using those bricks. The majority of the Divisional Court also focused on the multitude of variables that can affect the price of a building, including regional differences and delivery costs, and the fact that " . . . the product in question, iron oxide, is used merely as a small component in another product or series of products and the alleged overcharge is only a trivial part of the purchase price of residential or commercial buildings, which are highly individualized end products," (para. 23) as well as many subjective factors, such as the relative bargaining skills of the purchasers and vendors. The court also rejected the concept that statistical evidence could be used to prove the fact of loss, as opposed to the quantum of the loss. As a result, the Divisional Court concluded that the issue of liability could not be a common issue in the proceeding.

18 The Divisional Court further found that establishing the price-fixing conspiracy would not advance the litigation in a legally material way, because the balance of the action would be an unmanageable series of individual trials of the "pass-on" issue. Therefore, certifying the class action would not further the purposes of the *Class Proceedings Act*, particularly judicial economy, but also access to justice and behaviour modification, the purpose singled out by the motion judge. The Divisional Court was of the view that the procedures in the *Competition Act* were better suited to the goal of behaviour modification in

this case, and noted that an investigation under the *Competition Act* had been conducted and discontinued by the Director of Investigation and Research of the Competition Bureau.

19 The Divisional Court found the following further errors in the Order that had been made below:

- (a) the class definition is circular as it defines the class in terms that depend on the merits of the individual claims;
- (b) the affidavit of a proposed representative plaintiff should have been rejected as it did not state that his home construction included paving stones which actually contain iron oxide manufactured by the defendants, and should have been amended to excise the portion stating his belief that the cost of his home had been artificially inflated when he did not state the basis for his belief as required by Rule 39.01(4) of the *Rules of Civil Procedure*;
- (c) the motion judge erred in concluding that s. 24 of the *Class Proceedings Act* could be used to assess damages on an aggregate basis.

IV. ISSUES

- (1) Was the Divisional Court correct to conclude that the issue of liability, including proof of loss, could not be a common issue?
- (2) Was the Divisional Court correct that a class action is not the preferable procedure for the conduct of the action?
- (3) Is the class definition, as formulated by the motion judge, in error because it defines the class in terms of those who have suffered damages and not in objective terms, and therefore turns on the outcome of the litigation or the merits of the claim?

V. ANALYSIS

(i) Common Issue

20 The difference in approach between the motion judge and the appellants on one hand, and the majority of the Divisional Court and the respondents on the other, turns on whether this is a case where all end-purchasers paid a higher price for their homes and therefore the loss can be proved on a class wide basis, or whether each individual end-purchaser of a building that contains, as one component, bricks made with iron oxide pigment from the defendants, may or may not have had the inflated price of the iron oxide pigment passed through as part of the purchase price of the home they bought.

21 The motion judge concluded that liability was a common issue and that it could be proved on a class-wide basis. Based on that premise, he turned to the issue of preferable procedure.

22 The motion judge based his decision on preferable procedure on his view of the correct interpretation of s. 5(1)(d), which requires the plaintiff to prove that: "a class proceeding would be the preferable procedure for the resolution of the common issues." His interpretation was that the section requires only that the class action be the preferable procedure for resolution of the common issues, not for the remaining individual issues. However, having already concluded that liability was not an individual issue, the spectre of an unmanageable judicial proceeding for determining liability on a plaintiff-by-plaintiff basis was not a concern for him.

23 The critical finding of the motion judge on preferable procedure is at para. 22 of the reasons where he states:

If the plaintiffs are successful in establishing a price fixing conspiracy and in establishing that damages from such conspiracy flowed through to the ultimate owners of buildings containing the pigments supplied by the defendants, it will be for the trial judge to determine whether it is necessary to have individual hearings to assess and distribute damages. As I have already indicated, the Act contains provisions which contemplate damage assessment and distribution in cases of this kind without such individual hearings. In any event, for the purposes of the preferable procedure test, I have no difficulty

in finding that a class proceeding is the preferable procedure for resolution of the common issues. This is not a case like *Abdoool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.); *Mouhteros v. DeVry Canada Inc.*, (1998) 41 O.R. (3d) 63 (Gen. Div.); or *Rosedale Motors Inc. v. Petro-Canada Inc.*, [1998] O.J. No. 5461 (Gen. Div.); where it was simply not possible to resolve the common issues without scrutinizing the individual circumstances of each member of the proposed class. Here, there is an allegation of a general price-fixing agreement which is alleged to have a price impact upon the ultimate consumers of the product in question. If those are to be litigated at all, it seems apparent that a class proceeding is the preferable procedure. It would advance the goal of modification of behaviour as discussed earlier [emphasis added].

And he concluded at para. 24:

While there is no doubt that this will be a complex action involving the claims of a large number of individuals, as the claims have at their core significant common issues which can be readily dealt with on a class action basis, it is my view that the complexity of the proceeding favours rather than detracts from a class proceeding.

24 In other words, the motion judge contemplated the possibility of individual hearings only for the assessment of damages, but not for proof of loss as a component of liability. On that basis, he concluded that the class action is the preferable procedure.

25 The difference in the fundamental premises of the two sides is reflected in the way the appellants formulate in their factum the two issues for decision on this appeal. The issues as stated assume, rather than raise for decision, that proof of loss is a common issue which will not require the participation of any class member to prove. The issues are set out in the appellants' factum as follows:

- (1) Should the case be certified where liability and damages can be proven at a trial of the common issues without the participation of any class member?
- (2) Should the case be certified where the damages suffered by each class member can be assessed and distributed to them without the participation of the defendants?

It is clear from this formulation that the appellants assume that the issue of the loss component of liability can be proved on a class-wide basis. The difficulty is that the question of what method of proof could be used to establish loss on a class-wide basis has not been addressed, and it is the major subject of dispute on the certification motion.

26 Although the appellants recognize and acknowledge that "[l]oss is a critical component of the causes of action pleaded," they rely on the finding by the motion judge that the loss would be proved at the trial of the common issues through proof of two components: (1) an overall assessment of damages on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement; and (2) a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigments. The appellants argue further that proving these two components of loss would not require the participation of the plaintiff class. Finally, and critically, they state that there was "probative evidence" before the motion judge to support as reasonable the judge's conclusion on proof of loss through the two proposed components.

27 The motion judge's finding in that regard is at para. 11 of his reasons:

Third, the parties filed expert evidence from economists as to the effect of a price increase at the manufacturing stage on the ultimate consumer of the product. The defendants' expert deposed that it is not possible to trace the impact of such prices through to the consumer. *The expert retained by the plaintiffs disagreed with the defendants' expert and deposed that there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment.* The plaintiffs' expert also deposes that it would be possible to determine an over-all assessment of damages on the basis of the net gain realized by the defendants as a result of their allegedly unlawful agreement. While I am not to be taken as holding that it was necessary to adduce such evidence at this stage of the proceedings, the conflict on the evidence only highlights the point that the issue will have to be resolved at trial, rather than on the pleadings [emphasis added].

28 Although the motion judge expressed reservations about the need for the appellants' expert evidence at this stage of the proceedings, it is only on the basis of that evidence that any determination can be made as to whether loss can be proved on a class-wide or an individual basis, and therefore whether it can be a common issue. In *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) at para. 22, McLachlin C.J.C., writing for the court, clarified the role of evidence at the certification stage:

The 1990 Report of the Attorney General's Advisory Committee . . . 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 in *Hollick*]: 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.

29 The Supreme Court also noted that this evidentiary scheme represented the existing practice in Ontario, referring to the case of *Caputo v. Imperial Tobacco Ltd.* (1997), 34 O.R. (3d) 314 (Ont. Gen. Div.), at 319, where the court held that the adequacy of the record on a certification motion was of "primary concern." The Supreme Court also quoted with approval from the case of *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.). The relevant passage in *Hollick* reads as follows:

The court wrote (at pp. 380-1) that 'the CPA requires the representative plaintiff to provide a certain *minimum evidentiary* basis for a certification order'. 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' (para. 24) [emphasis added in *Hollick*].

McLachlin C.J.C. concluded:

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 (para.25).

30 In my view, with respect, the motion judge erred by relying on the expert evidence filed by the appellants as the basis for the certification order. That evidence does not address the issue of what method could be used at a trial to prove that all end-purchasers of buildings constructed using some bricks or paving stones that contain the respondents' iron oxide pigment overpaid for the buildings as a result. Rather, the appellants' expert effectively assumes that higher costs of products containing the respondents' iron oxide pigment would have been passed on to end-users, reasoning that they would have been willing to pay the higher cost because the amounts in question were so minimal. He made it clear that he did not know how willing end-purchasers would be to pay higher costs and that he had not had sufficient time to do any analysis to determine the response of the marketplace. He then went on to postulate a conceptual model for calculating the damages "to the extent that buyers of homes or other buildings made of construction materials using iron oxide pigment incur the damages of the conspiracy." The expert's models are based on the assumption of a full pass-through of the price increase of the iron oxide to the homebuyers. However, it is that assumption that is the very issue that the court must be satisfied is provable by some method on a class-wide basis before the common issue can be certified as such.

31 The motion judge relied on the opinion of the appellants' expert that "there would be a measurable price impact upon the ultimate consumer of the building products containing the iron oxide pigment." However, the fact that any price impact may be "measurable" goes only to the issue of how the damages can be calculated and distributed, not whether the inflated price charged to the direct buyers of the product was passed through to all of the ultimate consumers. The issue of whether there would be a price impact on all ultimate consumers of iron oxide coloured products, i.e., a pass-through to the class members of the inflated price charged by the respondents to their direct buyers, was what the expert assumed, but he did not indicate a method for proving, or even testing that assumption.

32 The critical importance of the issue of whether, and if so, by what method, loss is provable on a common basis in class action anti-trust suits was canvassed in detail in the recent decision of the U.S. Federal Court of Appeals Third Circuit in *Linerboard Antitrust Litigation, Re*, 305 F.3d 145 (U.S. 3rd Cir. Pa. 2002). The case involved an alleged conspiracy by linerboard (i.e., corrugated cardboard) manufacturers to reduce the industry inventory of linerboard and then, once supply was limited, to implement price increases. The linerboard manufacturers challenged a lower court ruling that had certified two classes of plaintiffs on the basis that they would be able to prove "common impact".¹ The two classes were both direct purchasers, one of corrugated sheets and one of corrugated boxes. Although the plaintiffs purchased the product directly from the defendants, the issue of whether the conspiracy affected the price of these products on a class-wide basis was a live one because corrugated cardboard was only a component of the finished product.

33 The manufacturers' challenge to the lower court decision was two-pronged. The main argument was that the lower court should not have relied on a legal presumption of impact, that it failed to apply rigorous scrutiny of the plaintiffs' impact evidence and that the existence of injury required an individualized inquiry. Second, the manufacturers argued that a question of fraudulent concealment also raised individualized issues. The parallel to the case at bar lies in the court's approach to the first prong, and its analysis of the type and strength of evidence required at the certification stage to satisfy the court that there is a method in a price-fixing case by which impact on the plaintiff class can be proved as a common issue.

34 The lower court in *Linerboard Antitrust Litigation* based its decision that loss could be proved on a common basis for all members of the class on two types of evidence and analysis. The first was expert evidence that the price-fixing conspiracy can be presumed to have a common impact on all purchasers. The relevant portion of the lower court judgment on the presumption of common impact is approved at p. 152 of the appeal reasons and reads:

Plaintiffs have shown that they plan to prove common impact by introducing generalized evidence which will not vary among individual class members. For example, plaintiffs contend that even though prices may have varied among regions, the alleged conspiracy caused these prices to rise throughout the country. Although the prices for corrugated sheets and boxes may have increased due to demand, because defendants allegedly conspired to reduce production of linerboard, the price was higher than it would have been under competitive conditions. Such allegations, supported by the evidence presented, are of the kind contemplated by the Third Circuit in [*Bogosian v. Gulf Oil Corp.*, 561 F.2d 434 (U.S. C.A. 3rd Cir. 1977)] and [*Newton v. Merill Lynch, Pierce, Fennard Smith, Inc.*, 259 F. 3d 154 (3d Cir. 2001)]. See also [*Lumco Indus., Inc. v. Jeld-Wen, Inc.*, 171 F.R.D. 168, 173 (E.D. Pa. 1997)].

The Court recognizes that defendants dispute plaintiffs' allegations. However, at the class certification stage, "the Court need not concern itself with whether Plaintiffs can prove their allegations regarding common impact; the Court need only assure itself that Plaintiffs' attempt to prove their allegations will predominantly involve common issues of fact and law." *Lumco Indus.*, 171 F.R.D. at 174. "Plaintiffs need only make a threshold showing that the element of impact will predominantly involve generalized issues of proof, rather than questions which are particular to each member of the plaintiff class." Id. (citing *In re Disposable Contact Lens Antitrust Litig.*, 170 F.R.D. 524 (M.D. Fla. 1996)). *Therefore, the Court concludes that plaintiffs' allegations regarding impact, like their allegations regarding conspiracy, will focus the inquiry on defendants' actions, not on individual questions relating to particular plaintiff class members* [emphasis added].

35 According to the court of appeals, the lower court's ruling represented a sound application of the concept of "presumed impact" approved in an earlier decision of the same appeals court in *Bogosian v. Gulf Oil Corp.* [561 F.2d 434 (U.S. C.A. 3rd Cir. 1977)]. The foundational essence of this approach to determining impact is that the focus of the evidence will be on the actions of the defendants and not on individual questions relating to particular plaintiffs. In applying the concept of presumed impact, the court takes notice of the laws of economics as support for a theory that an individual plaintiff can prove the fact of damage simply by proving that the free market prices would be lower than the prices actually paid by the plaintiff. In the *Linerboard Antitrust Litigation* case, a deliberate cut in supply was alleged. A reduction in supply will cause prices to rise. The concomitant rise in linerboard prices in the relevant market, on the presumed impact theory, represents the laws of supply and demand at work.

36 In addition to relying on the presumed impact theory, the lower court in *Linerboard Antitrust Litigation* relied on the extensive empirical investigations that had been undertaken by the plaintiffs' experts. The plaintiffs' experts' testimony was that advanced economic models could be prepared to establish class-wide impact. In the evidence before the lower court, the experts supported their opinions with charts, studies, company records, industry data and articles from leading trade publications. The key issue on which the experts focused was whether the variations in purchasers, products, regions, etc., precluded common impact. Taking the variations into account, they concluded that all purchasers would have paid a higher price because of the conspiracy. As a result, the fact of loss was common. Only the quantum of loss would vary. One expert stated categorically: "[b]ased on my analysis of the pricing data and company records, I conclude that the alleged unlawful conduct to raise linerboard prices would have impacted all members of the proposed class through higher corrugated sheet prices." (p.154) The court of appeals noted that this conclusion was supported by relevant data.

37 The court of appeals in *Linerboard Antitrust Litigation* approved of what it referred to as the lower court's use of a "belt and suspenders rationale" (p. 153) by relying on both the presumed impact theory together with the expert evidence, to form the evidentiary basis for its conclusion that loss as a component of the cause of action could be proved on a class wide basis.

38 The defendants in *Linerboard Antitrust Litigation* also argued that the *Linerboard Antitrust Litigation* case was exactly comparable to the case of *Newton, supra*, where the same court of appeals overturned the lower court's decision to certify. In *Newton v. Merrill Lynch* [259 F.3d 154 (U.S. C.A. 3rd Cir. 2001)], the complaint was that brokers in stock transactions had not obtained the best price for their clients. The evidence on the certification motion showed that the computer system used by the defendant brokers obtained variable prices, some of which were the best, and some of which were not. Consequently, some stock purchasers suffered loss while others did not. The appeals court rejected the comparison with the *Newton* case, essentially because in *Newton*, not all members of the putative class had suffered loss. In *Newton*, the court of appeals noted that "[w]hether a class member suffered economic loss from a given securities transaction would require proof of the circumstances surrounding each trade, the available alternative process, and the state of mind of each investor at the time the trade was requested" (p. 187). Based on the evidence before the court on the *Linerboard Antitrust Litigation* motion, no similar individual inquiries were required to prove loss to every member of the class of linerboard purchasers.

39 A useful comparison can be made between the evidentiary record in the *Linerboard Antitrust Litigation* certification motion and the record in this case. In *Linerboard Antitrust Litigation*, the court had both evidence based on economic theory as well as industry evidence that formed the basis for expert opinions of what actually occurred in the market when corrugated cardboard was sold as sheets and boxes. The evidence demonstrated to the certification court that it could be proved at trial that the plaintiffs did in fact suffer loss on a class-wide basis. The certification of the plaintiff class in *Linerboard Antitrust Litigation* did not, of course, mean that there would not be contrary evidence and substantial opposition to the plaintiffs' position at trial. It did mean that, on a preliminary basis, there was a sufficient record to support a decision to certify based on liability as a common issue.

40 In this case, the appellants presented no evidence from industry representatives to explain how the manufacturers and distributors of bricks and the developers of new homes price their products, and in particular, whether there is a direct pass-through of the price of every component into the sale price of all homes, the relevance of the value of the land component, and how other factors such as the real estate market and the individual bargaining of the purchaser and vendor affect the price. The evidence on the issue of loss to the members of the plaintiff class came only from the affidavit of an expert economist who did not address those issues. In his affidavit, the expert does not suggest that he consulted any industry records or other data which would substantiate a pass-through analysis.

41 Finally, in the *Linerboard Antitrust Litigation* case, the defendants asked the court to apply the decision of the U.S. Supreme Court in *Illinois Brick Co., supra*, which the respondents in this case also seek to rely on. *Illinois Brick Co.* was an anti-trust treble damages action, brought under s.4 of the *Clayton Act*, 15 U.S.C. s.15, by end-purchasers of structures built using concrete blocks. They alleged that the manufacturers of the concrete blocks had engaged in a conspiracy to fix prices in violation of federal antitrust legislation (*Sherman Act*, 15 U.S.C. s.1). The issue was whether indirect purchasers, as opposed to the intermediaries who had purchased directly from the manufacturers, could sue based on the alleged overcharge. In its earlier

decision in *Hanover Shoe Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (U.S. Pa. 1968), the U.S. Supreme Court had held that where the plaintiffs were direct purchasers from the defendants, the defendants could not use the defence that the alleged overcharge had been passed through to the ultimate consumer and therefore that the direct purchaser had suffered no damage. In *Illinois Brick Co.*, the same bar was applied to indirect purchasers as plaintiffs: they could not sue for treble damages for price fixing because allowing claims by both direct and indirect purchasers would create the risk of double recovery and make the process of determining who had suffered what proportion of the price overcharge too complex, thereby undermining the effectiveness of the remedy.

42 In the *Linerboard Antitrust Litigation* litigation, both classes of plaintiffs were direct purchasers from the defendant manufacturers. Because both the sheets and the boxes contained linerboard only as a component, so that the price-fixed product formed only one ingredient of the product purchased, the defendants argued that the class members were akin to indirect purchasers, and that the *Illinois Brick Co.* prohibition should apply. The appeals court rejected the analogy and held that the class members were direct purchasers and "entitled to recover the full amount of any overcharge" (pp. 159-60).

43 In his reasons in the case at bar, the motion judge declined to follow *Illinois Brick Co.*, which, as discussed above, bars actions by indirect purchasers for price fixing as a matter of law in the U.S.² However, in so doing he did not address the underlying reasoning of the U.S. Supreme Court that led to the result in *Illinois Brick Co.* and in *Hanover Shoe*, namely, the complexities of proving the extent to which the different players in the chain of purchase bear the higher price caused by the illegal conspiracy to fix the price of the base product.

44 The complexity of the "pass-through" problem was recognized by the Divisional Court. The court referred with approval to the following passage from pp. 742-43 of *Illinois Brick Co.*:

... "in the real economic world rather than an economist's hypothetical model," the latter's drastic simplifications generally must be abandoned. Overcharged direct purchasers often sell in imperfectly competitive markets. They often compete with other sellers that have not been subject to the overcharge; and their pricing policies often cannot be explained solely by the convenient assumption of profit maximization. As we concluded in *Hanover Shoe*, 392 U.S., at 492, attention to "sound laws of economics" can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variables would have behaved had there been no overcharge.

45 The Divisional Court noted the many problems of proof facing the appellants with respect to the pass-on issue, including the number of parties in the chain of distribution and the "multitude of variables" which would affect the end-purchase price of a building. The appellants would have to show that the price increase (or a part of it) was passed through from the respondents to the building materials manufacturer and distributor, to the builder, to the purchaser and on to any subsequent purchaser. If the price increase was absorbed at any point, the chain would be broken. The problem is compounded by the fact that the iron oxide pigment forms such a minimal part of the whole structure and therefore a similarly minimal portion of the purchase price of a building.

46 As noted above, neither the variables nor the issue of how to prove the flow of the price increase through the distribution chain were addressed by the appellants' expert in his evidence. Nor does he discuss the effect of the market on real estate prices and the relative effects on the purchase price of (a) the market, (b) the value of the land, (c) the value of the building, and (d) how one assesses the value of the component parts of the building at any particular point in time, remembering that the proposed class members are not only purchasers of new homes, but of resale homes as well, and that not all homes were constructed using the impugned materials.

47 In my view, this latter point — that not all buildings built and sold during the relevant period contained the respondents' materials — highlights a significant aspect of the problem with the appellants' theory and their position. The appellants' expert alludes to the issue of whether the increase in price of iron oxide pigmented materials may have had the effect of causing an increase in all substitute materials as well. In other words, the effect of the increase in price of coloured bricks might have been to cause the price of all bricks to rise, or looking at it another way, the homebuilders may have increased the prices of all houses built with bricks regardless of what bricks they used, in order to accommodate and at the same time to take advantage of the

price increase of the iron oxide pigmented bricks. The expert suggests that if that were true, then "all homebuyers or other end-users would have been damaged by the iron oxide conspiracy to a greater or lesser extent", not just buyers of homes containing the defendants' product. However, he goes on to say that he did no analysis to determine whether this in fact occurred, and opined that there was no practical relevance to the issue.

48 To the contrary, from the point of view of proof of loss to homebuyers as a class based on a pass-through of the price increase, if it could be shown that all home prices were artificially inflated as a result of the use of both iron oxide pigmented and non-iron oxide pigmented building materials, that could well have formed the basis for concluding that proof of loss could be presented on a class-wide basis as a common issue.

49 The Divisional Court also rejected several other methods referred to by the motion judge for arriving at class-wide proof of loss. First, the Divisional Court held that s.24 of the *Class Proceedings Act*, which deals with an aggregate assessment of monetary relief, cannot resolve the problems of proving loss on a class-wide basis. I agree that s. 24 of the *Class Proceedings Act* is applicable only once liability has been established, and provides a method to assess the quantum of damages on a global basis, but not the fact of damage.

50 Second, the Divisional Court rejected the suggestion that the variables in circumstances of different plaintiffs could be addressed by the creation of plaintiff sub-classes. Again, the creation of subclasses is an evidentiary matter. I note that the appellants have not relied on this solution before this court, nor is there any evidentiary foundation to suggest that different subclasses of plaintiffs can be formed which will effectively create a basis for commonality on the issue of proof of loss.

51 Finally, the Divisional Court concluded that s. 23 of the *Class Proceedings Act*, which contemplates the use of statistical evidence to determine the amount or distribution of a monetary award, would not allow the issue of liability to be proved through otherwise inadmissible statistical evidence. I do not adopt this comment by the Divisional Court. In the American cases, as discussed above, expert evidence that includes an analysis of statistical data has been used to establish loss on a class-wide basis. The admissibility of any such evidence will have to be considered when the issue arises.

Conclusion on Common Issue

52 In my view, the motion judge erred in finding that liability could be proved as a common issue in this case. The evidence presented by the appellants on the motion does not satisfy the requirement prescribed by the Supreme Court in *Hollick* of providing sufficient evidence to support certification. The evidence of the appellants' expert assumes the pass-through of the illegal price increase, but does not suggest a methodology for proving it or for dealing with the variables that affect the end price of real property at any particular point in time. The motion judge focused on the expert's opinion that the loss could be measured, rather than on how any such loss could first be established on a class-wide basis.

(ii) Preferable Procedure

53 In reaching his conclusion under s. 5(1)(d) of the *Class Proceedings Act* that "a class proceeding would be the preferable procedure for the resolution of the common issues," the motion judge specifically limited his focus to whether the class action procedure was preferable for resolution of the common issues only, and not of any other individual issues that would have to be resolved in the course of the litigation. In so doing, the motion judge did not have the benefit of the Supreme Court of Canada's decision in *Hollick, supra*, where the court specifically dealt with the breadth of the inquiry under s. 5(1)(d) of the Act. After noting that the section only speaks about the preferable procedure for resolving the common issues, McLachlin C.J.C, stated:

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 (para. 29).

54 The Chief Justice concluded that "[t]he question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole", and quoted with approval the statement of the Chairman of the Attorney General's Advisory Committee that the class representative must

demonstrate that, *given all the circumstances of the particular claim*, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings [emphasis added in *Hollick*] (para. 30).

55 Regardless of whether the motion judge was correct in concluding that a class action would be the preferable procedure when there were three major common issues, as I have concluded based on the record, that proof of loss as a component of liability cannot be a common issue, the only common issues are the price fixing conspiracy, and possibly, the measure of damages, if the scope of liability can be determined.

56 I do not believe the motion judge would have certified the action as a class action had he not viewed liability as a common issue. The number of potential plaintiffs in this case is very large, estimated at 1.1 million. Clearly, if individual trials are needed to establish loss and therefore liability, the action will be unmanageable.

57 Together with the issue of proof of loss is the question whether a home purchased by any plaintiff actually contains bricks or paving stones coloured with the respondents' iron oxide pigment. As part of the proof of loss, a massive record-tracing exercise will be required to establish the inclusion of the respondents' product in any particular structure. The respondents point out that the period over which records must be obtained spans seventeen years. The respondents also point to the many intermediary parties from whom those records, if they exist, must be sought.

58 In his discussion regarding the class definition and the potential difficulties of identifying class members because of this extensive tracing exercise required, the motion judge discounted apparent problems of self-identification of potential plaintiffs who might have large claims and would therefore want to opt out of the class procedure. He did so because all potential plaintiffs' claims appeared to be very minimal, so that the goal of certification would not be compensation of individual plaintiffs but rather behaviour modification. Consequently, the motion judge concluded that possible under-inclusion of potential plaintiffs was not a serious matter.

59 The motion judge did not consider how the same problem of identification of class members can also arise in the context of possible over-inclusion of parties in the class. The potential problem was masked by making proof of loss a common issue. However, with liability as an individual rather than a common issue, identification and proof of those actually affected is required, with all of the difficulties referred to above.

60 The appellants also base their argument on ss. 24 and 26 of the *Class Proceedings Act*. The expert evidence filed by the appellants opined that the illegal profits gained by the respondents could be calculated on an aggregate basis. The appellants argue that the loss to the class is equal to the gain of the respondents based on their illegal conspiracy. The appellants suggest that by finding that individual trials are needed to prove a loss in each case, the Divisional Court confused the process of assessing damages on an aggregate basis with the process of distributing damages to the class members. Section 24(1)(b) of the *Class Proceedings Act* provides:

24.(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

.....

(b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; . . .

61 It is clear to me that the Divisional Court made no such error. Section 24(1)(b) is a mechanism for assessing damages where there is no issue of liability. Section 26 also deals with the distribution of the damage award. The Divisional Court focused its analysis on the mechanism of proving the loss necessary to base liability. By seeking to equate the respondents' gain with the class members' alleged loss, the appellants effectively skip over the process of determining who in the chain, beginning with the direct purchasers from the respondents, absorbed the loss. In the U.S., this problem has been resolved by limiting the civil remedy of treble damages for price fixing to direct purchasers only and attributing the entire loss to them. The effect of

the appellants' approach is to attribute the entire loss to the indirect or end-purchasers rather than to determine whether those parties suffered loss as required by s. 36(1) of the *Competition Act* and as part of the common law causes of action.

62 The appellants complain that if the action is not certified, this will effectively end the litigation, and thereby defeat the goal of behaviour modification which would be accomplished through the action and which is one of the three goals of the *Class Proceedings Act*. However, where access to justice through compensation of individual plaintiffs who have suffered a loss is not a significant goal (because the amounts in issue are so minimal, and most plaintiffs do not know if or that they suffered any damage), and where judicial economy would be undermined, not enhanced, by certifying the action, the circumstances requiring behaviour modification would have to be extremely compelling to allow that single goal to overcome the other deficiencies. In this case, the *Competition Act* provides criminal sanctions to achieve that goal.

63 The appellants argue further that if certification is not allowed in this case, the effect would be a complete bar on all class actions by consumers in price-fixing cases. They argue that the civil action under the *Competition Act*, used together with the *Class Proceedings Act*, is an important tool for preventing and effectively punishing price-fixing activity. It must be able to be used along with the enforcement mechanisms in the *Competition Act* in order to effectively regulate and discourage anti-competitive behaviour in the marketplace. The appellants point to the limited resources of the Competition Bureau for carrying out comprehensive enforcement and therefore the necessity that class actions exist as an effective threat to potential anti-competitive market behaviour.

64 Although the civil remedy for anti-competitive behaviour can be an important component of the enforcement of the goals of the *Competition Act*, it is only one component. In appropriate cases, the *Competition Act* and *Class Proceedings Act* can work together as a valuable tool against price-fixing. However, in this case, the obstacles to an effective class proceeding override its potential benefits.

65 In my view, the question of whether and how consumers will be able to use class actions to obtain relief from price fixing by suppliers and manufacturers remains an open one in this jurisdiction. The appellants were unsuccessful in this case because they did not present the evidentiary basis for a certifying court to be satisfied that loss as a component of liability could be proved on a class-wide basis. Whether such evidence could have been obtained is not clear.

66 The Divisional Court's approach suggested that it could not: that the variables in house purchase prices were such that the type of evidence that would have been required to show "pass-through" on a class-wide basis would not have been available in this case, in large part because of the nature of real estate and the individualized pricing factors on each sale. The Divisional Court's concerns follow the U.S. approach as defined in the *Illinois Brick Co.* and *Hanover Shoe* cases.

67 The difficulties with proving pass-through of price increases on a class-wide basis are illuminated in an article that discusses *Illinois Brick Co.*. (William H. Page, "The Limits of State Indirect Purchaser Suits: Class Certification in the Shadow of Illinois Brick" (1999) 67 Antitrust L.J. 1). The author essentially concludes that indirect purchaser litigation for price-fixed goods is not a viable method of achieving behaviour modification against anti-competitive behaviour. At pp. 36-7 the author states:

Thus, only a highly artificial subset of indirect purchasers of price-fixed goods will ever be compensated by class actions. Moreover the denial of certification is largely unrelated to the merits of the underlying claim. Most of the factors that preclude certification of classes of indirect purchasers have little to do with whether a price fixing conspiracy actually existed or whether indirect purchasers bore an overcharge. The number of levels of intermediate purchasers between the price fixers and plaintiff class is unrelated to the success of the conspiracy. Similarly, whether plaintiff intermediate purchasers alter or add value to the product, or use it as an ingredient in another product, has nothing to do with whether price fixing has occurred upstream, or even whether the overcharge was passed on. Yet these factors may preclude certification because they make it impossible to establish harm to each class member by any kind of common proof.

Thus, in many cases, a price-fixing overcharge will simply dissolve into the currents of the channels of distribution. Eighty years ago, Justice Holmes noted the "endlessness and futility of the effort to follow every transaction to its ultimate result," even though "in the end the public pays the damages in most cases of compensated torts." Now, as then, it may well

be that an overcharge is passed on but the legal system cannot identify its incidence. Common proof is impossible and individualized proof would be more costly than the amount of the harm. The emerging reality of the indirect purchaser class action offers no realistic mechanism for accomplishing compensation for remote purchasers of price-fixed goods. If the indirect purchaser class action is only available to a small subset of indirect purchaser injuries, even among price-fixing conspiracies that are actually detected, it is not fulfilling its stated purpose [internal citations omitted].

68 In this jurisdiction it remains to be determined whether in a particular case a sufficient evidentiary record can be brought before a certifying court to satisfy that liability can be proved as a common issue. Whether it can be done is a question left open for future cases.

(iii) Definition of the class

69 Leave to appeal to the Divisional Court was granted by Lane J. on the basis that the motion judge erred in his definition of the class. As part of its decision, the majority of the Divisional Court held that the class definition was in error because the definition is not objective, but turns on the outcome of the litigation or the merits of the claim. I agree with that conclusion. As Sharpe J. stated in another case, (*Robertson v. Thomson Corp.* (1999), 43 O.R. (3d) 161 (Ont. Gen. Div.) at 169):

I agree with Winkler J. in [*Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.)] and with [H. Newberg and A. Conte, *Newberg on Class Actions*, 3d Ed. (West Group, 1992)] at p. 6-61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

70 As discussed earlier, when the motion judge was considering the class definition, he rejected the problems of self-identification of potential class members because he did not consider under-inclusion as a problem. However, by defining the class as those who suffered damage, he in effect defined away any potential over-inclusion that could occur if proof of loss is a common issue. In my view, the two errors were linked in this case.

VI. CONCLUSION

71 In light of my conclusion that the action cannot be certified as a class action because a class action is not the preferable procedure given the limited common issues, it is not necessary to address the propriety of the motion judge's reliance on the appellant's affidavit.

72 I would dismiss the appeal.

73 The respondents have provided their bill of costs. The appellants shall have ten days from release of these reasons to provide the Senior Legal Officer with their submissions as to costs. The respondents may respond within 7 days thereafter.

Austin J.A.:

74 I agree.

Rosenberg J.A.:

75 I agree.

Appeal dismissed.

Footnotes

* Additional reasons re costs: 2003 CarswellOnt 1205 (Ont. C.A.).

- 1 The lower court decision is reported at *Linerboard Antitrust Litigation, Re*, 203 F.R.D. 197 (U.S. Dist. Ct. E.D. Penn. 2001)).
- 2 The same approach has been followed, for example by Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.) where he named lead counsel for the plaintiff classes in a class action involving both direct and indirect purchaser classes of plaintiffs affected by a world-wide conspiracy to increase the price of vitamins to both wholesale and retail users. The ability of the different classes to prove loss did not appear to be a disputed issue in the motion. The issue of concern was the allocation of the global loss among the various groups. The class action procedure did not fail based on the potential difficulty of allocating damages. In the Divisional Court decision in the case at bar, Somers J. specifically left open the possibility that there could be indirect purchaser anti-trust claims advanced by way of class proceeding, and at para. 44, referred to the *Vitapharm* case.

2003 CarswellOnt 2810
Supreme Court of Canada

Chadha v. Bayer Inc.

**2003 CarswellOnt 2810, 2003 CarswellOnt 2811, [2003] 2 S.C.R. vi (note), [2003]
S.C.C.A. No. 106, 191 O.A.C. 397 (note), 320 N.R. 399 (note), 65 O.R. (3d) xvii**

Avininder Chadha, Renu Chadha v. Bayer Inc. and Bayer Corporation

Arbour J., Gonthier J., Major J.

Judgment: July 17, 2003
Docket: 29651

Proceedings: Leave to appeal refused, 2003 CarswellOnt 49, 223 D.L.R. (4th) 158, 168 O.A.C. 143, 63 O.R. (3d) 22, 31 B.L.R. (3d) 214, 23 C.L.R. (3d) 1, 31 C.P.C. (5th) 40 (Ont. C.A.); Affirmed, 2001 CarswellOnt 1697, 200 D.L.R. (4th) 309, 54 O.R. (3d) 520, 15 B.L.R. (3d) 177, 147 O.A.C. 223, 8 C.P.C. (5th) 138 (Ont. Div. Ct.); Reversed, 1999 CarswellOnt 2080, 45 O.R. (3d) 29, [1999] O.J. No. 2497, 36 C.P.C. (4th) 188 (Ont. S.C.J.)

Counsel: None given

Subject: Civil Practice and Procedure

Per Curiam:

1 The application for leave to appeal from the judgment of the Court of Appeal for Ontario, Number C37224, dated January 14, 2003, is dismissed with costs.

TAB 9

2001 CarswellOnt 1784
Ontario Superior Court of Justice [Commercial List]

Confectionately Yours Inc., Re

2001 CarswellOnt 1784, 25 C.B.R. (4th) 24

**In the Matter of the Proposals of Confectionately Yours,
Inc., Bakemates International Inc., Marmac Holdings Inc.,
Confectionately Yours Bakeries Inc., and Sweet-Ease Inc.**

Farley J.

Heard: April 17, 2001

Judgment: April 18, 2001

Docket: Doc. 31-377993, 31-377994, 31-377995, 31-377996, 31-377997

Counsel: *Robert J. Chadwick*, for KPMG Inc., Court-Appointed Receiver of Confectionately Yours, Inc., Bakemates International Inc., Marmac Holdings Inc., Confectionately Yours Bakeries Inc., and Sweet-Ease Inc.

Aubrey Kauffman, for Laurentian Bank of Canada

Paul Pape, for the Parravano, shareholders of companies in receivership

Gunther Wagner in person, inspector of bankruptcy estate of companies in receivership

Subject: Insolvency; Corporate and Commercial; Insolvency; Corporate and Commercial

REVIEW of receiver's fees and disbursements.

Endorsement. Farley J.:

April 17, 2001

1 Perhaps it is the height-or depth — of audacity for counsel for the Parravano to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees). However Mr. Pape was only retained some time last week. He is the fourth counsel for the Parravano (after Mr. S. Graf of Aird & Berlis, Mr. F. Bennett of Bennett & Company and Mr. J. Sereda of Sereda and Sereda). He was so certain as to this that he sent me a letter last Thursday (the day before Good Friday) faxed at 2:23 p.m. stating that "I [Mr. Pape] have arranged for a reporter".

2 The jurisprudence with respect to this question is as I understand it most recently dealt with me by me in *Re Anvil Range Mining Corp.*, an endorsement of February 21, 2001, [(2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List])] (a copy of which was provided by Mr. Chadwick to Mr. Pape before court this morning). See paras. 3-4 where I observed:

[3] The Interim Receiver is an officer of the Court. That designation with all of its obligations and responsibilities does not change merely because the Interim Receiver has brought a sanctioning motion. I disagree with and reject Mr. Jones' submissions that the Interim Receiver by virtue of bringing this motion has become an adversarial party in a contentious matter. Nor is this an exceptional or unusual circumstance situation which would require cross-examination.

[4] See *Mortgage Insurance Co. v. Innisfill Landfill Corp.* (1995) 30 C.B.R. (3d) 100 (Ont. Gen. Div.) at pp. 101-2 where I stated:

As to the question, of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required

to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is truly needed. [emphasis added]

The jurisprudence which I referred to included *Re Mr. Greenjeans Corp.* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.J.) and *Avery v. Avery*, [1954] O.W.N. 364 (H.C.J.) as I recollect as I make this endorsement over this lunch hour break but was not limited to these two cases. I note that my view of the situation was adopted by Paperny J. (as she then was) in *Re Canadian Airlines Corp.* (2000), 20 C.B.R. (4th) 1 (Alta. QB) at p.30. See also paper "Canadian Airlines — The Last Tango in Calgary" by Norm A. McPhedran at pp. 43-5 regarding cross examination of the monitor issue.

3 The more appropriate course of action is to proceed to interview the court officer with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravano's and their previous counsel, Mr. Sereda. Apparently they did not wish to avail themselves of that opportunity until after attendance by Mr. Sereda at a 9:30 at the request of Mr. Chadwick. Forthwith after that an interview of Mr. Morawetz took place and a written response was provided by the Receiver to the questions put to the Receiver in writing. Mr. Pape indicates that he only regards that as discovery; whereas what he wants is cross-examination under oath before me as the judge.

4 Mr. Pape wants me to exercise my discretion to allow him to cross-examine Mr. Morawetz but he has not provided any factual evidence/background to substantiate that there were unusual circumstances in this regard. In essence his main thrust was that the bills were too large — as a result of the hourly rate of everyone involved being too high and that too many hours were expended. He refers to *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B. C.A.) which he says stands for the proposition that 5% of the proceeds is the starting point for remuneration and then one goes up or down depending on complexity and other factors. Here he asserts that the subject bills amount to four times the 5% "rule of thumb"; however what he did not point out was that he was basing on his percentage on the net as opposed to gross — i.e. apparently the gross when one takes into account the first mortgage was approximately \$14 million (versus \$1 million of Receiver's fees and \$200,000 for legals). Thus we have a situation here which is not four times the 5% but value somewhat less than 2 times. As to excessive hourly rates he pointed out that a "bookkeeper" billed at \$175/hr. would be a remuneration of \$310,000 a year for that bookkeeper — which ignores the question of overhead.

5 I do not think that this is a proper case in which to exercise my discretion to allow cross-examination of Mr. Morawetz. Mr. Pape has not established any grounds for doing that.

6 Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

April 18, 2001

7 These Reasons are to be read as together with my reasons of April 17, 2001.

8 Unfortunately I was disappointed. Mr. Pape opted for attempting to show that Mr. Morawetz was not truthful or was misleading. Rather than getting information and clarification as to the actions of the Receiver and its charges, what we had instead was counsel attempting to spring traps. When Mr. Morawetz reasonably attempted to elaborate or explain, he was cut off. An example was that Mr. Morawetz attempted to explain why there was no charge/time entry for his reading and verifying of the time entries/work of the people under his command as he never charges for this type of activity as a general principle. He was cut off several times in this regard with counsel attempting to prove with his initial answer that there was no charge/time entry as being conclusive proof that there was no such checking. This was an unfortunate and ill-based attempt on Mr. Morawetz's character. Mr. Pape ought to have known better and I can only conclude that, in the rush of matters since he was retained last week, he did not have the time to properly research matters but instead relied on the spade work of his clients, the Parravanos, without checking (this seems to have been the basis for some of his materials hand up). In this regard I would note that the Parravanos provided no evidence in any form that the court could accept. Expert witness testimony was long promised by the Parravanos. It was one of the bases for getting the original adjournment. No expert report/testimony was forthcoming to challenge the Receiver's reports and the activities and charges of the Receiver.

9 I note as well that Mr. Pape, in his letter of Thursday, April 12 (the day before Good Friday) faxed to me at 2:23 p.m., states "My clients will not place into issue the conduct of the Receiver as specified in its reports. However, they reserve whatever rights they may still have to protest the conduct". The Parravanos have had more than ample opportunity to contest the contested conduct, all of which is referred to in my earlier endorsement of Feb. 15, 2001. They have had two adjournments and two months to prepare. They knew that this hearing today was pre-emptory in the result. They did not contest any activities. It is inappropriate to claim to reserve a further right to do so. The Receiver's activities as reflected in their report are approved.

10 What should be pointed out furthermore is that the Laurentian Bank (Bank) which is at serious risk of not being paid out in full despite its secured position supported the fees and disbursements of the Receiver. The Business Development Bank (BDB) also did not oppose the fees and disbursements. I am of the view that the April 9, 2001 letter of Paige Wadden, counsel for the BDB, to the Parravanos must be taken in context where she states:

Our client is in agreement that the professional fees generated by the Receiver KPMG LLP are extremely high.

In that she is stating nothing more than what Mr. Morawetz had not volunteered. He took as of the view that the charges were high — but necessarily high and justifiable in the circumstances. I do find it puzzling and troubling that the Receiver was not provided with a copy of this letter in advance and that counsel would not have also given the Receiver and the court a copy of Mr. Parravanos' letter of March 26, 2001. Further, it is not clear what other circumstances may have influenced Ms. Wadden, but I do note that she was concerned about incurring further expense when it would not benefit BDB and also that it appears that the Parravanos have personal guarantees to the BDB and one may question whether it is better to have guarantees from people who feel that you are on the same wave length.

11 Further, it is important to point out that this was an "operating" receivership and not merely one which involved the gathering in and disposal of assets. Under usual circumstances, an operating receivership will be a more intensive and extensive user of receiver personnel than a liquidation one. Here the Receiver viewed, appropriately in my opinion and prior approval, that a going concern sale would realize the most for the receivership estate, with resultant ultimate benefit for the Parravanos, as shareholders and guarantors. This required the Receiver to be involved with running the companies for a three month period. These were not an easy three months. The companies (5 in total) were in financial disarray and had been in that condition for some time. Not only was this a practical problem — but the record keeping was of very poor quality — inaccurate, confused among the companies and incomplete. The Parravanos had been attempting to find a buyer for over a year. In July 2000 they filed Notices of Intent to File a Proposal and thus made customers (none being subject to long term/no break contracts), suppliers who were being caught as unsecured and employees very nervous and skittish. No proposal was in fact made and Spence J. Granted

the receiverships on October 3, 2000. This and the legal battles which followed did not make the waters any calmer. This was a full fledged storm in which the Receiver found itself plunged. The Parravano attempted to obtain leverage by sowing seeds of false hope and dissension amongst the unsecured creditors in an effort to have a proposal confirmed after the receivership.

12 Gunther Wagner, a creditor and one of the inspectors in the bankruptcy estate was thoroughly disillusioned by the situation. He was of the view that the insolvency regime had failed him and the other unsecureds. However, what must be appreciated is that he is an inspector of the bankruptcy estate — not of the Receivership Estate. It is the bankruptcy trustee who should take action/participate but Mr. Wagner said that the bankruptcy trustee would not since there were no funds in the bankruptcy estate. Perhaps if they were a moment of calm reflection it would be appreciated that the underlying cause of this financial dilemma was the financial mismanagement of the Parravano against which the creditors were unprepared, unsuspecting and/or unprotected.

13 As to the question of ramp up knowledge and experience prior to Oct. 3, 2000, I would also point out that Mr. Pape did not appear to have a good idea of the general duties of an "interim receiver" (or of a "monitor") and of a "receiver" nor of the specific duties of same in this situation vis-a-vis his thrust with respect to a leg up on the learning curve ramp up.

14 I accept Mr. Morawetz's view that this receivership was a difficult and rather unique one. Examples, non-exhaustive examples, of this are illustrated at s. 3.1.3, s. 3.9.2, as 4.3.2 and 4.3.4 of the Receiver's first report, which involve activities of the Parravano or their then counsel. Another instance of a neutral origin was the infestation problem (a second occurrence which had wild fire possibility as to customers) as set out in s. 3.9.3. While not relied on — but filed — was an affidavit of Barbara Parravano sworn April 4, 2001; I note para. 44 which complains about the Receiver not taking action with respect to a court order obtained from me earlier than the receivership. What Mrs. Parravano does not reveal is that that order was obtained when she relied on false information from her trucking broker.

15 Counsel for the Parravano asserted that human nature would dictate that 10% of the bills involved duplication and/or wheel spinning. He advanced no basis for this assertion — save "human nature" nor did he establish in the examination/questioning any basis for such assertion. I accept Mr. Morawetz's advice that he did scrutinize the bills before they went out so that inappropriate charges were not included. He indicated that fees would be some 40 - 50 hours and he modestly indicated that in the overall scheme of things that this elimination was not anything of magnitude.

16 I was provided with 5 cases by the counsel for the Parravano which dealt with legal hourly rates — *Re Nadeau, Job v. Remax, Chitel v. BMO, Leenen v. CBC* and *Roach v. Long*. They are all fact specific. I would also observe that the court is not likely to award a fee based on a higher than requested hourly rate. What also must be taken into account is that the litigation activity (in fact the receivership activity here as well to a large degree) was real time litigation (activity) as opposed to autopsy litigation (activity). The pressures of real time are significantly higher than of autopsy.

17 Mr. Pape pointed out that the receivership order of October 3, 2000 relieved the Receiver for liability for negligence except gross negligence or wilful misconduct with a view to suggesting that this relieved the Receiver of a significant burden. That, in my view, (and in Mr. Morawetz's) fails to recognize the integrity of professionalism.

18 While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

19 The Parravano complain about having so many KPMG personnel on site. However what must be appreciated is that the two of them, experienced in the industry and in the company had not been financially successful. It is not surprising that more staff would be required by the Receiver. Further that staff would have to be skilled and reasonably experienced. The Parravano complain that the KPMG people did not have bakery experience. What they fail to appreciate is that it would be impossible to have firms with such narrow specialties and it is the adaptability of the large tier one firms which allow them to respond to the demands imposed upon them in particular situations.

20 The Parravano sent many many letters questioning and criticizing the Receiver. Each had to be answered. A time consuming and expensive process — and one which encouraged the Receiver to be very concerned about crossing all "t"s and dotting all "i"s.

21 The Parravano rely on *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]), (Farley J.) especially where I observed at para. 4 concerning the multiplicand of hours docketed/worked multiplied by the hourly rate — where I stated:

This is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the courthouse to the Royal York Hotel via Oakville.

There was no evidence of such a driver and fare here. The work done appears reasonable in the circumstances (subject to some objection about menial tasks being done by senior people). I would point out that the fare cannot complain about the meter charge if the fare insists on being taken a roundabout route — or if the fare greases the roadway so that the taxi cannot get purchase and slips. The Parravano, while employed for a period by the Receiver to avoid disruption, were not cooperative. It is, as another example, astounding that Mrs. Parravano would insist on the trade mark people only dealing with her and not informing the Receiver of her activities.

22 As to senior people doing junior work, see para. 9 of *BT-PR* where I further observed:

That observation is subject to one qualification — for a small intermittent matters, it may be more expensive to have a senior person instruct a junior with the junior doing the work than for the senior person to do it.

There was a complaint about the managers delivering cheques and doing photocopying and about Ms. Desrocher, the technician doing data entry. However it is noted that Ms. Desrocher was required to be on site full time and it would be better to employ her time to the maximum extent rather than have her do nothing for part of the day. Similarly, Mr. Morawetz satisfied me with the need to have the inventory count done by his personnel on a timely and accurate way for the closing.

23 See also para. 26 of *BT-PR* as to inappropriate reliance on inadmissible evidence. Here there was no contrary evidence forthcoming from the Parravano. (That is not to say the Receiver's account including legal bills should not be scrutinized notwithstanding this deficiency).

24 *Belyea v. Federal Business Development Bank*, [1983] N.B.J. No. 41 (N.B. C.A.) was a *liquidation* (as opposed to an operational/going concern sale) scenario where the rule of thumb 5% was employed.

25 I am in full accord with the sentiments of Austin JA in *Sherman v. Drabinsky*, [1996] O.J. No. 1525 (Ont. C.A.) at para 25. Judgment is of the element of importance — the fee is not simply a question of arithmetic. However in the circumstances prevailing here, I do not see that there was in fact any demonstrated inefficiency — but rather dedication and competence. In such circumstances there should be no prohibition against calculating the fee in the way that the Receiver and its counsel have. I should pause to note that the Parravano have no issue with the legal fees of Mr. Kauffman's firm — in fact they asserted that his firm's fees should be the governing factor for the fees of Mr. Chadwick's firm.

26 I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

27 I am further satisfied that Mr. Morawetz as a hands on manager experienced in the industry/field had a very good handle on the work and the worth of the legal work.

28 I note that prior to the hearing the Receiver voluntarily dropped its charge for secretarial and other administrative services — a charge of some \$13,000. With that change I would approve the charges of the Receiver and its counsel, such appearing to be reasonable in the circumstances. As indicated above, the balance of the activities of the Receiver is also approved.

29 I may be spoken to with respect to costs in the next 40 days, if that is necessary.

Order accordingly.

2002 CarswellOnt 3002
Ontario Court of Appeal

Confectionately Yours Inc., Re

2002 CarswellOnt 3002, [2002] O.J. No. 3569, 116 A.C.W.S. (3d) 871, 164
O.A.C. 84, 219 D.L.R. (4th) 72, 25 C.P.C. (5th) 207, 36 C.B.R. (4th) 200

**IN THE MATTER OF THE PROPOSALS OF CONFECTIONATELY YOURS,
INC., BAKEMATES INTERNATIONAL INC., MARMAC HOLDINGS INC.,
CONFECTIONATELY YOURS BAKERIES INC., and SWEET-EASE INC.**

Catzman, Doherty, Borins J.J.A.

Heard: April 8, 2002

Judgment: September 19, 2002

Docket: CA C36486

Proceedings: reversing in part (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List])

Counsel: *Martin Teplitsky*, for Appellants, Barbara Parravano, Mario Parravano

Benjamin Zarnett, David Lederman, for Respondent, KPMG Inc.

Katherine McEachern, for Respondent, Laurentian Bank of Canada

Subject: Corporate and Commercial; Insolvency

APPEAL by shareholders of debtor companies from judgment reported at 2001 CarswellOnt 1784, 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]), assessing fees and disbursements of court-appointed receiver and its solicitors.

Borins J.A.:

1 This is an appeal by Mario Parravano and Barbara Parravano from the assessment of a court-appointed receiver's fees and disbursements, including the fees of its solicitors, Goodmans, Goodman and Carr and Kavinoky and Cook, consequent to the receiver's motion to pass its accounts. The motion judge assessed the fees and disbursements in the amounts presented by the receiver. The appellants ask that the order of the motion judge be set aside and that the receiver's motion to pass its accounts be heard by a different judge of the Commercial List, or that the accounts be referred for assessment, with the direction that the appellants be permitted to cross-examine both a representative of the receiver and of the solicitors in respect to their fees and disbursements.

Introduction

2 On October 3, 2000, on the application of the Laurentian Bank of Canada (the "bank"), Spence J. appointed KPMG Inc. ("KPMG") as the receiver and manager of all present and future assets of five companies ("the companies"). Collectively, the companies carried on a large bakery, cereal bar and muffin business that employed 158 people and generated annual sales of approximately \$24 million. The companies were owned by Mario and Barbara Parravano (the "Parravanos") who had guaranteed part of the companies' debts to the bank. Upon its appointment, KPMG continued to operate the business of the companies pending analysis as to the best course of action. As a result of its analysis, KPMG decided to continue the companies' operations and pursue "a going concern" asset sale.

3 Paragraph 22 of the order of Spence J. reads as follows:

THIS COURT ORDERS that, prior to the passing of accounts, the Receiver shall be at liberty from time to time to apply a reasonable amount of the monies in its hands against its fees and disbursements, including reasonable legal fees and disbursements, incurred at the standard rates and charges for such services rendered either monthly or at such longer or shorter intervals as the Receiver deems appropriate, and such amounts shall constitute advances against its remuneration when fixed from time to time.

4 The receiver was successful in attracting a purchaser and received the approval of Farley J. on December 21, 2000, to complete the sale of substantially all of the assets of the companies for approximately \$6,500,000. The transaction closed on December 28, 2000.

5 The receiver presented two reports to the court for its approval. In the first report, presented on December 15, 2000, KPMG outlined its activities from the date of its appointment and requested approval of the sale of the companies' assets. The second report, which is the subject of this appeal, was presented on February 2, 2001. The second report contained the following information:

- an outline of KPMG's activities subsequent to the sale of the companies' assets;
- a statement of KPMG's receipts and disbursements on behalf of the companies;
- KPMG's proposed distribution of the net receipts;
- a summary of KPMG's fees and disbursements supported by detailed descriptions of the activities of its personnel by person and by day;
- a list of legal fees and disbursements of its solicitors supported by detailed billings.

In its second report, KPMG recommended that the court, *inter alia*, approve its fees and disbursements, as well as the fees and disbursements of Goodmans, calculated on the basis of hours multiplied the hourly rates of the personnel. The total time billed by KPMG was 3,215 hours from October 3, 2000 to December 31, 2000 at hourly rates that ranged from \$175 to \$550. Its disbursements included the fees and disbursements of its solicitors. Each report was signed on behalf of KPMG by its Senior Vice-President, Richard A. Morawetz.

6 In summary, KPMG sought approval of the following:

- receiver's fees and disbursements of \$1,080,874.93, inclusive of GST.
- legal fees of Goodmans of \$209,803.46, inclusive of GST.
- legal fees of Goodman and Carr of \$92,292.32, inclusive of GST.
- legal fees of Kavinoky & Cook of \$2,583.23.

7 The Parravanoos objected to the amount of the fees and disbursements of KPMG and Goodmans. Their grounds of objection were that the time spent and the hourly rates charged by the receiver and Goodmans were excessive. They submitted that the fees of KPMG and Goodmans were not fair and reasonable. They also sought to cross-examine Mr. Morawetz with respect to their grounds of objection. The motion judge refused to permit Mr. Pape, counsel for the Parravanoos, to cross-examine Mr. Morawetz on the ground that a receiver, being an officer of the court, is not subject to cross-examination on its report. However, the motion judge permitted Mr. Pape as the judge's "proxy" to ask questions of Mr. Morawetz, who was not sworn. The motion judge then approved the fees and disbursements of the receiver and Goodmans in the amounts as submitted in the receiver's report without any reduction.

8 The appellants appeal on the following grounds:

- (1) The motion judge exhibited a demonstrable bias against the appellants and their counsel as a result of which the appellants were denied a fair hearing;
- (2) The motion judge erred in holding that on the passing of its accounts a court-appointed receiver cannot be cross-examined on the amount of the fees and disbursements in respect to which it seeks the approval of the court; and
- (3) The motion judge erred in finding that the receiver's fees and disbursements, and those of its solicitors, Goodmans, were fair and reasonable.

9 For the reasons that follow, the appellants have failed to establish that they were denied a fair hearing on the grounds that the motion judge was biased against them and their counsel and that they were not permitted to cross-examine the receiver's representative, Mr. Morawetz, on the receiver's accounts. As I will explain, the examination of Mr. Morawetz that was permitted by the motion judge afforded the appellants' counsel a fair opportunity to challenge the remuneration claimed. As well, the appellants have provided no grounds on which the court can interfere with the motion judge's finding that the receiver's accounts were fair and reasonable. However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. The motion judge failed to give these accounts separate consideration. I would, therefore, allow the appeal to that extent and order that there be a new assessment of Goodmans' accounts.

Reasons of the motion judge

10 The reasons of the motion judge are reported as *Bakemates International Inc. Re* (2001), 25 C.B.R. (4th) 24 (Ont. S.C.J. [Commercial List]).

11 In the first part of his reasons, the motion judge provided his decision on the request of the appellants' counsel to cross-examine Mr. Morawetz with respect to the receiver's accounts. He began his consideration of this issue at p. 25:

Perhaps it is the height — or depth — of audacity for counsel for the Parravano to come into court expecting that he will be permitted (in fact using the word "entitled") to cross-examine the Receiver's representative (Mr. Richard Morawetz) in this court appointed receivership concerning the Receiver's fees and disbursements (including legal fees).

After reviewing two of his own decisions — *Anvil Range Mining Corp., Re* (2001), 21 C.B.R. (4th) 194 (Ont. S.C.J. [Commercial List]) and *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.* (1995), 30 C.B.R. (3d) 100 (Ont. Gen. Div. [Commercial List]) — the motion judge concluded that because a receiver is an officer of the court who is required to report to the court in respect to the conduct of the receivership, a receiver cannot be cross-examined on its report.

12 In support of this conclusion, the motion judge relied on the following passage from his reasons for judgment in *Mortgage Insurance* at pp. 101-102:

As to the question of there not being an affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-) examination when the Receiver is willing to clarify or amplify his material when such is *truly* needed [emphasis added].

13 As authority for the proposition that a receiver, as an officer of the court, is not subject to cross-examination on his or its report, the motion judge relied on *Avery v. Avery*, [1954] O.W.N. 364 (Ont. H.C.) and *Silver v. Kalen* (1984), 52 C.B.R. (N.S.) 320 (Ont. H.C.). He went on to say at p. 26 that when there are questions about a receiver's compensation, "[t]he more

"appropriate course of action" is for the disputing party "to interview the court officer [the receiver] . . . so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions".

14 The motion judge noted on p. 26 that the appellants' counsel had "not provided any factual evidence/background to substantiate that there were unusual circumstances" in respect to the rates charged and the time spent by the receiver. Consequently, he concluded that it was not an appropriate case to exercise what he perceived to be his discretion to allow the Parravano's counsel to cross-examine Mr. Morawetz on the passing of the receiver's accounts. At p. 27, he stated: "Mr. Pape has not established any grounds for doing that."

15 Nevertheless, the motion judge did permit Mr. Pape to question Mr. Morawetz. His explanation for why he did so, the conditions that he imposed on Mr. Pape's examination, and his comments on Mr. Pape's "interview" of Mr. Morawetz, are found at p. 27:

Mr. Pape has observed that Mr. Morawetz is here to answer any questions that I may have as to the fees and disbursements. While Mr. Pape has no right or entitlement to cross-examine Mr. Morawetz with respect to the fees and disbursements — and he ought to have availed himself of any last minute follow-up interview/questions last week if he thought that necessary, I see no reason why Mr. Pape may not be permitted to ask appropriate questions to Mr. Morawetz covering these matters — in essence as my proxy. However, Mr. Pape will have to conduct himself appropriately (as I am certain that he will — and I trust that I will not be disappointed), otherwise the questioning will be stopped as I would stop myself if I questioned inappropriately. Mr. Morawetz is under an obligation already as a court appointed officer to tell the truth; it will not be necessary for him to swear another/affirm [sic] — he may merely acknowledge his obligation to tell the truth. It is redundant but I think necessary to point out that this is not the preferred route nor should it be regarded as a precedent.

[There then followed the interview of Mr. Morawetz by Mr. Pape and submissions. I cautioned Mr. Pape a number of times during the interview that he was going beyond what was reasonable in the circumstances and that Mr. Morawetz was entitled to give a full elaboration and explanation.]

16 In the second part of his reasons, the motion judge considered the amount of the compensation claimed by the receiver and its solicitors, Goodmans. He began at p. 27 by criticizing Mr. Pape "for attempting to show that Mr. Morawetz was not truthful or was misleading" in the absence of any expert evidence from the appellants in respect to the time spent and the hourly rates charged by the receiver in the course of carrying out its duties.

17 In assessing the receiver's accounts, the motion judge made the following findings:

- (1) This was an operating receivership in which the receiver operated the companies for three months so that the companies' assets could be sold as a going concern.
- (2) Usually, an operating receivership will require a more intensive and extensive use of a receiver's personnel than a liquidation receivership.
- (3) The receivership was difficult and "rather unique".
- (4) Mr. Morawetz scrutinized the bills before they were finalized "so that inappropriate charges were not included".
- (5) It was not "surprising" that the receiver was required to use many members of its staff to operate the companies' businesses given what he perceived to be problems created by the Parravano's.
- (6) It was necessary to use the receiver's personnel to conduct an inventory count in a timely and accurate way for the closing of the sale of the companies' assets.
- (7) Mr. Morawetz "had a very good handle on the work and the worth of the legal work".

18 The motion judge assessed, or passed, the receiver's accounts, including those of its solicitors, Goodmans, in the amounts requested by the receiver in its report. He gave no effect to the objections raised by the appellants. On a number of occasions, he emphasized that there was no contrary evidence from the appellants that, presumably, might have caused him to reduce the fees claimed by the receiver or its solicitors.

19 He referred to Spence J.'s order appointing KPMG as the receiver, in particular para. 22 of the order as quoted above, and observed at p. 30:

While certainly not determinative of the issue, that order does contemplate in paragraph 22 a charging system based on standard rates (i.e. docketed hours × hourly rate multiplicand). That would of course be subject to scrutiny — and adjustment as necessary.

20 He also noted that the appellants had relied on his own decision in *BT-PR Realty Holdings Inc. v. Coopers & Lybrand*, [1997] O.J. No. 1097 (Ont. Gen. Div. [Commercial List]) in which he had said:

[An indemnity agreement] is not a licence to let the taxi meter run without check. The professional must still do the job economically. He cannot take his fare from the court house to the Royal York Hotel via Oakville.

As to the application of this observation to the circumstances of this case, the motion judge said at pp. 31-32:

I am of the view that subject to the checks and balances of *Chartrand v. De la Ronde* (1999), 9 C.B.R. (4th) 20 (Man. Q.B.) a fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent. Further I am of the view that the market is the best test of the reasonableness of the hourly rates for both receivers and their counsel. There is no reason for a firm to be compensated at less than their normal rates (provided that there is a fair and adequate competition in the marketplace). See *Chartrand*; also *Prairie Palace Motel Ltd. v. Carlson* (1980), 35 C.B.R. (N.S.) 312 (Sask. Q.B.). No evidence was led of lack of competition (although I note that Mr. Pape asserts that legal firms and accounting firms had a symbiotic relationship in which neither would complain of the bill of the other). What would be of interest here is whether the rates presented are in fact sustainable. In other words are these firms able to collect 100 cents on the dollar of their "rack rate" or are there write-offs incurred related to the collection process?

Issues and Analysis

21 In my view, there are three issues to be considered. The first issue is the alleged bias of the motion judge against the appellants and their counsel. The second issue is the proper procedure to be followed by a court-appointed receiver on seeking court approval of its remuneration and that of its solicitor. This procedural issue arises from the second ground of appeal in which the appellants assert that the motion judge erred in precluding their lawyer from cross-examining the receiver in respect to the remuneration that it requested. The third issue is whether the motion judge erred in finding that the remuneration requested by the receiver for itself and its solicitor was fair and reasonable.

(1) Bias

22 I turn now to the first issue. If I am satisfied that the appellants were denied a fair hearing because the motion judge exhibited a demonstrable bias against the appellants and their counsel, it will be unnecessary to consider the other grounds of appeal since the appellants would be entitled to a new hearing before a different judge. As I will explain, I see no merit in this ground of appeal.

23 The appellants submit that the motion judge acted with bias against their counsel, Mr. Pape. They rely on the following circumstances as demonstrating the motion judge's bias:

- the motion judge took offence to Mr. Pape having arranged for a court reporter to be present at the hearing.
- the motion judge was affronted by Mr. Pape's request to cross-examine Mr. Morawetz on the receiver's accounts.

- the first paragraph of the motion judge's ruling with respect to Mr. Pape's request to cross-examine Mr. Morawetz (which is quoted in para. 11) demonstrates that the motion judge was not maintaining his impartiality.
- in his ruling the motion judge curtailed the scope of the questions Mr. Pape was permitted to ask Mr. Morawetz and admonished Mr. Pape that he would "have to conduct himself properly".
- Mr. Pape's examination of Mr. Morawetz was curtailed by multiple interjections by the motion judge favouring the receiver.
- the motion judge's ruling on the passing of the receiver's accounts disparaged the appellants and Mr. Pape, in particular, by commenting with sarcasm and derision on Mr. Pape's lawyering.

24 Public confidence in the administration of justice requires the court to intervene where necessary to protect a litigant's right to a fair hearing. Any allegation that a fair hearing was denied as a result of the bias of the presiding judge is a serious matter. It is particularly serious when made against a sitting judge by a senior and respected member of the bar.

25 The test for reasonable apprehension of bias on the part of a presiding judge has been stated by the Supreme Court of Canada in a number of cases. In dissenting reasons in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), 68 D.L.R. (3d) 716 (S.C.C.), at 735, which concerned the alleged bias of the chairman of the National Energy Board, Mr. Crowe, de Grandpré J. stated:

The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal [at p. 667], that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly?"

26 This test was adopted by a majority of the Supreme Court of Canada in *R. v. S. (R.D.)* (1997), 151 D.L.R. (4th) 193 (S.C.C.). Speaking for the majority, Cory J. expanded upon the test at pp. 229-230:

This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. . . . Further the reasonable person must be an *informed* person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold"[emphasis in original].

27 Cory J. concluded at pp. 230-31:

Regardless of the precise words used to describe the test, the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. . . . Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.

28 My review of the transcript of the proceedings and the reasons of the motion judge leads me to conclude that the appellants have failed to satisfy the test. The most that can be said about the motion judge's reaction to the presence of a court reporter, his interjections during the cross-examination of Mr. Morawetz and his reference to Mr. Pape's lawyering in his reasons for judgment, is that he evinced an impatience or annoyance with Mr. Pape. In the circumstances of this case, the motion judge's impatience or annoyance with Mr. Pape does not equate with judicial support for either Mr. Morawetz or the receiver. To the extent that the motion judge's interjections during the examination of Mr. Morawetz reveal his state of mind, they suggest only

some impatience with Mr. Pape and a desire to keep the examination moving forward. They did not prevent counsel from conducting a full examination of Mr. Morawetz.

29 Considered in the context of the entire hearing, the circumstances relied on by the appellants do not come close to the type of judicial conduct that would result in an unfair hearing. I would not, therefore, give effect to this ground of appeal.

(2) The procedure to be followed on the passing of the accounts of a court-appointed receiver

30 In my view, the motion judge erred in equating the procedure to be followed for approving the receiver's conduct of the receivership with the procedure to be followed in assessing the receiver's remuneration. The receiver's report to the court contained information on its conduct of the receivership as well as details of items such as the fees the receiver paid to its solicitors during the receivership. Such details also relate to or support the receiver's passing of its accounts. However, it is one thing for the court to approve the manner in which a receiver administered the assets it was appointed by the court to manage, but it is a different exercise for the court to assess whether the remuneration the receiver seeks is fair and reasonable (applying the generally accepted standard of review).

31 Moreover, the rule that precludes cross-examination of a receiver was made in the context of a receiver seeking approval of its report, not in the context of the passing of its accounts. When a receiver asks the court to approve its compensation, there is an onus on the receiver to prove that the compensation for which it seeks court approval is fair and reasonable.

32 As I will explain, the problem in this case was that the receiver's accounts were not verified by an affidavit. They were contained in the receiver's report. As a matter of form, I see nothing wrong with a receiver including its claim for compensation in its final report, as the receiver has done in this case. However, as I will discuss, the receiver's accounts and those of its solicitors should be verified by affidavit. Had KPMG verified its claim for compensation by affidavit, and had its solicitors done so, the issue that arose in this case would have been avoided.

33 The inclusion of the receiver's accounts, including those of its solicitors, in the report had the effect of insulating them from the far-ranging scrutiny of a properly conducted cross-examination when the motion judge ruled that the receiver, as an officer of the court, was not subject to cross-examination on the contents of its report. Assuming, without deciding, that the ruling was correct, its result was to preclude the appellants, and any other interested person or entity, that had a concern about the amount of the remuneration requested by the receiver, from putting the receiver to the proof that the remuneration, in the context of the duties it carried out, was fair and reasonable. When I discuss the third issue, I will indicate how the court is to determine whether a receiver's account is fair and reasonable.

34 A thorough discussion of the duty of a court-appointed receiver to report to the court and to pass its accounts is contained in F. Bennett, *Bennett on Receiverships*, 2nd ed. (Scarborough: Carswell, 1999) at 443 *et seq.* As Bennett points out at pp. 445-446:

... the court-appointed receiver is neither an agent of the security holder nor of the debtor; the receiver acts on its own behalf and reports to the court. The receiver is an officer of the court whose duties are set out by the appointing order. ... Essentially, the receiver's duty is to report to the court as to what the receiver has done with the assets from the time of the appointment to the time of discharge.

A report is required because the receiver is accountable to the court that made the appointment, accountable to all interested parties, and because the receiver, as a court officer, is required to discharge its duties properly. Generally, the report contains two parts. First, the report contains a narrative description about what the receiver did during a particular period of time in the receivership. Second, the report contains financial information, such as a statement of affairs setting out the assets and liabilities of the debtor and a statement of receipts and disbursements. At p. 449 Bennett provides a list of what should be contained in a report, which does not include the remuneration requested by the receiver. As Bennett states at p. 447, the report need not be verified by affidavit.

35 The report is distinct from the passing of accounts. Generally, a receiver completes its management and administration of a debtor's assets by passing its accounts. The court can adjust the fees and charges of the receiver just as it can in the passing

of an estate trustee's accounts; the applicable standard of review is whether those fees and charges are fair and reasonable. As stated by Bennett at p. 471, where the receiver's remuneration includes the amount it paid to its solicitor, the debtor (and any other interested party) has the right to have the solicitor's accounts assessed.

36 I accept as correct Bennett's discussion of the purpose of the passing of a receiver's accounts at pp. 459-60:

One of the purposes of the passing of accounts is to afford the receiver judicial protection in carrying out its powers and duties, and to satisfy the court that the fees and disbursements were fair and reasonable. Another purpose is to afford the debtor, the security holder and any other interested person the opportunity to question the receiver's activities and conduct to date. On the passing of accounts, the court has the inherent jurisdiction to review and approve or disapprove of the receiver's present and past activities even though the order appointing the receiver is silent as to the court's authority. The approval given is to the extent that the reports accurately summarize the material activities. However, where the receiver has already obtained court approval to do something, the court will not inquire into that transaction upon a passing of accounts. The court will inquire into complaints about the calculations in the accounts and whether the receiver proceeded without specific authority or exceeded the authority set out in the order. The court may, in addition, consider complaints concerning the alleged negligence of the receiver and challenges to the receiver's remuneration. *The passing of accounts allows for a detailed analysis of the accounts, the manner and the circumstances in which they were incurred, and the time that the receiver took to perform its duties. If there are any triable issues, the court can direct a trial of the issues with directions* [footnotes omitted] [emphasis added].

37 As for the procedure that applies to the passing of the accounts, Bennett indicates at p. 460 that there is no prescribed process. Nonetheless, the case law provides some requirements for the substance or content of the accounts. The accounts must disclose in detail the name of each person who rendered services, the dates on which the services were rendered, the time expended each day, the rate charged and the total charges for each of the categories of services rendered. See, e.g., *Hermanns v. Ingle* (1988), 68 C.B.R. (N.S.) 15 (Ont. Assess. O.); *Toronto Dominion Bank v. Park Foods Ltd.* (1986), 77 N.S.R. (2d) 202 (N.S. T.D.). The accounts should be in a form that can be easily understood by those affected by the receivership (or by the judicial officer required to assess the accounts) so that such person can determine the amount of time spent by the receiver's employees (and others that the receiver may have hired) in respect to the various discrete aspects of the receivership.

38 Bennett states that a receiver's accounts and a solicitor's accounts should be verified by affidavit (at pp. 462-63).¹ I agree. This conclusion is supported by both case law and legal commentary. Nathanson J. in *Halifax Developments Ltd. v. Fabulous Lobster Trap Cabaret Ltd.* (1983), 46 C.B.R. (N.S.) 117 (N.S. T.D.), adopted the following statement from *Kerr on Receivers*, 15th ed. (London: Sweet & Maxwell, 1978) at 246: "It is the receiver's duty to make out his account and to verify it by affidavit."² In *Holmested and Gale on the Judicature Act of Ontario and rules of practice*, vol. 3, looseleaf ed. (Toronto: Carswell 1983) at 2093, the authors state: "[t]he accounts of a receiver and of a liquidator are to be verified by affidavit." In *In-Med Laboratories Ltd. v. Ontario (Director, Laboratory Services Branch)*, [1991] O.J. No. 210 (Ont. Div. Ct.). Callaghan C.J.O.C. held that the bill of costs submitted by a solicitor "should be supported by an affidavit . . . substantiating the hours spent and the disbursements". This court approved that practice in *Murano v. Bank of Montreal* (1998), 163 D.L.R. (4th) 21 (Ont. C.A.), at 52-53, in discussing the fixing of costs by a trial judge under rule 57.01(3) of the *Rules of Civil Procedure* (as it read at that time). In addition, I note that on the passing of an estate trustee's accounts, rule 74.18(1)(a) requires the estate trustee to verify by affidavit the estate accounts which, by rule 74.17(1)(i), must include a statement of the compensation claimed by the estate trustee. However, if there are no objections to the accounts, under rule 74.18(9) the court may grant a judgment passing the accounts without a hearing. Thus, the practice that requires a court-appointed receiver to verify its statement of fees and disbursements on the passing of its accounts conforms with the general practice in the assessment of the fees and disbursements of solicitors and trustees.

39 The requirement that a receiver verify by affidavit the remuneration which it claims fulfils two purposes. First, it ensures the veracity of the time spent by the receiver in carrying out its duties, as provided by the receivership order, as well as the disbursements incurred by the receiver. Second, it provides an opportunity to cross-examine the affiant if the debtor or any other interested party objects to the amount claimed by the receiver for fees and disbursements, as provided by rule 39.02(1). In the

appropriate case, an objecting party may wish to provide affidavit evidence contesting the remuneration claimed by the receiver, in which case, as rule 39.02(1) provides, the affidavit evidence must be served before the party may cross-examine the receiver.

40 Where the receiver's disbursements include the fees that it paid its solicitors, similar considerations apply. The solicitors must verify their fees and disbursements by affidavit.

41 In many cases, no objections will be raised to the amount of the remuneration claimed by a receiver. In some cases, however, there will be objections. Objecting parties may choose to support their position by tendering affidavit evidence. In some instances, it may be necessary for the court before whom the receiver's accounts are to be passed to conduct an evidentiary hearing, or direct the hearing of an issue before another judge, the master or another judicial officer. This situation would usually arise where there is a conflict in the affidavit evidence in respect to a material issue. The case law on the passing of accounts referred to by the parties indicates that evidentiary hearings are quite common. See, e.g., *Canadian Imperial Bank of Commerce v. Barley Mow Inn Inc.* (1996), 41 C.B.R. (3d) 251 (B.C. C.A.); *Hermanns v. Ingle, supra*; *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B. C.A.); *Walter E. Heller (Can.) Ltd. v. Sea Queen of Canada Ltd.* (1974), 19 C.B.R. (N.S.) 252 (Ont. S.C.); *Olympic Foods (Thunder Bay) Ltd. v. 539618 Ontario Inc.* (1989), 40 C.P.C. (2d) 280 (Ont. H.C.); *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.). These and other cases also illustrate that courts employ careful scrutiny in determining whether the remuneration requested by a receiver is fair and reasonable in the context of the duties which the court has ordered the receiver to perform. I will now turn to a discussion of what is "fair and reasonable".

(3) Fair and reasonable remuneration

42 As I stated earlier, the general standard of review of the accounts of a court-appointed receiver is whether the amount claimed for remuneration and the disbursements incurred in carrying out the receivership are fair and reasonable. This standard of review had its origin in the judgment of this court in *Atkinson Estate, Re* (1951), [1952] O.R. 685 (Ont. C.A.); aff'd [1953] 2 S.C.R. 41 (S.C.C.), in which it was held that the executor of an estate is entitled to a fair fee on the basis of *quantum meruit* according to the time, trouble and degree of responsibility involved. The court, however, did not rule out compensation on a percentage basis as a fair method of estimating compensation in appropriate cases. The standard of review approved in *Atkinson, Re* is now contained in s. 61(1) and (3) of the *Trustee Act*, R.S.O. 1990, c. T.23. Although *Atkinson Estate, Re* was concerned with an executor's compensation, its principles are regularly applied in assessing a receiver's compensation. See, e.g., *Ibar Developments Ltd. v. Mount Citadel Ltd.* (1978), 26 C.B.R. (N.S.) 17 (Ont. H.C.). I would note that there is no guideline controlling the quantum of fees as there is in respect to a trustee's fees as provided by s. 39(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

43 Bennett notes at p. 471 that in assessing the reasonableness of a receiver's compensation the two techniques discussed in *Atkinson Estate, Re* are used. The first technique is that the quantum of remuneration is fixed as a percentage of the proceeds of the realization, while the second is the assessment of the remuneration claimed on a *quantum meruit* basis according to the time, trouble and degree of responsibility involved in the receivership. He suggests that often both techniques are employed to arrive at a fair compensation.

44 The leading case in the area of receiver's compensation is *Belyea*. At p. 246 Stratton J.A. stated:

There is no fixed rate or settled scale for determining the amount of compensation to be paid a receiver. He is usually allowed either a percentage upon his receipts or a lump sum based upon the time, trouble and degree of responsibility involved. The governing principle appears to be that the compensation allowed a receiver should be measured by the fair and reasonable value of his services and while sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible. Thus, allowances for services performed must be just, but nevertheless moderate rather than generous.

45 In considering the factors to be applied when the court uses a *quantum meruit* basis, Stratton J.A. stated at p. 247:

The considerations applicable in determining the reasonable remuneration to be paid to a receiver should, in my opinion, include the nature, extent and value of the assets handled, the complications and difficulties encountered, the degree of

assistance provided by the company, its officers or its employees, the time spent, the receiver's knowledge, experience and skill, the diligence and thoroughness displayed, the responsibilities assumed, the results of the receiver's efforts, and the cost of comparable services when performed in a prudent and economical manner.

46 In an earlier case, similar factors were employed by Houlden J. in *West Toronto Stereo Center Limited, Re* (1975), 19 C.B.R. (N.S.) 306 (Ont. Bkcy.) in fixing the remuneration of a trustee in bankruptcy under s. 21(2) of the *Bankruptcy Act*, R.S.C. 1970, c. B-3. At p. 308 he stated:

In fixing the trustee's remuneration, the Court should have regard to such matters as the work done by the trustee; the responsibility imposed on the trustee; the time spent in doing the work; the reasonableness of the time expended; the necessity of doing the work, and the results obtained. I do not intend that the list which I have given should be exhaustive of the matters to be considered, but in my judgment they are the more important items to be taken into account.

These factors were applied by Henry J. in *Hoskinson, Re* (1976), 22 C.B.R. (N.S.) 127 (Ont. S.C.).

47 The factors to be considered in assessing a receiver's remuneration on a *quantum meruit* basis stated in *Belyea* were approved and applied by the British Columbia Court of Appeal in *Bank of Montreal v. Nican Trading Co.* (1990), 78 C.B.R. (N.S.) 85 (B.C. C.A.). They have also been applied at the trial level in this province. See, e.g., *MacPherson (Trustee of) v. Ritz Management Inc.*, [1992] O.J. No. 506 (Ont. Gen. Div.)

48 The *Belyea* factors were also applied by Farley J. (the motion judge in this case) in *BT-PR Realty Holdings, supra*, which was an application for the reduction of the fees and charges of a receiver. In that case the debtor had entered into the following indemnity agreement with the receiver:

Guarantee payment of Coopers & Lybrand Limited's professional fees and disbursements for services provided by Coopers & Lybrand Limited with respect to the appointment as Receiver of each of the Companies. It is understood that Coopers & Lybrand Limited's professional fees will be determined on the basis of hours worked multiplied by normal hourly rates for engagements of this type.

In reference to the indemnity agreement, Farley J. made the comment referred to above that "[t]his is not a license to let the taxi meter run without check."

49 He went on to add at paras. 23 and 24:

While sufficient fees should be paid to induce competent persons to serve as receivers, receiverships should be administered as economically as reasonably possible: see *Belyea v. Federal Business Development Bank* (1983), 46 C.B.R. (N.S.) 244 (N.B.C.A.). Reasonably is emphasized. It should not be based on any cut rate procedures or cutting corners and it must relate to the circumstances. It should not be the expensive foreign sports model; but neither should it be the battered used car which keeps its driver worried about whether he will make his destination without a breakdown.

50 Farley J. applied the list of factors set out in *Belyea* and *Nican Trading* and added "other material considerations" pertinent to assessing the accounts before him. He concluded at para. 24:

In the subject case C&L charged on the multiplicand basis. Given their explanation and the lack of any credible and reliable evidence to the contrary, I see no reason to interfere with that charge. It would also seem to me that on balance C&L scores neutrally as to the other factors and of course, the agreement as to the fees should be conclusive if there is no duress or equivalent.

51 I am satisfied that in assessing the compensation of a receiver on a *quantum meruit* basis the factors suggested by Stratton J.A. in *Belyea* are a useful guideline. However, they should not be considered as exhaustive of the factors to be taken into account as other factors may be material depending on the circumstances of the receivership.

52 An issue that has arisen in this appeal has been the subject of consideration by the courts. It is whether a receiver may charge remuneration based on the usual hourly rates of its employees. The appellants take the position that the receiver's compensation based on the hourly rates of its employees has resulted in excessive compensation in relation to the amount realized by the receivership. The appellants point out that the compensation requested is approximately 20% of the amount realized. As I noted in paragraph 20, the motion judge held that "subject to checks and balances" of *Chartrand v. De la Ronde and Prairie Palace Motel Ltd. v. Carlson*, a "fair and reasonable compensation can in proper circumstances equate to remuneration based on hourly rates and time spent". It is helpful to consider these cases.

53 In *Chartrand* the issue was whether a master had erred in principle in reducing a receiver's accounts, calculated on the basis of its usual hourly rates, on the ground that the entity in receivership was a non-profit federation. Although Hamilton J. was satisfied that the master had appropriately applied the factors recommended in *Belyea*, she concluded that the master had erred in reducing the receiver's compensation because the federation was a non-profit organization. She was otherwise in agreement with the master's application of the *Belyea* criteria to the circumstances of the receivership. However, she added at p. 32:

Having said that, I do not interpret the *Belyea* factors to mean that fair and reasonable compensation cannot equate to remuneration based on hourly rates and time spent.

By this comment I take Hamilton J. to mean that there may be cases in which the hourly rates charged by a receiver will be reduced if the application of one or more of the *Belyea* factors requires the court to do so to constitute fair and reasonable remuneration. I presume that this is what the motion judge had in mind when referring to "the checks and balances" of *Chartrand*.

54 In *Prairie Palace Motel* the court rejected a submission that a receiver's fees should be restricted to 5% of the assets realized and stated at pp. 313-14:

In any event, the parties to this matter are all aware that the receiver and manager is a firm of chartered accountants of high reputation. In this day and age, if chartered accountants are going to do the work of receiver-managers, in order to facilitate the ability of the disputing parties to carry on and preserve the assets of a business, there is no reason why they should not get paid at the going rate they charge all of their clients for the services they render. I reviewed the receiver-manager's account in this matter and the basis upon which it is charged, and I have absolutely no grounds for concluding that it is in any way based on client fees which are not usual for a firm such as Touche Ross Ltd.

Conclusion

(1) Bias

55 As I concluded earlier, the motion judge did not exhibit bias against the appellants or their counsel rendering the hearing unfair.

(2) Cross-examination of the receiver

56 The appellants did not have an opportunity to cross-examine Mr. Morawetz or another representative of the receiver in respect to its remuneration. Nor did they have an opportunity to cross-examine a representative of the receiver's solicitors, Goodmans, in respect to their fees and disbursements. This was as a result of the process sanctioned by the motion judge on the passing of the receiver's accounts in implicitly not requiring that the receiver's and the solicitors' accounts be verified by affidavit. Whether the appellants' lack of an opportunity to cross-examine the appropriate person in respect to these accounts should result in a new assessment being ordered, or whether this should be considered as a harmless error, requires further examination of the process followed by the motion judge in the context of the procedural history of the receiver's passing of its accounts.

57 Mr. Pape was not the appellants' original solicitor. The appellants were represented by another lawyer on February 9, 2001 when the receiver moved for approval of its accounts. The bank, which was directly affected by the receiver's charges, supported the fees and disbursements claimed by the receiver. Another creditor expressed concern that the receiver's fees were extremely high, but did not oppose their approval. Only the appellants opposed their approval. On February 16, 2001, which

was the first return of the motion, the motion judge granted the appellants' request for an adjournment to February 26, 2001 to provide them a reasonable opportunity to review the receiver's accounts.

58 On February 26, 2001, the appellants requested a further adjournment to enable them to obtain an expert's opinion commenting on the fees of the receiver and its solicitors. The motion judge granted an adjournment to April 17, 2001 on certain terms, including the requirement that the receiver provide the appellants with curricula vitae and professional designations of its personnel, which the receiver did about two weeks later. The appellants' counsel informed the motion judge that he intended to examine "one or two people" from the receiver about its fees, whether or not they filed an affidavit. It appears that this was satisfactory to the motion judge who wrote in his endorsement: "A reporter should be ordered; counsel are to mutually let the court office know as to what time and extent of time a reporter will be required."

59 On March 13, 2001, the receiver wrote to the appellants to advise them of its position that any cross-examination in respect of the receiver's report to the court was not permitted in law. However, the receiver said that it would accept and respond to written questions about its fees and disbursements. On April 4, 2001, the appellants gave the receiver twenty-nine written questions. The receiver answered the questions on April 10, 2001, and invited the appellants, if necessary, to request further information. The receiver offered to make its personnel available to meet with the appellants and their counsel to answer any further questions about its fees. By this time, Mr. Pape had been retained by the appellants. He did not respond to the meeting proposed by the receiver, but, rather, wrote to the receiver on April 12, 2001 stating that arrangements had been made for a court reporter to be present to take the evidence of the receiver at the hearing of the motion on April 17, 2001.

60 This set the stage for the motion of April 17, 2001 at which, as I have explained, the motion judge ruled that the appellants were precluded from cross-examining the receiver's representative, Mr. Morawetz, on the receiver's accounts, but nevertheless permitted Mr. Pape, as his "proxy", to question Mr. Morawetz, as an unsworn witness, about the accounts. In the discussion between the motion judge and counsel for all the parties concerning the propriety of Mr. Pape having made arrangements for the presence of a court reporter, it appears that every one had overlooked the motion judge's earlier endorsement that a reporter should be ordered for the passing of the accounts.

61 Although the appellants had obtained an adjournment to obtain expert reports about the receiver's fees, no report was ever provided by the appellants. They did file an affidavit of Mrs. Parravano, but did not rely on it at the hearing of the motion.

62 It appears from the motion judge's reasons for judgment and what the court was told by counsel that the practice followed in the Commercial List permits a receiver to include its request for the approval of its fees and disbursements in its report, with the result that any party opposing the amounts claimed is not able to cross-examine the receiver, or its representative, about the receiver's fees. In denying the appellants' counsel the opportunity to cross-examine Mr. Morawetz under oath, at p. 26 of his reasons, the motion judge referred to the practice that is followed in the Commercial List: "The more appropriate course of action is to proceed to interview the court officer [the receiver] with respect to the report so as to allow the court officer the opportunity of clarifying or amplifying the material in response to questions. That course of action was pointed out to the Parravanos and their previous counsel . . ."

63 Mr. Pape, before the motion judge, and Mr. Teplitsky, in this court, submitted that neither the practice of interviewing the receiver, nor the opportunity given to Mr. Pape to question Mr. Morawetz as the motion judge's proxy, is an adequate and effective substitute for the cross-examination of the receiver under oath. I agree. However, as I will explain, I am satisfied that in the circumstances of this case Mr. Pape's questioning of Mr. Morawetz was an adequate substitute for cross-examining him. It is well-established, as a matter of fundamental fairness, that parties adverse in interest should have the opportunity to cross-examine witnesses whose evidence is presented to the court, and upon which the court is asked to rely in coming to its decision. Generally speaking, in conducting a cross-examination counsel are given wide latitude and few restrictions are placed upon the questions that may be asked, or the manner in which they are asked. See J. Sopinka, S. N. Lederman, A. W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at paras. 16.6 and 16.99. As I observed earlier, in the cases in which the quantum of a receiver's fees has been assessed, cross-examination of the receiver and evidentiary hearings appear to be the norm, rather than the exception.

64 In my view, the motion judge was wrong in equating the receiver's report with respect to its conduct of the receivership with its report as it related to its claim for remuneration. As the authorities indicate, the better practice is for the receiver and its solicitors to each support its claim for remuneration by way of an affidavit. However, the presence or absence of an affidavit should not be the crucial issue when it comes to challenging the remuneration claimed. Whether or not there is an affidavit, the interested party must have a fair opportunity to challenge the remuneration at the hearing held for that purpose. I do not think that an interested party should have to show "special" or "unusual" circumstances in order to cross-examine a receiver or its representative, on its remuneration.

65 Where the accounts have been verified by affidavit, rule 39.02(1) provides that the affiant may be cross-examined by any party of the proceedings. Although there is a *prima facie* right to cross-examine upon an affidavit, the court has discretion to control its own process by preventing cross-examination or limiting it, where it is in the interests of justice to do so. See, e.g., *Ferguson v. Imax Systems Corp.* (1984), 47 O.R. (2d) 225 (Ont. Div. Ct.). It would, in my view, be rare to preclude cross-examination where the accounts have been challenged. Similarly, where the accounts have not been verified by affidavit, the motion judge has discretion to permit an opposing party to cross-examine the receiver, or its representative. In my view, the threshold for permitting questioning should be quite low. If the judge is satisfied that the questioning may assist in determining whether the remuneration is fair and reasonable, cross-examination should be permitted. In this case, I am satisfied that the submissions made by Mr. Pape at the outset of the proceedings were sufficient to cross that threshold.

66 Thus, whether or not there is an affidavit, the opposing party must have a fair opportunity to challenge the remuneration claimed. That fair opportunity requires that the party have access to the relevant documentation, access to and the co-operation of the receiver in the review of that material prior to the passing of the accounts, an opportunity to present any evidence relevant to the appropriateness of the accounts and, where appropriate, the opportunity to cross-examine the receiver before the motion judge, or on the trial of an issue or an assessment, should either be directed by the motion judge.

67 In this case, I am satisfied that the appellants had a fair opportunity to challenge the remuneration of the receiver and that the questioning of Mr. Morawetz was an adequate substitute for cross-examining him. I base my conclusion on the following factors:

- The appellants had the report for over two months.
- The appellants had access to the backup documents for over two months.
- The appellant had been given two adjournments to procure evidence.
- The appellants had the opportunity to meet with the receiver and in fact did meet with the receiver.
- The appellants submitted a detailed list of questions and received detailed answers. Mr. Pape expressly disavowed any suggestion that those answers were unsatisfactory or inadequate.
- The motion judge allowed Mr. Pape to question the receiver for some 75 pages. That questioning was in the nature of a cross-examination. I can find nothing in the transcript to suggest that Mr. Pape was precluded from any line of inquiry that he wanted to follow. Certainly, he did not suggest any such curtailment.
- Mr. Pape was given a full opportunity to make submissions.

(3) *The remuneration claimed by the receiver and its solicitor*

68 Having found no reason to label the proceedings as unfair in any way as they concern the receiver's remuneration, I shall now consider, on a correctness standard if there is any reason to interfere with the motion judge's decision on the receiver's remuneration.

69 In my view, the motion judge was aware of the relevant principles that apply to the assessment of a receiver's remuneration as discussed in *Belyea* and the other cases that I have reviewed. He considered the specific arguments made by Mr. Pape. He had the receiver's reports, the backup documents, the opinion of Mr. Morawetz, all of which were relied on, properly in my view, to support the accounts submitted by the receiver. Against that, the motion judge had Mr. Pape's submissions based on his personal view of what he called "human nature" that he argued should result in an automatic ten percent deduction from the times docketed by the receiver's personnel. In my view, the receiver's accounts as they related to its work were basically unchallenged in the material filed on the motion. I do not think that the motion judge can be criticized for preferring that material over Mr. Pape's personal opinions.

70 In addition, the position of the secured creditors is relevant to the correctness of the motion judge's decision. The two creditors who stood to lose the most by the passing of the accounts accepted those accounts.

71 The terms of the receiving order of Spence J. are also relevant, although not determinative. Those terms provided for the receiver's payment "at the standard rates and charges for such services rendered". Mr. Morawetz's evidence was that these were normal competitive rates. There was no evidence to the contrary, except Mr. Pape's personal opinions. It is telling that despite the two month adjournment and repeated promises of expert evidence from the appellants, they did not produce any expert to challenge those rates.

72 However, the accounts of the receiver's solicitors, Goodmans, stand on a different footing. Mr. Morawetz really could not speak to the accuracy or, except in a limited way, to the reasonableness of those accounts. There was no representative of Goodmans for the appellants to question or cross-examine. The motion judge did not give these accounts separate consideration. In my view, he erred in failing to do so. Consequently, I would allow the appeal to that extent.

Result

73 For the foregoing reasons, I would allow the appeal to the extent of setting aside the order of the motion judge approving the accounts of the receiver's solicitors, Goodmans, and order that the accounts be resubmitted, verified by affidavit, and that they be assessed by a different judge who may, in his or her discretion, direct the trial of an issue or refer the accounts for assessment by the assessment officer. In all other respects, the appeal is dismissed. As success is divided, there will be no costs.

Catzman J.A.:

I agree.

Doherty J.A.:

I agree.

Appeal allowed in part.

Footnotes

- 1 Among suggested precedents prepared for use in Ontario, at pp. 755-56, Bennett includes a precedent for a Receiver's Report on passing its accounts. The report is in the form of an affidavit in which the receiver, *inter alia*, includes a statement verifying its requested remuneration and expenses.
- 2 Although the practice in England formerly required that a receiver's accounts be verified by affidavit, the present practice is different. Now the court becomes involved in the scrutiny of a receiver's accounts, requiring their proof by the receiver, only if there are objections to the account. See R. Walton & M. Hunter, *Kerr on Receivers & Administrators*, 17th ed. (London: Sweet & Maxwell, 1989) at 239.

TAB 10

2008 BCCA 276
British Columbia Court of Appeal

Everest Canadian Properties Ltd. v. Mallmann

2008 CarswellBC 1373, 2008 BCCA 276, [2008] 10 W.W.R. 60, [2008] B.C.W.L.D. 5136, [2008] B.C.W.L.D. 5137, [2008] B.C.W.L.D. 5147, [2008] B.C.W.L.D. 5148, [2008] B.C.J. No. 1258, 167 A.C.W.S. (3d) 291, 167 A.C.W.S. (3d) 305, 258 B.C.A.C. 49, 294 D.L.R. (4th) 622, 434 W.A.C. 49, 46 B.L.R. (4th) 198, 82 B.C.L.R. (4th) 230

Everest Canadian Properties Ltd., Everest Investors 12, L.P., Everest Investors 15, L.P., Everest Investors 16, L.P., Everest Del Cano Investors, L.P., Everest HCA Investors, L.P., and Everest DC EDC Investors, L.P. (Appellants / Plaintiffs) and CIBC World Markets Inc./Marchés Mondiaux CIBC Inc. (Respondent / Defendant)

Newbury, Hall, Frankel JJ.A.

Heard: May 5-7, 2008

Judgment: July 3, 2008 *

Docket: Vancouver CA034941

Proceedings: affirming *Everest Canadian Properties Ltd. v. Mallmann* (2007), 2007 BCSC 312, 2007 CarswellBC 469, [2007] 8 W.W.R. 209, 70 B.C.L.R. (4th) 358 (B.C. S.C.)

Counsel: D. Gooderham for Appellants
H. Poulus, Q.C., P. Price for Respondent

Subject: Corporate and Commercial; Civil Practice and Procedure

APPEAL by plaintiffs from judgment reported at *Everest Canadian Properties Ltd. v. Mallmann* (2007), 2007 BCSC 312, 2007 CarswellBC 469, [2007] 8 W.W.R. 209, 70 B.C.L.R. (4th) 358 (B.C. S.C.), granting defendant's application to strike statement of claim.

Newbury J.A.:

1 The primary question raised by this appeal is whether the venerable rule of corporate law enunciated in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (Eng. V.-C.), applies in general to a real estate investment trust ("REIT") formed under the laws of Maryland. As will be seen, a Maryland REIT combines the framework of a trust with many of the features of a corporation. The beneficiaries of the REIT, who are referred to as shareholders, hold shares that represent "transferable unit[s] of beneficial interest in the trust"; the REIT is managed by a board of trustees who are elected annually by shareholders; and it holds its assets and can sue and be sued in its own name. In this case, the shares of the REIT, Del Cano Properties Trust ("Del Cano"), were widely held, and a bid made by the appellants (collectively called "Everest") for some, and later all, outstanding shares placed it "in play". Ultimately, Del Cano's trustees, relying in part on advice provided by the respondent herein ("CIBC"), accepted an offer from another source to buy all the Trust's assets. The Trust was wound up (as was required under its constating document, the Declaration of Trust), and its shareholders, including Everest itself, received approximately \$7,352 (U.S.) per share — a substantial premium above what Everest's offer would have yielded.

2 A year later, Everest sued the trustees of Del Cano and CIBC, alleging that the sale had taken place at an improvidently low price, and that the board's failure to address certain alleged procedural deficiencies meant that it had not had the authority to carry out the sale. Everest sought an order "directing the Trustees to restore the Trust Property to the Trust" (a remedy now conceded to be impossible); an order directing the Trustees to restore Everest's "proportionate share of the Trust Property" to

the plaintiffs; an accounting; equitable compensation; disgorgement; and damages generally. CIBC was also alleged to have breached a fiduciary duty owed to shareholders and to have provided "knowing assistance" to the trustees, and remedies similar to those sought against the trustees, including the restoration of the Trust Property, were sought against the advisor.

3 The action was not framed as a derivative or representative one, but Everest took the position that in accordance with normal trust principles, it could sue as a beneficiary of the Trust for damage it had suffered by reason of the defendants' alleged breaches of duty. CIBC responded by invoking the rule in *Foss v. Harbottle*, and applied to have the action struck out as against it. The summary trial judge below, Madam Justice Ross, held that the rule *did* apply in this case, and granted CIBC's application. Her reasons are reported at 2007 BCSC 312 (B.C. S.C.). For reasons indexed as 2007 BCSC 311 (B.C. S.C.), she also dismissed Everest's claims as against the trustees. Our reasons on the appeal of that part of her order are indexed as 2008 BCCA 275 (B.C. C.A.) and the reader is referred to them for a more detailed review of the factual background to both appeals.

The Claims Against CIBC

4 At para. 27 of its statement of claim, Everest referred to the duties undertaken by CIBC when it agreed in October 2001 to act as the financial advisor to Del Cano in connection with a possible sale of its shares or assets. These responsibilities included evaluating and responding to any "Proposed Transaction" (a term that included Everest's offer to acquire all the shares of the Trust); assisting the trustees in identifying any "Alternative Transaction"; providing a fairness opinion with respect to any Proposed Transaction; and generally assisting the trustees "in discharging the Trust's and the Trustees' duties to the Beneficiaries." Everest pleaded that as an advisor to the Trust and the trustees, CIBC owed a duty of care and a fiduciary duty to the beneficiaries (i.e., the shareholders of the Trust), including Everest. Paras. 37-8 and 88-92 of the Statement of Claim, which I have appended to these Reasons, contain the material portions of its allegations of breach of duty.

5 CIBC joined issue with all of Everest's allegations, denying that it owed a duty of care or fiduciary duty to the plaintiffs as alleged or at all. According to its statement of defence, if a duty of care or loyalty was owed by CIBC, such duty had been discharged; CIBC had not been motivated by any improper purpose or knowingly assisted the trustees in any breach of duty; and the sale price received by the Trust for the assets had not been improvidently low. Accordingly, neither Del Cano nor Everest had suffered any loss.

6 In January 2006, CIBC applied to have the statement of claim struck as disclosing no reasonable cause of action. Ross J. dismissed this application [2006 CarswellBC 354 (B.C. S.C.)] on the basis that, as she stated at para. 7 of her later reasons, it was not possible to determine whether the Rule in *Foss v. Harbottle* applied in the absence of evidence with respect to the law of Maryland. On May 10, 2006, CIBC applied under Rule 18A for a declaration that the action as pleaded violated the rule in *Foss v. Harbottle* and an order dismissing the action as against CIBC. It adduced the expert evidence of some Maryland attorneys concerning the nature of a Maryland REIT, and Everest did the same. I will review that evidence after examining the rule in *Foss v. Harbottle*, the exceptions thereto and its application in some modern Canadian cases.

Foss v. Harbottle

7 It is a striking fact that during the entire hearing of this appeal, which was said to turn on the rule in *Foss v. Harbottle*, none of the counsel before us referred to the case itself. In fairness, the reasoning of Vice-Chancellor Wigram is couched in highly technical and rather arcane language which makes it difficult to extract one clear "rule". Many subsequent cases and many more academic writers, however, have extracted two basic principles which were stated by Jenkins L.J. in *Edwards v. Halliwell*, [1950] 2 All E.R. 1064 (Eng. C.A.):

The rule in *Foss v. Harbottle*, as I understand it, comes to no more than this. First, the proper plaintiff in an action in respect of a wrong alleged to be done to a company or association of persons is *prima facie* the company or the association of persons itself. Secondly, where the alleged wrong is a transaction which might be made binding on the company or association and on all its members by a simple majority of the members, no individual member of the company is allowed to maintain an action in respect of that matter for the simple reason that, if a mere majority of the members of the company or association is in favour of what has been done, then *cadit quaestio*. No wrong had been done to the company or association

and there is nothing in respect of which anyone can sue. If, on the other hand, a simple majority of members of the company or association is against what has been done, then there is no valid reason why the company or association itself should not sue. In my judgment, it is implicit in the rule that the matter relied on as constituting the cause of action should be a cause of action properly belonging to the general body of corporators or members of the company or association as opposed to a cause of action which some individual member can assert in his own right. [At 1066-7; emphasis added.]

8 Jenkins L.J. noted that there were exceptions to the rule. The first is made where a "fraud on the minority" has been perpetrated and the wrongdoers are in control of the company. In these circumstances, "the rule is relaxed in favour of the aggrieved minority who are allowed to bring what is known as a minority shareholders' action on behalf of themselves and all others." (At 1067.) Otherwise, the grievance would never reach the court as the wrongdoers would not allow the company to sue. A second exception applies where the act complained of could be sanctioned only by a special majority of shareholders. If the rule were applied in those circumstances, Jenkins L.J. observed:

... a company which, by its directors, had broken its own regulations by doing something without a special resolution which could only be done validly by a special resolution could assert that it alone was the proper plaintiff in any consequent action and the effect would be to allow a company acting in breach of its articles to do *de facto* by ordinary resolution that which according to its own regulations could only be done by special resolution. [*Ibid.*]

9 As the Court also noted, the rule does not apply in respect of a cause of action that 'belongs to' an individual member of the corporation or association personally. In such cases, *Foss v. Harbottle* "has no application at all, for the individual members who are suing sue, not in the right of the [corporation or other association], but in their own right to protect from invasion their own individual rights as members." (*Ibid.*) It is this "exception" that is particularly difficult to delineate in particular fact situations. (Compare, for example, *MacDougall v. Gardiner* (1875), 1 Ch. D. 13 (Eng. C.A.) with *Pender v. Lushington* (1877), 6 Ch. D. 70 (Eng. Ch. Div.), as discussed by Paul L. Davies, *Gower's Principles of Modern Company Law* (6th ed., 1997), at 660-5.) The exception was found to be applicable in *Edwards v. Halliwell* to an action brought by two members of a trade union on behalf of themselves and all other members. They sought to sue two members of the executive committee of the union who, the plaintiffs alleged, had passed a resolution increasing the union dues of employed members, in contravention of the union's rules, which required the approval of such resolution by a two-thirds majority. The union, which was presumably in the control of the alleged wrongdoers, was joined as a defendant. *Foss v. Harbottle* did not block the plaintiffs' action, which the Court characterized as intended to "protect from invasion their own individual rights as members." (*Ibid.*)

10 The foregoing "exceptions" to the rule were historically treated as rigid categories, notwithstanding the suggestion, which accords with traditional equitable principles, made in *Foss v. Harbottle* itself that in a case involving injury to a corporation by some of its members for which no adequate remedy existed other than an action by individual shareholders "in their private characters", the interests of justice would prevail over "technical rules respecting the mode in which corporations are required to sue." (At 203.) At the turn of the present century, however, the House of Lords seemed to suggest in *obiter dicta* that another exception might be made where a company suffers loss but has no cause of action to sue to recover that loss. In those circumstances, it was said, a shareholder might sue in respect of it (if he or she had a cause of action) even though the loss complained of was the diminution in value of his or her shares: *Johnson v. Gore Wood & Co.*, [2000] UKHL 65, [2001] 1 All E.R. 481 (U.K. H.L.), at para 44, *per* Lord Bingham.

11 But while the rule and its exceptions can be stated fairly simply, *Foss v. Harbottle* has provided a rich vein for judicial analysis and academic debate. The following texts and articles are only a small part of the literature: Stanley M. Beck, "An Analysis of *Foss v. Harbottle*", in Jacob S. Ziegel, ed., *Studies in Canadian Company Law* (1967) at 545-600; K.W. Wedderburn, "Shareholders' Rights and the Rule in *Foss v. Harbottle*" [1957] Camb. L.J. 194, continued in [1958] Camb. L.J. 93; B.A.K. Rider, "Amiable Lunatics and the Rule in *Foss v. Harbottle*", (1978) 37 Camb. L.J. 270; Colin Baxter, "The True Spirit of *Foss v. Harbottle*", (1987) 38 N. Ir. Legal Q. 6; and Giora Shapira, "Shareholder Personal Action in Respect of a Loss Suffered by the Company, The Problem of Overlapping Claims and 'Reflective Loss' in English Company Law", (2003) 37 Int'l. L. 137. Fortunately, it is not necessary in this case to resolve the many apparent inconsistencies in the cases discussed by these authors, nor to comment on their many views. For purposes of this appeal, it will I hope be sufficient to note three fairly settled principles of law that are relevant to an analysis of whether and how the rule applies in the case at bar.

Foss v. Harbottle

The Nature of the Rule

12 Although the characterization of the rule in *Foss v. Harbottle* for conflicts of law purposes was not discussed by the court below, it is implicit in Ross J.'s reasons and in counsel's arguments that the rule is a procedural one and that therefore the *lex fori* applies to determine a shareholder's standing to sue. This was the view taken in *Heyting v. Dupont*, [1964] 2 All E.R. 273, [1964] 1 W.L.R. 843 (Eng. C.A.), where a shareholder of a Jersey company sought to sue, in England, a corporate director for misfeasance. At the outset of his reasons, Russell L.J. said this:

This appeal is from a decision of Plowman J. that a claim, asserting liability of a director of a Jersey incorporated limited liability company, to the company for damages for misfeasance, could not be put forward by a shareholder suing on behalf of himself and shareholders other than the allegedly liable director, who held the majority of shares and could therefore control a vote on whether the company should be a plaintiff in such a claim. It thus appears that the question is whether this is a case in which a departure from the rule in *Foss v. Harbottle* is required. I dare say that the rule in *Foss v. Harbottle* is a conception as unfamiliar in the Channel Islands as is the Clameur de Haro in the jurisdiction of England and Wales. But clearly this is a matter of procedure to be decided according to the law of this forum. [At 848; emphasis added.]

13 Although this reasoning was questioned by one writer (see Anthony Boyle, "A Liberal Approach to Foss v. Harbottle" (1964) 27 Mod. L. Rev. 603), the same author in a later article ("The Shareholders' Derivative Action in the English Conflict of Laws" (2000) Eur. Bus. L. Rev. 130) retreated from his previous position and agreed that "... the principle of the company as the proper plaintiff (even if it rests upon the concept of corporate personality) should probably be regarded as procedural. Certainly the conditions that govern the use of the derivative actions are essentially procedural." (At 131.) In Canada, although the matter is not free from doubt, the better view would appear to accord with *Heyting v. Dupont*. (See, e.g., *Baniuk v. Carpenter (No. 2)* (1987), 85 N.B.R. (2d) 385, at 393-4, 217 A.P.R. 385 (N.B. C.A.) and *Teck Corp. v. Millar* (1972), [1973] 2 W.W.R. 385, at 388-9, 33 D.L.R. (3d) 288 (B.C. S.C.), at para. 13; cf. *King v. On-Stream Natural Gas Management Inc.*, [1993] B.C.J. No. 1302 (B.C. S.C.) at para. 67.)

14 Accordingly, the *lex fori* rather than the law of Maryland was properly applied to the question of whether Everest had standing to make its claims. This principle is not affected by the *International Trusts Act*, R.S.B.C. 1996, c. 237, Article 6 of which confirms that the law applicable to substantive questions concerning a trust, such as its validity, construction and administration, is the law chosen by the settlor, or failing a choice in the trust document, the law with which the trust has the closest connection.

Foss v. Harbottle is Not Confined to Proceedings Brought by Corporate Shareholders

15 It will be recalled that in *Foss v. Harbottle*, the wrongs alleged were wrongs to a joint-stock company called "The Victoria Park Company", which had been incorporated by special act. (The *Joint Stock Companies Act, 1844* (U.K.), 7 & 8 Vict., c. 110, was one year away, and *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.) still lay 50 years in the future.) The plaintiffs were individual shareholders who sought to sue on behalf of themselves and the other shareholders (other than the defendants) for harm allegedly done to the company by some of its directors. The defendants were alleged to have purchased their own land for the company at an inflated price and to have borrowed money by an *ultra vires* transaction, using the proceeds of the loan to pay themselves as sellers of the property. The plaintiffs contended that the directors were trustees for them to the extent of their shares in the company, and that the corporate form of the organization should not deprive them, as *cestuis que trust*, of a remedy against their trustees for abuse of their powers.

16 The Vice-Chancellor ruled that the company was the proper plaintiff in such a suit, except in exceptional circumstances. In his words:

The Victoria Park Company is an incorporated body, and the conduct with which the Defendants are charged in this suit is an injury not to the Plaintiffs exclusively; it is an injury to the whole corporation by individuals from the corporation entrusted with powers to be exercised only for the good of the corporation ...

It was not, nor could it successfully be, argued that it was a matter of course for any individual members of a corporation thus to assume to themselves — the right of suing in the name of the corporation. In law the corporation and the aggregate members of the corporation are not the same thing for purposes like this; and the only question can be whether the facts alleged in this case justify a departure from the rule which, *prima facie*, would require that the corporation should sue in its own name and in its corporate character, or in the name of someone whom the law has appointed to be its representative. [At 490-1; emphasis added.]

17 In 1929 in *Cotter v. N.U.S.*, [1929] All E.R. Rep. 342, [1929] 2 Ch. 58 (Eng. C.A.), the English Court of Appeal applied *Foss v. Harbottle* in an action brought by minority members of a trade union. The Court considered the nature of trade unions, rejecting the argument that they were different in a material way from corporations and that the doctrine did not apply to them. The Master of the Rolls noted provisions of the *Trade Union Act, 1871*, to the effect that a trade union's property was "vested in the trustees for the time being of the trade union ... for the use and benefit of such trade union and the members thereof"; and noted previous decisions of the Court to the effect that a union was the beneficial owner of its property (see especially *Taff Vale Railway v. Amalgamated Society of Railway Servants*, [1901] A.C. 426, 70 L.J.K.B. 905 (U.K. H.L.)), and that a registered trade union was a statutory legal entity. Thus Lord Hanworth M.R. observed:

By a sequence of authority it has been held that a registered trade union is a legal entity: if it is a legal entity, with its own code whereby it is governed, any mistake or irregularities by the imperfect carrying out of, or imperfect attention to, those rules can be corrected, and, if so, then the principle of *Foss v. Harbottle* applies. [At 350.]

18 In British Columbia, courts have extended *Foss v. Harbottle* beyond the corporate and labour union contexts. In *Lee v. Block Estates Ltd.* (1984), 50 B.C.L.R. 289, [1984] 3 W.W.R. 118 (B.C. S.C.), the Court held that the rule applied to deny standing to certain limited partners who were seeking to sue the defendant, an outsider to the partnership, to compel it to lend certain funds to the firm. (At the same time, the general partner had sued in the name of the limited partnership to compel the defendant to perform that obligation, but that action was tentatively settled during trial.) McEachern C.J.S.C. (as he then was) noted that there were many American cases which hold that *Foss v. Harbottle* applies to partnerships, and concluded that the plaintiffs' failure "to bring or convert [the] action into a derivative or representative action" precluded the Court from applying the exception to the rule. (At 311.) *Lee v. Block* was followed by Farley J. in *Covia Canada Partnership Corp. v. PWA Corp.* (1993), 105 D.L.R. (4th) 60 (Ont. Gen. Div. [Commercial List]), at 85-7 aff'd (1993), 106 D.L.R. (4th) 608 (Ont. C.A.).

19 More importantly, I note this court's decision in *Watson v. Imperial Financial Services Ltd.* (1994), 88 B.C.L.R. (2d) 88, [1994] 5 W.W.R. 197 (B.C. C.A.), in which the defendant successfully argued that "a wrong done to the [limited] partnership is one for which redress can be sought by the partnership only." (Para. 23.) Speaking for the Court, Hollinrake J.A. reasoned as follows:

I think the rule in *Foss v. Harbottle* is applicable here even if it can be successfully asserted that because a partnership is not a legal entity as is a company, the respondent bank owed the duty I have referred to above to the individual partners. The basis of the application of the rule in *Foss v. Harbottle* is that the harm or damage is done to the partnership itself and whatever loss or damage the individual members of it suffer is as a consequence of and incidental to the fact that they are members of the partnership. The position of the respondent bank is that it matters not whether the bank participated in a breach of Galcor's fiduciary duty to the partnership and its individual partners but whether any such breach gives rise to a loss other than one to the partnership. The respondent bank says the true substance of the claim is damage to the partnership and the partnership only.

This raises the issue of whether *Foss v. Harbottle* applies to limited partnerships inasmuch as they do not have a separate legal identity as such as is the case of a company. *Lee v. Block Estates Ltd.* (1984), 50 B.C.L.R. 289 gives the answer to

this question, says the respondent bank. I should say here that I would not decide this issue in favour of the respondent bank because there was a Supreme Court of British Columbia precedent governing it unless I was satisfied that precedent accurately set out the law to the point that the conclusion reached in it was not only correct but further that it was plain and obvious an attack on it could not succeed.

.....

Even if it could be said that each of the 845 partners was owed a transmitted or transferred fiduciary duty by the respondent bank I do not think it would be open to those partners to individually commence actions against the bank. That would expose the bank to any number of law suits within the limitation period. I do not think that can be right. In my opinion any such claim by the partners would have to be in the firm name as permitted by the *Rules of Court* or in some form such that all the partners were before the court in one action such as a representative action. In my opinion this emphasizes the point made by the respondent bank that this claim, in substance, is one of the partnership and not the individual partners. This, in my opinion, is no less so just because the partnership itself is not a legal entity. The fact is that partnerships can sue and be sued as long as the proper procedure is followed.

In my opinion the general principle that comes from *Foss v. Harbottle* applies to the claims of the 845 partners against the respondent bank. It is a claim of the partnership. I am satisfied that this is plain and obvious and that a claim by the individual partners other than in a form that shows it to be a claim of the partnership or a representative action where all the partners are before the court cannot succeed.

Having concluded that *Lee v. Block Estates* correctly decided that the rule in *Foss v. Harbottle* applies to partnerships I turn now to the claims as they are pleaded as derivative and the issue of whether the appellants can succeed on those claims in the face of the rule in *Foss v. Harbottle*. [At paras. 24-5 and 27-9; emphasis added.]

20 *Foss v. Harbottle* has been held to apply, then, to associations that are not legal persons at law and in which the members hold beneficial interests in the assets, or net assets, of the association. (See Alison Manzer, *Canadian Partnership Law* (2006, looseleaf) at para. 4.1020.) This extension of the rule seems to take one farther away from the first rationale of the rule as stated in *Edwards v. Halliwell* — the logical proposition that in respect of a wrong done to a person, that person is the proper plaintiff. Modern courts have given greater emphasis to the second rationale stated in *Edwards v. Halliwell* — that if a simple majority of members can approve of what has been done, the court should not interfere in a matter of internal management.

21 On the other hand, I note the suggestion made by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd. (No. 2)* (1981), [1982] 1 All E.R. 354, at 367, [1982] 2 W.L.R. 31 (Eng. C.A.), that the rule in *Foss v. Harbottle* is "the consequence of the fact that a corporation is a separate legal entity." Their Lordships continued:

Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequence of such further rights require careful consideration. [At 367; emphasis added.]

22 As noted in *Robak Industries Ltd. v. Gardner*, 2007 BCCA 61, 28 B.L.R. (4th) 1 (B.C. C.A.), this passage from *Prudential* was cited by La Forest J. writing for the Supreme Court of Canada in *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165, 146 D.L.R. (4th) 577 (S.C.C.), to which I will refer below. La Forest J. added, however:

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions. [At para. 59.]

The Rule Does Not Apply to "Personal" Rights as Opposed to Derivative or "Reflective" Rights

23 As was also observed in *Robak Industries*, the Supreme Court in *Hercules* was careful to confirm that where a "separate and distinct claim" can be raised by a shareholder with respect to a wrong done to him or her *qua* individual, a personal action may lie, provided all the elements of a cause of action can be made out. (See *Hercules* at para. 62.) As an example, the Court in *Hercules* cited *Haig v. Bamford* (1976), [1977] 1 S.C.R. 466, 72 D.L.R. (3d) 68 (S.C.C.), in which the plaintiff Haig had been induced by financial statements prepared a company's accountants, to invest in shares in the company and guarantee its bank loan. It turned out that the financial statements had been negligently prepared. Haig sued the company and its principal shareholder, as well as the company's accountants. The claim against the company and its principal shareholder was later discontinued, leaving only the action against the accountants. The Court found that the accountants had owed the investor a duty to use reasonable care in the preparation of the accounts. The plaintiff recovered against the accountants.

24 The Supreme Court contrasted *Haig v. Bamford* with the facts before it in *Hercules*. In the latter case, it was alleged that the defendant auditors had negligently prepared financial statements for a company in which some of the plaintiffs owned shares. However, the statements had been prepared under the direction of the company's management and had not been relied on directly by the plaintiffs for investment purposes. La Forest J. reasoned:

One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done to the corporation. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

The facts of *Haig, supra*, provide the basis for an example of where such a claim might arise. Had the investors in that case been shareholders of the corporation, and had a similarly negligent report knowingly been provided to them by the auditors for a specified purpose, a duty of care separate and distinct from any duty owed to the audited corporation would have arisen in their favour, just as one arose in favour of Mr. Haig. While the corporation would have been entitled to claim damages in respect of any losses it might have suffered through reliance on the report (assuming, of course, that the report was also provided for the corporation's use), the shareholders in question would also have been able to seek personal compensation for the losses they suffered *qua* individuals through their personal reliance and investment. On the facts of this case, however, no claims of this sort can be established. [At paras. 62-3; emphasis added.]

25 I have already referred in passing to *Prudential Assurance v. Newman*, decided in 1982. There, a minority shareholder sought equitable damages against two directors for breach of their fiduciary duty to the company (a derivative claim); common law damages for conspiracy (a direct personal claim); and on behalf of all shareholders, a declaration that a circular approved by the defendant directors was misleading, and damages for conspiracy (the "direct representative claim"). The Court of Appeal did not find it necessary to rule on the derivative claim, since by the time the appeal was heard, the action had in fact been heard and determined and the company had undertaken to proceed to recover any judgment made in its favour against the two defendant directors. As for the personal action, the Court found that it was "misconceived" and stated:

It is of course correct, as the judge found and Mr. Bartlett did not dispute, that he and Mr. Laughton, in advising the shareholders to support the resolution approving the agreement, owed the shareholders a duty to give such advice in good faith and not fraudulently. It is also correct that, if directors convene a meeting on the basis of a fraudulent circular, a shareholder will have a right of action to recover any loss which he has been personally caused in consequence of the fraudulent circular; this might include the expense of attending the meeting. But what he cannot do is to recover damages merely because the company in which he is interested suffered damage. He cannot recover a sum equal to the diminution in

the market value of the shares, or equal to the likely diminution in dividend, because such a 'loss' is merely a reflection of the loss suffered by the company. The shareholder does not suffer any personal loss. His only 'loss' is through the company, in the diminution in the value of the net assets of the company, in which he has (say) a 3% shareholding. The plaintiff's shares are merely a right of participation in the company on the terms of the articles of association. The shares themselves, his right of participation, are not directly affected by the wrongdoing. The plaintiff still holds all the shares as his own absolutely in unencumbered property. The deceit practised on the plaintiff does not affect the shares; it merely enables the defendant to rob the company. [At 366-7; emphasis added.]

With respect to the representative claim, the Court found that dishonest concealment on the part of the two directors had been proven and that the company itself was entitled to damages therefor.

26 *Prudential* was followed by a series of English cases, some of which were referred to at para. 18 of *Robak Industries*, *supra*, culminating in the House of Lords' decision in *Johnson v. Gore Wood & Co.*, *supra*. These cases, as this court noted, considered at length the limits on the principle of *Foss v. Harbottle* as explained in *Prudential*, and contained *dicta* suggesting that in some circumstances, a shareholder may have a personal cause of action for the loss of value in his or her shares of a company even where the alleged wrongful acts are in relation to the company's affairs or assets. In *Robak Industries* itself, however, this court rejected an argument based on these *dicta*, concluding that "there is no principle articulated there that would allow a shareholder to claim damages for the loss of value in the shares of a company that is consistent with the legal theories adopted in the Canadian authorities (principally *Hercules*) and applied consistently in Canada." (Para. 28.)

27 The Court in *Robak Industries* also referred to the decision of the Ontario Court of Appeal in *Meditrust Healthcare Inc. v. Shoppers Drug Mart* (2002), 61 O.R. (3d) 786, 220 D.L.R. (4th) 611 (Ont. C.A.), in which the plaintiff Meditrust, which operated a mail order pharmacy business through two subsidiary companies, claimed that the defendant had conspired to destroy its business. The defendant applied for summary judgment and most of the claims were struck out on the basis that the losses had been suffered by the subsidiaries and were therefore barred by the operation of the rule in *Foss v. Harbottle*. This result was affirmed by the Court of Appeal, *per* Laskin J.A., who held that to maintain a cause of action, Meditrust had to prove damages that were "not derivative of the damage suffered by the subsidiaries." (Para. 18.) He noted that *Johnson v. Gore Wood & Co.* had put a gloss on the rule in *Foss v. Harbottle* to the extent that, in Lord Bingham's words, "Where a company suffers loss but has no cause of action to pursue to recover that loss, the shareholder of the company may sue in respect of it (if he or she has a cause of action) even though the loss is a diminution in the value of the shareholding." Laskin J.A. ruled, however, that in order to claim the loss in the value of its shares, Meditrust would at least have to show that it had a cause of action and the subsidiaries did not. Meditrust had failed to do so, and in the result it could not sue for damages resulting from the loss of the value of its shares in its subsidiaries.

28 Levine J.A. for the Court in *Robak* summarized the current position in Canada in a passage that is worth quoting at length. In her words:

The appellants suggest that *Goldex Mines Ltd. v. Revill et al.* (1974), 7 O.R. (2d) 216 (Ont. C.A.), mentioned in *Hercules*, supports their claim to a separate cause of action for a wrong done to Getty. In *Goldex*, the Ontario Court of Appeal considered the distinction between a personal action by a shareholder for a personal wrong and a derivative action brought on behalf of the corporation for a wrong done to the corporation. The Court pointed out that an action may be brought by several shareholders for the same personal wrong. It stated:

In *Farnham v. Fingold*, *supra*, this Court was not required, on the facts of that case, to consider a situation where the same wrongful act is both a wrong to the company and a wrong to each individual shareholder. In one sense every injury to a company is indirectly an injury to its shareholders. On the other hand, if one applies the test: "Is this wrongful act one in respect of which the company could sue?", a shareholder who is personally and directly injured must surely be entitled to say, as a matter of logic, "the company cannot sue for my injury; it can only sue for its own."

The converse is, of course, also true. Where the company is injured, an individual shareholder cannot sue for the company's injury; the shareholder can only sue for its own. Loss reflective of a loss suffered by the company is not the shareholder's personal loss.

There are good reasons for not allowing a shareholder to claim the loss in value of its shares where a wrong has been done to the company. As explained by Laskin J.A. in *Meditrust* (at para. 13); La Forest J. in *Hercules* (at para. 59), and McKenzie J. in *Rogers* at 78-81 (citing *Prudential Assurance* and *Green v. Victor Talking Mach. Co.*, 24 F. 2d 378 (1928) (C.A. 2nd Circ.)), the rule avoids a multiplicity of actions. Further, and consistent with the legal theory of *Foss v. Harbottle*, the loss in value of shares of a company is a loss of all of the shareholders, not just one or some of them. There is no logic that would allow only one shareholder to claim that loss, where the claim relates to wrongs done to the company, and all of the shareholders have suffered the loss in value. A single shareholder cannot claim that the loss in value of the shares, *per se*, is a personal, direct loss.

The appellants suggest that the English cases have exposed the underlying principle of *Foss v. Harbottle*, as interpreted by *Prudential Assurance*, as one of avoiding "double recovery" for the same loss: once by the company and secondly by the shareholders: see *Johnson v. Gore Wood*, per Lord Bingham, at para. 44; Lord Cooke at para. 81; Lord Hutton at paras. 97 and 99; Lord Millett at para. 124. Thus, if it can be shown that the company cannot sue for the loss, the shareholder may. The appellants say that Getty cannot sue for the loss in value of the shares; therefore, the appellants may.

Double recovery is a consequence that is avoided by the application of the rule in *Foss v. Harbottle*, but the jurisprudence does not support the appellants' argument that it is the principal reason for its existence. In addition to the reasons for the rule discussed above, as Lord Hutton and Lord Millett pointed out in *Johnson v. Gore Wood*, citing *Prudential Assurance*, the rule bars recovery by one or some shareholders of losses caused by wrongs done to the company, at the expense of creditors and other shareholders of the company. (See also: *Gardner v. Parker*, [2004] 2 BCLC 554 at para. 33 (Eng. C.A.); *Thomas v. D'Arcy & Ors*, [2005] QCA 68 at para. 11 (Queensland S.C., C.A. Div.). [At paras. 33-7; emphasis added.]

In the result, the trial judge's ruling that the plaintiffs had not shown they had a cause of action for an "independent loss" in respect of wrongs done to the company, was affirmed.

Suing in the Trust Context

29 There is of course no doubt that in the context of a "normal" trust, a beneficiary may sue the trustee(s) for breach of duty in respect of the administration of the trust or trust property. This would appear to be true even where the trust has many hundreds of members, as in the case of a pension trust: see *Buschau v. Rogers Communications Inc.*, 2006 SCC 28, [2006] 1 S.C.R. 973 (S.C.C.). No objection was raised in that case, at least at the appellate levels, on the basis of a procedural rule such as *Foss v. Harbottle*.

30 The beneficiary of a trust may also sue a third party or "stranger" to the trust who has knowingly participated in a breach of trust. This principle, established in the seminal English cases of *Barnes v. Addy* (1874), 9 Ch. App. 244, 43 L.J. Ch. 513 (Eng. C.A.) and *Selangor United Rubber Estates Ltd. v. Cradock*, [1968] 2 All E.R. 1073, [1968] 1 W.L.R. 1555 (Eng. Ch. Div.), was confirmed in Canada in *Air Canada v. M & L Travel Ltd.*, [1993] 3 S.C.R. 787, at 809-12, 108 D.L.R. (4th) 592 (S.C.C.). The Supreme Court also held that for the stranger's conscience to be "sufficiently affected to justify the imposition of personal liability", he or she must have knowingly assisted the trustee in a fraudulent and dishonest breach of trust and that "the taking of a knowingly wrongful risk resulting in prejudice to the beneficiary is sufficient to ground personal liability." (At 826.) (See also *3464920 Canada Inc. v. Strother*, 2005 BCCA 35, 38 B.C.L.R. (4th) 159 (B.C. C.A.) (varied 2007 SCC 24, [2007] 2 S.C.R. 177 (S.C.C.)), at paras. 74-8.)

The Maryland Real Estate Investment Trust

31 The Maryland REIT, however, is not an ordinary trust. In the court below there was a great deal of evidence, including expert opinion from attorneys practising in Maryland, concerning its particular characteristics. This evidence was summarized

by the summary trial judge at paras. 10-23 of her reasons and I will not rehearse it here. Counsel for Everest in this appeal conceded that the summary trial judge was correct in concluding that a Maryland REIT, unlike an ordinary trust, is a "separate legal entity". (Para. 19.) As such, a REIT can sue and be sued in its own name. The REIT's assets are "vested in the trust", although according to s. 2.4 of Del Cano's Declaration of Trust, legal title may also be held in the name of one or all of the trustees or any other person as nominee. As noted earlier, a share issued by the trust is said to represent a "transferable unit of beneficial interest" in the trust. The liability of shareholders is limited to the trust assets, and the business and affairs of a REIT are carried out by a board of trustees who are elected and removable by shareholders.

32 In short, as the summary trial judge stated, whilst a Maryland REIT is not a corporation, it has several characteristics of a corporation, including "substantial powers to act as a separate legal person." (Para. 19.) She summarized the evidence of the Maryland attorneys who provided expert opinions in this matter as follows:

United States courts have treated Maryland REITs like corporations for several purposes. Courts have applied to Maryland REITs principles of Maryland corporate law regarding:

- (a) Duties of majority stockholders to minority stockholders: see *Twenty Seven Trust v. Realty Growth Investors*, 533 F. Supp. 1028 (D. Md. 1982) ("*Twenty Seven Trust*");
- (b) Restrictions upon dividends that are not pro rata among stockholders of the same class: see *Twenty Seven Trust* at 1040; and
- (c) Maryland's "business judgment rule" as it relates to business decisions made by trustees of a Maryland REIT: see *Realty Acquisition Corp. v. Property Trust of America*, Fed. Sec. L. Rep. (CCH) 95246 (D. Md. Oct. 27, 1989).

Both James J. Hanks Jr. and J.W. Thompson Webb, on behalf of CIBC, opined that a Maryland court would also apply corporate principles with respect to derivative actions to a Maryland REIT, in particular that if a wrong is committed against a Maryland REIT, the shareholder may not sue for it in the shareholder's own name. [In] *In re Mortgage and Realty Trust Securities Litigation*, 787 F. Supp. 84 (E D. Pa. 1991), the United States District Court of Pennsylvania considered a case brought by shareholders of a Maryland real estate investment trust against the REIT's board of trustees. The shareholders alleged that the trustees had committed various grossly negligent acts which violated their fiduciary duty to the REIT. The trustees filed a motion to dismiss the complaint on the ground that the shareholders had failed to comply with the requirements of Rule 23.1 of the Federal Rules of Civil Procedure, the rule with respect to derivative actions. The Court held at 86:

It is a basic principle that decisions concerning the operation or governance of a corporation or unincorporated association, including the decision to litigate, should be made by the entity's governing board or by the majority of its shareholders or members. *Kamen v. Kemper Financial Services, Inc.*, 114 L. Ed. 2d 152, U.S., 111 S. Ct. 1711, 1719 (1991), citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, at 530, 78 L. Ed. 2d 645, 104 S. Ct. 831. One exception to this basic principle is a shareholders' derivative action, an action which is "brought by one or more shareholders or members to enforce a right of ... an unincorporated association" because the association has failed to enforce a right which it could have properly asserted. Rule 23.1

.....

It is now settled that the law of the state of organization governs whether a demand must be made upon the Trustees or directors prior to the institution of a derivative action, or whether such a demand is excused because it would be futile. In *Kamen v. Kemper Financial Services, Inc.*, 114 L. Ed. 2d 152, U.S., 111 S. Ct. 1711 (1991), involving a Maryland corporation, the Supreme Court held:

The scope of the demand requirement under state law clearly regulates the allocation of corporate governing powers between the directors and individual shareholders ... a court that is entertaining a derivative action under the statute must apply the demand futility exception as it is defined by the law of the State of incorporation.

Neither Mr. Hanks nor Mr. Webb were aware of any decisions in which a Maryland court applied common law trust principles to matters of governance of a Maryland REIT. Mr. Webb noted that Maryland statutory law specifically contemplates that certain claims against trustees of a Maryland REIT may not be enforceable other than by or in the right of the Maryland REIT, that is to say derivatively.

Neither Mr. Poliakoff nor Richard Lindstrom, who provided opinion evidence on Maryland law on behalf of the plaintiffs, provided any reason to conclude that a Maryland court would not follow *In re Mortgage and Realty Trust Securities Litigation*. [At paras. 20-3; emphasis added.]

33 Messrs. Poliakoff and Lindstrom emphasized in their letters of opinion the use of "trust" terminology in Title 8 of the Corporations and Association Article of the *Maryland Code*, the constating legislation. Mr. Poliakoff noted, for example, that:

Throughout the Declaration of Trust, the Trust is referred to as a "*Trust*." Article I, Section 1.4 states that the nature of the Trust is "a real estate investment *trust* within the meaning of Title 8." Article I, Section 1.5 of the Declaration of Trust states that "the Trust shall have and be possessed of all of the powers granted to real estate investment *trusts* generally by Title 8 and shall have any other and further powers as are not expressly prohibited by Title 8 or any other applicable law." Article II, Section 2.4 provides that "legal title to all Trust Property shall be vested in the *Trust*."

Moreover, in describing the interests of the holders, Article I, Section 1.6 defines the term "shares" to mean "transferable shares of *beneficial interest of the Trust* consisting of, collectively, the Priority Preferred Shares and Common Shares". It therefore appears that the intention in creating this entity was to create a trust. [Emphasis added.]

He concluded:

By casting a Maryland REIT in the same genre as a common law trust and other trusts, and by describing its business as being conducted for the benefit and profit of the holders of beneficial interests, it is apparent that Maryland recognizes a Maryland REIT as a trust.

Accordingly, the Trust, as a Maryland REIT, should be considered a trust under Maryland law rather than a corporation.

[Emphasis added.]

34 Mr. Lindstrom was asked to consider the question: "Can a beneficiary of a trust sue a third party directly?" He responded that as a general rule "As long as the trustee is ready and willing to take the proper proceedings against the third person, the beneficiaries cannot maintain a suit against him ... [i]n most cases it is for the trustee and not for the beneficiaries to maintain an action." He went on, however, to note exceptions that are made where the trustee fails or refuses to bring such an action. In these circumstances, the beneficiary is permitted to do so directly, as referred to in A.W. Scott and W.F. Fratcher, *The Law of Trusts* (4th ed., 1988) at §294. Accordingly, Mr. Lindstrom opined that under common law and Maryland law, a beneficiary of a trust may have a right to sue a third party directly. Mr. Lindstrom was not, however, considering REITs in particular.

35 Mr. Hanks (one of the Maryland attorneys retained by CIBC), on the other hand, addressed himself to REITs in his letter of April 28, 2006. He wrote:

Maryland law distinguishes between wrongs done to a corporation, or to a Maryland REIT, and wrongs done to their shareholders. If a wrong is committed against a Maryland corporation, a shareholder generally may not sue for it in the holder's own name — only the corporation may do so. See *Goodman v. Poland*, 395 F. Supp 660, 687 (D. Md. 1975)..... If the wrong alleged was committed against the shareholder rather than the Maryland corporation, then the shareholder must bring the action as a direct action and not as a derivative action. This rule applies equally to a Maryland REIT, such as Del Cano, as it would to a Maryland corporation. See *In re Mortgage and Realty Trust Securities Litigation*, 787 F. Supp 84 (E.D.Pa. 1991) ...

.....

In my opinion, Maryland law would regard the claims against CIBC that have been advanced in the Statement of Claim as claims for wrongs done to Del Cano and, accordingly, it is my opinion that a Maryland court would not permit Everest to assert such claims directly in its own name. [Emphasis added.]

36 In the case cited by Mr. Hanks, *In re Mortgage & Realty Trust Securities Litigation*, 787 F. Supp. 84 (U.S. Dist. Ct. E.D. Penn. 1991), it was held that an action brought by certain shareholders of a Maryland REIT alleging breach of fiduciary duty on the part of the trustee/defendant was subject to dismissal on the basis that the plaintiffs had not followed the steps required for a shareholder's derivative action. The Court stated:

It is a basic principle that decisions concerning the operation or governance of a corporation or unincorporated association, including the decision to litigate, should be made by the entity's governing board or by the majority of its shareholders or members. *Kamen v. Kemper Financial Services Inc.*, 500 U.S. 90, 111 S.Ct. 1711, 1719, 114 L.Ed.2d 152 (1991), citing *Daily Income Fund, Inc. v. Fox*, 464 U.S. 523, at 530, 104 S.Ct. 831, at 835, 78 L.Ed.2d 645. One exception to this basic principle is a shareholders' derivative action, an action which is "brought by one or more shareholders or members to enforce a right of ... an unincorporated association" because the association has failed to enforce a right which it could have properly asserted. *Rule 23.1*.

The specific steps which must be followed in order to institute a derivative action are set out in *Rule 23.1 of the Federal Rules of Civil Procedure*. Under that Rule, the Complaint must

"allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or members and the reasons for the plaintiff's failure to obtain the actions ..." *Rule 23.1*.

and further:

Under Maryland law, gross negligence on the part of the Trustees would obviate the need for a demand. *Parish*, 242 A2d. at 540. However, merely sprinkling the conclusory words "gross negligence" throughout the Complaint does not save the Plaintiffs from the demand requirement. If we were to allow this talisman, then all a plaintiff in a derivative action would have to do would be to pen the words "gross negligence" to avoid making a demand on the directors of Trustees. The Maryland business judgement rule and the policies behind it would then be a thing of the past. [At 3-4; emphasis added.]

The Court did not refer to the common law of trusts, but held that Civil Procedure Rule 23.1, "the rule which deals with derivative actions by shareholders", applied.

37 Mr. Hanks' opinion was echoed by Mr. Webb, who stated that "Maryland law would regard the plaintiffs' claims against CIBC as set forth in the statement of claim as claims for wrongs done to the Trust and ... a Maryland court would not permit the plaintiffs to assert those claims directly in their own names."

The Summary Trial Judge's Reasons

38 Against this background, I turn to the summary trial judge's reasoning on the question of whether the rule in *Foss v. Harbottle* applies in this case and if so, whether Everest's claims offend that rule.

39 At paras. 24-8 of her reasons, the summary trial judge reviewed the parties' respective arguments concerning the applicability of the rule to a Maryland REIT. CIBC submitted that corporate personality was not a prerequisite to the application of the rule; that Del Cano is a statutory trust; and that in the same manner that members of a trade union were found in *Cotter, supra*, to be bound by the rule, so the shareholders of Del Cano should be bound. As well, CIBC argued, Del Cano could potentially be faced with a multiplicity of actions — a state of affairs that the rule has been said to be intended to avoid. In response, Everest again contended that because Del Cano was a trust, common law trust principles apply to it and that:

... each beneficiary is entitled to bring action for the damage to the trust property in which they hold a beneficial interest. The plaintiffs submit that by virtue of Rule 5(17), the prospect of multiple actions brought by other beneficiaries does

not arise since the determination in this action will be binding, not only on the parties, but also on all other beneficiaries. [At para. 28.]

40 In the trial judge's analysis, the fact Del Cano was a trust did not supply a complete answer to CIBC's argument. Citing *Buschau v. Rogers Communications Inc.*, 2004 BCCA 80, 236 D.L.R. (4th) 18 (B.C. C.A.) at para. 6 (varied 2006 SCC 28, [2006] 1 S.C.R. 973 (S.C.C.)), she suggested that the court was required to perform a more nuanced analysis to determine whether and to what extent traditional trust principles would apply. With respect to Everest's argument that shareholders in a REIT hold "a beneficial interest in the assets" she noted that the precise nature of the shareholders' interests was not free from controversy. But assuming without deciding that that argument was correct, it did not follow that the rule in *Foss v. Harbottle* was inapplicable. (Para. 33.) Ross J. then reviewed various policy rationales that underlie the courts' reluctance to permit the members of a corporation or similar association to sue in situations such as this — the "importance of respecting consensual schemes for internal governance, and the need to avoid a multiplicity of actions and have the proper parties before the court." (Para. 36.) She reviewed *Lee v. Block Estates* and *Watson v. Imperial Financial Services Ltd.*, both *supra*, and then concluded:

If Everest's position were correct, the rule would apply only to corporations and certainly not to partnerships. This, however, is clearly not the case.

Del Cano is an independent entity, which can work through its agents, and which is governed by the Code contained in its rules. The shares in Del Cano were initially sold to over 800 shareholders and as of 2001, it had 4,237.6 shares outstanding. As such, it is an entity for which there is concern about a multiplicity of suits. I find that Del Cano is an association to which the rule in Foss v. Harbottle applies. [At paras. 38-9; emphasis added.]

41 Next, the summary trial judge rejected Everest's contention that its claim, properly understood, was not derivative but "rather represents the individual personal claims of the beneficiaries." (Para. 40.) She found that the claim was "directly analogous" to that advanced in *Watson*, and cited Cumming J.A.'s comment in *McGauley v. British Columbia* (1989), 39 B.C.L.R. (2d) 223 (B.C. C.A.), at 236 that the test is one of a "relationship" between the plaintiffs and defendants "giving rise to duties, fiduciary and otherwise, owed by the defendants to the plaintiffs distinct from and independent of the duties owed by them to [the corporation] itself." In the case at bar, the summary trial judge said, there was no such independent relationship between Everest and CIBC. Rather, the harm alleged to have been suffered by Everest was "harm that is a 'consequence of, and incidental to', the damage alleged to have been suffered by Del Cano." (Para. 44.) Accordingly, the rule in *Foss v. Harbottle* applied to Everest's claims. This conclusion was not weakened by amendments made to the statement of claim immediately prior to the hearing of the Rule 18A application.

42 Finally, the summary trial judge rejected the argument that Everest's claim fell within one of the exceptions to the rule in *Foss v. Harbottle*. In her analysis:

... the answer to this submission is, as was found by McEachern C.J.S.C. in *Lee v. Block Estates Ltd.* at 141, that the exceptions to the rule can only apply to a derivative or a representative action:

First, he says this rule may be disregarded wherever the interests of justice require it be disregarded. It appears to me that this exception, if it is an exception of general application, can only apply if the action is a derivative or a representative action. In cases about corporations, leave to bring a derivative action must be obtained before action (although it has been granted *nunc pro tunc*). In the case of associations or partnerships, the action, at the very least, would have to be a representative action in which all parties would be represented. Remedies cannot be given in the absence of essential parties.

Here the action is framed as the personal action of the plaintiffs not as a derivative or representative action. Recourse cannot therefore [be had] to the exception to the rule. [At paras. 50-1.]

In the result, Ross J. dismissed the action as against CIBC.

On Appeal

43 In this court, Everest argued firstly that *Foss v. Harbottle* was simply inapplicable in the present context because Everest's claim was a personal one as opposed to a "derivative" or "reflective" one. As Jenkins L.J. stated in *Edwards v. Halliwell, supra*:

... *Foss v. Harbottle* has no application at all, for the individual members who are suing sue, in the right of the union, but in their own right to protect from invasion their own individual rights as members. [At 1067.]

Mr. Gooderham on behalf of Everest emphasized the genesis of REITs as successors to business trusts (such as the Massachusetts business trust), being vehicles designed to avoid taxation at the corporate level and instead to facilitate the "pass-through" of taxable benefits to beneficiaries, all as explained by Mr. Poliakoff in his letter of opinion of June 15, 2006. This arrangement was eventually ended by a Supreme Court decision, but was re-instated in 1960. According to Mr. Poliakoff:

It was not until 1960 that Congress passed the initial real estate investment trust provisions which restored the pass-through tax advantages on the federal level. These federal income tax benefits were extended *only* to entities which were trusts. Pub. L. No. 86-779 §856(a)(1960). In 1963, the only choice of entity when forming a REIT was a trust. It was during this period that the State of Maryland enacted the first state real estate investment trust statute, creating an entity in Maryland which was not, and could not be, a corporation; this entity was called a Maryland real estate investment trust ("a Maryland REIT"). 1963 Md. Laws ch. 93, codified as Md. Code Ann., CORPS & ASS'NS §8-101 et. seq. (1993) ("Maryland REIT Law"). A REIT, by definition could not be corporation, and the prohibitions on the REIT's organization, income and distribution were intended to ensure that the REIT did not function as a corporation. "The prime desire of these trusts is to avoid the corporate tax and the trust conduit theory offers a chance to do this." Charles Whittlin, "The Real Estate Investment Trust — Past, Present and Future", 23 U. Pitt. L. Rev. 779, 793 (1961-1962).

The intention of Congress in creating the REIT, was "to afford an opportunity for the small investor, by pooling his funds with those of many others, to own an interest in real estate rental properties and in real estate mortgages, and get the benefits of diversification and centralized expert management, not available to him otherwise because of the corporate income tax on such pooled organizations." ... For tax purposes, "[REITs] were originally treated as trusts, which are pass-through entities, so that all distributions of income would be taxed at the beneficiary, rather than at the trust level. ... [Emphasis added.]

44 Mr. Poliakoff emphasized that when an enterprise elects to become a REIT under the laws of Maryland, it chooses not to become a corporation and that although a Maryland REIT has many of the attributes of a corporation, there are still significant differences between the two vehicles. Generally speaking, one must look to the terms of the declaration of trust, rather than the corporate statute, for the internal regulation of the organization (although it must be said that Title 8 of the Corporations and Associations Article of the *Code* regulates these matters, including indemnification and "exculpation" provisions, to a large degree). Whilst a Maryland corporation is required to have officers, for example, a REIT is not; there are no restrictions on the making of distributions by a REIT to its shareholders, as there are for corporations; and while a corporation may be formed under Maryland law for any lawful purpose, a REIT may exist only for the purposes of "acquiring, holding, managing, administering, controlling, investing in or disposing of property for the benefit and profit of any person who may become a shareholder." (§8-101(b).) Finally, Mr. Poliakoff noted various similarities between a common law trust formed in Maryland and a REIT, concluding that "a Maryland REIT is (and is not just similar to) a Maryland trust and is not analogous to a corporation."

45 Mr. Poliakoff's analysis provided interesting information, but with respect, none of his points, even taken together, is determinative of the question before us. The tax status of a REIT is not helpful to determining whether the procedural rule of *Foss v. Harbottle* should be applied to block Everest's action in British Columbia. More important are the facts that (as the summary trial judge found and as Mr. Gooderham conceded in this court), the Maryland REIT is a person at law and is therefore able to sue in respect of wrongs done to itself by its trustees or outside parties. (In the absence of any evidence of Maryland law on this point, we may assume as well that the shareholders may by ordinary resolution modify or adopt any irregular act done by the trustees on behalf of the Trust, but that they may not ratify an *ultra vires* or fraudulent act.) Nor did Mr. Poliakoff or any of the other experts opine on whether the trustees of a REIT owe a fiduciary duty directly to shareholders, as counsel suggested.

46 Mr. Gooderham did refer, however, to the decision of the Ontario Court of Appeal in *Ventas Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254 (Ont. C.A.), which involved a Canadian public real estate investment trust the shares of which were publicly traded and which had been put "in play" on the public market. (Para. 1.) At issue was the interpretation of certain standstill agreements; but in the course of his reasoning, Blair J.A. for the Court said that there was "no doubt that the directors of a corporation that is the target of a takeover bid — or, in this case, the Trustees — have a fiduciary obligation to take steps to maximize shareholder (or unitholder) value in the process". (Para. 53.) On the other hand, we have the statement of the Supreme Court of Canada in *People's Department Stores Ltd. (1992) Inc., Re*, 2004 SCC 68, [2004] 3 S.C.R. 461 (S.C.C.) to the effect that the "various shifts in interests that naturally occur as a corporation's fortunes rise and fall do not ... affect the content of the fiduciary duty under s. 122(1)(a) of the [Canada Business Corporations Act]. At all times, directors and officers owe their fiduciary obligation to the corporation. The interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders." (Para. 43.) One expects that the nature of directors' duties upon a company being put "in play" will be clarified by the Supreme Court of Canada in its reasons in *BCE Inc., Re*, 2008 QCCA 935 (Que. C.A.), rev'd [2008] S.C.C.A. No. 202 (S.C.C.) (reasons to follow). Whether that case will have any ramifications for REITs remains to be seen, but at present it is certainly arguable that the trustees of Del Cano can be said to have owed a duty of some kind to the shareholders of the Trust once it was in play.

47 Further, if one regards Everest's claims as arising from an interest in the Trust property, it is arguable that the shareholders had a direct interest in the (net) assets of the Trust after the payment of all proper debts and liabilities. (Again, the expert evidence did not address this point and we must therefore assume that the law of Maryland is the same as that of British Columbia.) The point is problematic, however, because as Everest conceded in its factum, and as the summary trial judge found at para. 26 of her reasons, Del Cano is a legal entity. In this respect, it lies towards the "corporate" end of the continuum, unlike the limited partnership that was at issue in *Watson, supra*. As we have seen, *Foss v. Harbottle* was found to apply to that association even though it was not a legal entity (and accordingly, the partners had a direct interest in the (net) assets of the partnership) and even though the general partner owed a fiduciary duty directly to the limited partners.

48 I regard *Watson*, by which we are bound, as highly relevant to the case at bar. Here, the losses and damages complained of arise only as a "consequence of and incidental to the fact" that Everest is a shareholder in the REIT. To paraphrase *Watson*, the "true substance of the claim is damage to the REIT and the REIT only", and "the fact is that [REITs] can sue and be sued as long as the proper procedure is followed." (Para. 27.) In the language of *Meditrust, supra*, Everest has not shown that it has a cause of action that the (other) shareholders do not. Moreover, in the language of *Robak Industries, supra*, Everest has neither an "independent relationship" with CIBC nor has it suffered an "independent loss" in respect of wrongs done to Del Cano. In short, Everest's alleged losses, if proven, would be entirely derivative or reflective of losses suffered by Del Cano. As such, the action does not fall within the "personal claim" exception to *Foss v. Harbottle* and the pleadings do not disclose a reasonable cause of action against CIBC.

Conversion to a Representative Action?

49 In its factum under the heading "Errors in Judgment", Everest submitted that this court should grant leave to convert the action to a representative one rather than strike out the action. It does not appear that this application was made to the court below and therefore it is not strictly speaking a ground of appeal. Nevertheless, CIBC did not object to Everest's application *per se*, but addressed the point on its merits.

50 Everest argued that the rule in *Foss v. Harbottle* is a procedural one not intended to affect substantive rights. It suggested that as a matter of justice, it should be given the opportunity to join all of the shareholders by converting the action to a representative one under Rule 5(11) or even under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50. But, as CIBC contends in its factum, adding all the other shareholders as parties to the litigation would not change the fact that their claims are derivative. In CIBC's words, "If an individual personal claim fails, then so does the personal claim brought as a representative action. If the claim belongs to the association, then only the association can sue. A shareholder asserting a claim that belongs to the company cannot engineer around the Rule by framing the action as a class action or as a representative action." This of course returns us

to the first principle of *Foss v. Harbottle* — that the proper plaintiff in respect of a wrong done to the corporation or association is the corporation or association.

51 The only solution from Everest's point of view would be to seek to convert the action to a derivative one or to bring a fresh derivative action. CIBC suggests in its factum that Everest was given the opportunity to reframe its case but that it chose not to do so, perhaps because of the substantial procedural difficulties that would ensue under Maryland law as well as in the Supreme Court of British Columbia. It seems to me that, before deciding whether to press on with its claims against CIBC, Everest must consider its position closely. In particular, there is the fact that under its retainer agreement with Del Cano, CIBC is entitled to be indemnified by the Trust in most circumstances; that Everest's allegations of "active and deliberate dishonesty" on the part of the trustees have been dismissed on the merits; and that the restoration of a REIT, if restoration is possible under Maryland law, would no doubt be a long and expensive process. These circumstances indicate that Everest's case has been reduced to one that is almost entirely theoretical.

52 I would dismiss the appeal, confirm the summary trial judge's order dismissing the action as against CIBC, and dismiss the application to convert this part of the action to a derivative one.

Hall J.A.:

I agree.

Frankel J.A.:

I agree.

Appeal dismissed.

APPENDIX

37. In particular, CIBC's duty of care and fiduciary duty arose from the following circumstances:

- (a) CIBC managed the sale of the Trust Property including marketing the Trust Property for sale, soliciting others and inviting competition, setting out time limits and conducting the negotiations;
- (b) the Beneficiaries were uniquely vulnerable to the actions of the CIBC as the CIBC controlled the sale of the Trust Property, the information provided to prospective purchasers and the negotiation process;
- (c) under the Declaration of Trust, any sale could be conducted without the approval of the Beneficiaries;
- (d) CIBC knew that its actions in relation to the sale of the Trust Property would directly affect the Beneficiaries; and,
- (e) CIBC knew that there was no process in place for Beneficiaries to approve of any sale of the Trust Property, prior to any such sale.

38. In the premises, CIBC owed a duty to the Beneficiaries, including Everest, to

- (a) use all reasonable diligence to obtain the best price for the Trust Property on any sale of the Trust Property;
- (b) pay equal and fair attention to the interests of all of the Beneficiaries of the Trust; and,
- (c) provide the Beneficiaries with all material facts relating to any potential sale of the Trust Property.

.....

88. Everest claims that CIBC breached a fiduciary duty and duty of care owed to Everest as a beneficiary of the Trust by advising the Trustees to enter into the improvident sale of all of the Trust Property on or about December 20, 2001, in circumstances where the Defendants, and all of them, were motivated by the improper purpose of defeating Everest's bid to acquire all of the Shares of the Trust.

89. Further, or in the alternative, CIBC knowingly [assisted] the Trustees in their breach of fiduciary duty; in particular, CIBC pursued and recommended the improvident sale of all of the Trust Property knowing that the Aspen Agreement was not in the best interests of the Beneficiaries, including Everest.

90. In selling all of the Trust Property to Aspen for net \$106,000,000 (U.S.), the Defendants, and each of them, breached their duties of care and fiduciary duties owed to the Beneficiaries of the Trust, including Everest, in that:

- (a) the Defendants failed to sell all of the Trust Property with a fair and impartial attention to the interests of all Beneficiaries and acted with the intention of defeating the bid by Everest to acquire all of the Shares;
- (b) the Defendants failed to market the sale of all of the Trust Property adequately;
- (c) the Defendants failed to use reasonable diligence in inviting competition with respect to the sale of all of the Trust Property, including but not limited to failing to pursue interested purchasers including,
 - (i) Camden Property Trust;
 - (ii) KDF Communities, LLC;
 - (iii) The Bascom Group;
 - (iv) Lyon Capital Ventures LLC;
 - (v) Pacifica Enterprises LLC; and,
 - (vi) Everest;
- (d) the Defendants failed in the management of the sale;
- (e) The Defendants set Timing Requirements which were not realistic for the sale of all of the Trust Property at the best price;
- (f) the Defendants told prospective purchasers that all of the Trust Property would be sold to the bidder who could meet the Timing Requirements at a purchase price of \$106,000,000 (U.S.), deflating the sale price;
- (g) the Trustees sold all of the Trust Property without seeking the approval of the Beneficiaries and without holding an annual general meeting for the purpose of an election of trustees for the Trust;
- (h) the Defendants proceeded with undue and reckless haste and improvidence in completing the sale to Aspen; and,
- (i) the sale price of net \$106,000,000 (U.S.) for the Trust Property was improvidently low.

91. In addition, CIBC acted beyond the scope of its responsibilities and duties and assisted the Trustees, and each of them, in a course of conduct designed to sell the Trust Property as quickly as possible, with the intention of defeating the Everest Offer or any subsequent Everest offers, at an improvidently low price which it knew was not in the best interests of the Beneficiaries, including Everest.

92. In the premises, CIBC is jointly and severally liable along with the Trustees, and each of them, for breach of trust.

Footnotes

* A corrigendum issued by the Court on August 27, 2008 has been incorporated herein.

End of Document

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TAB 11

2012 ONCA 47
Ontario Court of Appeal

Fischer v. IG Investment Management Ltd.

2012 CarswellOnt 635, 2012 ONCA 47, [2012] O.J. No. 343, 109 O.R. (3d) 498,
15 C.P.C. (7th) 81, 211 A.C.W.S. (3d) 785, 287 O.A.C. 148, 346 D.L.R. (4th) 598

Dennis Fischer, Sheila Snyder, Lawrence Dykun, Ray Shugar and Wayne Dzeoba, Plaintiffs (Respondents) and IG Investment Management Ltd., CI Mutual Funds Inc., Franklin Templeton Investments Corp., AGF Funds Inc. and AIC Limited, Defendants (Appellants)

W.K. Winkler C.J.O., G.J. Epstein J.A., G. Pardu J. (ad hoc)

Heard: December 6, 2011

Judgment: January 27, 2012

Docket: CA C53852, C53853

Proceedings: affirming *Fischer v. IG Investment Management Ltd.* (2011), 104 O.R. (3d) 615, 276 O.A.C. 84, 2011 CarswellOnt 800, 2011 ONSC 292, 6 C.P.C. (7th) 139 (Ont. Div. Ct.); reversing *Fischer v. IG Investment Management Ltd.* (2010), 89 C.P.C. (6th) 205, 2010 CarswellOnt 135, 2010 ONSC 296 (Ont. S.C.J.); additional reasons at *Fischer v. IG Investment Management Ltd.* (2010), 89 C.P.C. (6th) 263, 2010 CarswellOnt 3338, 2010 ONSC 2839 (Ont. S.C.J.)

Counsel: Benjamin Zarnett, Jessica Kimmel, Melanie Ouanounou, for Appellant, CI Mutual Funds Inc.

James D.G. Douglas, David Di Paolo, Heather Pessione, for Appellant, AIC Limited

Joel Rochon, Peter Jervis, Sakie Tambakos, for Respondents

Subject: Civil Practice and Procedure; Corporate and Commercial; Securities

APPEAL by defendant mutual fund managers from judgment reported at *Fischer v. IG Investment Management Ltd.* (2011), 104 O.R. (3d) 615, 276 O.A.C. 84, 2011 CarswellOnt 800, 2011 ONSC 292, 6 C.P.C. (7th) 139 (Ont. Div. Ct.), granting certification of proposed class action by investors.

W.K. Winkler C.J.O.:

I. Introduction

1 This appeal raises the question whether a class action by investors against certain mutual fund managers is the preferable procedure for resolving the class members' claims. The statement of claim alleges that the five defendant mutual fund managers, including the two appellants, CI Mutual Funds Inc. ("CI") and AIC Limited ("AIC"),¹ permitted securities market conduct referred to as "market timing"² in certain mutual funds that they managed. Market timing is alleged to have caused long-term investors in the affected mutual funds to suffer losses in the value of their investments of several hundred million dollars.

2 Before the class action was started, the Ontario Securities Commission ("OSC") conducted a lengthy investigation into the practice of market timing in the mutual fund industry. The investigation led the OSC to bring enforcement proceedings against the five mutual fund managers who were named as defendants in the proposed class action. The enforcement proceedings concerned the same market timing conduct that the investors complain about in the present action.

3 All of the defendant fund managers entered into settlement agreements with the OSC staff. The terms of the settlements required the five defendants to pay \$205.6 million to investors in the relevant mutual funds. For purposes of the OSC settlement

agreements, the defendants admitted that: they entered into arrangements with third-party investors, who engaged in market timing; the market timing conduct had occurred; the market timers made profits that adversely affected investors in the relevant mutual funds; and the defendants earned commissions from their arrangements with the market timers. These factual admissions were made on the basis that they were "without prejudice" to the defendants in "any civil or other proceedings which may be brought".

4 Hearings were then held before a panel of the OSC for the purpose of deciding whether to approve the settlement agreements as being in the public interest pursuant to s. 127 of the *Securities Act*, R.S.O. 1990, c. S. 5. These hearings, which led to the approval of the settlements, were conducted *in camera*.

5 After the settlements were approved, the plaintiffs brought a motion for certification of a class action. The central contentious issue on the motion was whether the proposed class action met the preferable procedure criterion in s. 5(1)(d) of the *Class Proceedings Act*, 1992, S.O. 1992, c. 6 ("CPA"). The motion judge concluded that although the action otherwise satisfied the criteria for certification, it did not satisfy the preferable procedure requirement. This was because, in the motion judge's view, the completed OSC proceedings and settlement agreements fulfilled the judicial economy, access to justice and behaviour modification purposes of the CPA.

6 The Divisional Court disagreed. Writing for the court, Molloy J. held that the OSC proceedings could not be the preferable procedure for recovering damages because the investors' action was for significant monetary damages *beyond* the amount that had been recovered through the OSC proceedings. The court was satisfied that the class action was the only viable procedure for recovering these substantial additional damages. The court went on to grant the motion for certification on certain specified conditions.

7 The appellant mutual fund managers appeal, with leave of this court, from the Divisional Court's order granting certification of the class action. The appellants submit that the Divisional Court erred in concluding that the class action is a preferable procedure to the OSC proceedings.

8 I cannot accede to this submission. As will be explained further, in considering whether an alternative means of resolving the class members' claims is preferable to the mechanism of a class action, a court must examine the fundamental characteristics of the proposed alternative proceeding, such as the scope and nature of the jurisdiction and remedial powers of the alternative forum, the procedural safeguards that apply, and the accessibility of the alternative proceeding. The court must then compare these characteristics to those of a class proceeding in order to determine which is the preferable means of fulfilling the judicial economy, access to justice and behaviour modification purposes of the CPA. In a given case, certain characteristics will drive the preferability analysis more than others.

9 In this case, the OSC commenced investigatory and enforcement proceedings into the market timing conduct in question. The OSC staff reached agreements with the defendants to settle the proceedings, and those settlement agreements were then approved by the OSC. The investors did not participate in the proceedings before the OSC and, quite properly, the OSC in approving the settlements did not purport to settle the claims of the investors in a full and final manner. In the circumstances, it would not have been empowered to do so. The essence of the OSC initiative was that of a parallel or complementary proceeding to any civil action brought by the investors.

10 In my view, the courts below erred by focusing on the substantive outcome of the OSC proceedings, which is not a relevant factor in the comparative analysis under s. 5(1)(d) of the CPA. The courts ought instead to have considered the regulatory nature of the OSC's jurisdiction and its remedial powers, as well as the lack of participatory rights afforded to affected investors by the OSC proceedings. A consideration of these two particular characteristics compels the conclusion that the OSC proceedings would not fulfill the CPA goal of providing class members with access to justice in relation to their claims. Thus, the OSC proceedings cannot constitute a preferable procedure to the proposed class action for purposes of the CPA. The Divisional Court came to the same conclusion, albeit for different reasons, and I would therefore dismiss the appeal.

II. Background

i) OSC Investigation and Enforcement Proceedings Concerning Market Timing

11 In November 2003, the OSC launched an investigation into the practice of market timing in the mutual fund industry. "Market timers" seek to take advantage of the fact that the value of mutual funds — unlike other traded securities — is calculated only once a day (at 4:00 p.m. EST). As a result of time zone differences, the prices of securities principally traded on foreign exchanges may be as much as 12-15 hours old at the time the daily mutual fund valuation is done. As a result, the daily value of a fund may be, for a short period of time, artificially low. Market timers purchase mutual funds they believe are undervalued for a short-term turnaround, unlike the vast majority of unit holders who invest in mutual funds as long-term investments.

12 Although market timing is not an illegal activity, the profit made by market timers is at the expense of long-term investors. Also, market timing activity in a fund impedes the efficient operation of the fund in a number of ways. The OSC, in launching its investigation, was concerned that some managers of mutual funds were not taking steps to control market timing and were therefore not acting in the best interests of the relevant mutual funds.

13 At the conclusion of its investigation, the OSC initiated enforcement proceedings against the five defendant mutual fund managers for failing to act in the public interest in relation to market timing activity in the affected funds. The OSC staff entered into settlement agreements with the defendant managers, pursuant to which the defendants agreed to pay a total of \$205.6 million to their investors.

14 Two separate hearings were held before a panel of the OSC to consider whether to approve these settlement agreements as being in the public interest pursuant to s. 127 of the *Securities Act*. The OSC issued general public notices that the hearings were being held, but gave no direct notice to investors.³

15 The first hearing occurred on December 16, 2004, and involved CI, AIC, IG Investment Management Inc. and AGF Funds Inc. These four parties jointly requested that the matter proceed on an *in camera* basis. The Chair of the OSC agreed to this request, stating:

We will now go *in camera*. So I would ask those persons in the hearing room who are not associated with any of the four parties, their counsel, or the two Commissions [the Ontario and the Manitoba Securities Commissions] or the MFDA [the Mutual Fund Dealers Association], please, leave.

16 A second hearing was held on March 3, 2005, to consider the settlement agreement between the OSC staff and Franklin Templeton Investments. It was also conducted *in camera*.

17 The OSC approved the settlement agreements with the five defendants. All of the agreements specified that the "agreement of facts" are "without prejudice" to the parties in "any civil or other proceedings which may be brought by any other person or agency."

ii) Class Proceedings Commenced Against the Defendants

18 Shortly after the settlements were approved, several investors in mutual funds managed by the defendants commenced a class action on behalf of investors in the funds. The amended statement of claim alleges that the defendants are liable to class members for breach of a fiduciary duty and/or breach of a duty of care owed to class members for failing to take appropriate steps to stop market timing in the affected funds. The plaintiffs seek declaratory and restitutionary relief, as well as general and special damages.

19 The plaintiffs allege that, by permitting the market timing to occur, the defendants failed to act in the best interests of the fund and all investors in the fund. They assert that market timing caused an annual loss in the value of the affected mutual funds of several hundred million dollars. In addition, they allege that market timing led to the imposition of increased transaction costs on long-term investors, as well as other transaction costs arising from inefficiencies caused by the market timing conduct. The plaintiffs further assert that the amount paid by the defendants to investors under the OSC settlement agreements falls

well short of providing full reparation to investors and fails to account for management and transaction costs associated with market timing activity.

iii) Certification Motion

20 The plaintiffs' motion to certify the proposed action was heard in December 2009. They filed expert evidence on the motion in support of the assertion that the OSC settlements do not constitute full compensation to investors. According to this evidence, the settlement with CI represents only 1/7 of the actual loss of CI investors and the AIC settlement represents only 1/3 of the total harm to AIC investors.

21 The defendants' primary argument in opposing the certification motion was that the action does not satisfy the preferable procedure criterion in s. 5(1)(d) of the *CPA* because the completed OSC proceedings were the preferable procedure for resolving the investors' claims. Section 5(1)(d) states:

5. (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

...

(d) a class proceeding would be the preferable procedure for the resolution of the common issues...

22 The motion judge agreed with the defendants' position and refused to certify the action. He concluded that the other four criteria for certification in s. 5(1) were satisfied: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims raise common issues; and (e) there are appropriate representative plaintiffs who could produce a workable litigation plan. Nevertheless, the plaintiffs' failure to satisfy the preferable procedure criterion was fatal to the motion for certification.

iv) Appeal to the Divisional Court

23 The plaintiffs appealed the motion judge's decision to the Divisional Court. By the time the appeal was argued, three of the five defendants had entered into settlements of the class proceedings with the plaintiffs and only CI and AIC remained (and still remain) as defendants.

24 In reasons delivered on behalf of the court, Molloy J. allowed the plaintiffs' appeal and granted a certification order. The court concluded that the motion judge's analysis of the impact of the OSC settlements on the preferable procedure assessment was "fundamentally flawed" and held that the preferable procedure criterion was satisfied.

25 Given that this appeal turns on the preferable procedure issue, I now describe in more detail the reasons of the motion judge and the Divisional Court on this issue.

III. Reasons of the Courts Below

i) The Motion Judge's Preferable Procedure Analysis

26 The motion judge described, at paras. 195-200, the general principles regarding the preferable procedure criterion in s. 5(1)(d) of the *CPA*. He noted, citing *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321 (Ont. C.A.), at para. 69, leave to appeal to S.C.C. refused, (S.C.C.), and *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, [2001] 3 S.C.R. 158 (S.C.C.), at para. 27, that the preferability inquiry is to be conducted through the lens of the three principal advantages of class actions: judicial economy, access to justice and behaviour modification.

27 As recognized by the motion judge, at paras. 221-22, there are two core elements of the preferable procedure inquiry: see *Hollick*, at para. 28; *Markson*, at para. 69. The first element is whether the class action would be a fair, efficient and manageable method for advancing the claim. The second element is whether a class action would be preferable to other reasonably available means of resolving the class members' claims. This question of preferability turns not only on whether a class action would be

preferable to individual civil actions, but also on whether a class action would be preferable to "all reasonably available means of resolving the class members' claims": *Hollick*, at para. 31.

28 The motion judge concluded, at para. 210, that if the OSC proceedings had not taken place, a class action would have been the preferable procedure. And he observed, at para. 221, that even when the availability of the OSC proceedings is considered, a class action would meet the first element of the *Hollick* inquiry because it constitutes a fair, efficient and manageable method for resolving the claims of the class members. However, the motion judge went on to conclude that the proposed class action does not meet the second element of the *Hollick* inquiry because the action is not preferable to other reasonably available means of resolving the class members' claims. In his view, the OSC proceedings were the preferable procedure for resolving these claims.

29 In reaching this conclusion, the motion judge found that the OSC proceedings accomplished the *CPA* goals of behaviour modification, judicial economy and access to justice: see paras. 235-60. In his view, behaviour modification was achieved by penalizing the defendants for their failure to respond to the market timing conduct (para. 236); judicial economy was achieved by securing compensation for all investors in "an efficient, principled, and consistent way" (para. 238); and access to justice was accomplished because the OSC settlements included the same form of remedy sought by the class action (*i.e.*, monetary relief), and in reaching the settlements, the OSC staff took an adversarial stance towards the defendants in a manner akin to the role of class counsel, demanding concessions from the defendants and the payment of compensation for the investors (paras. 246-48).

30 The motion judge further observed, at para. 252, that the debate over whether the OSC proceedings were the preferable procedure could not be "converted into a settlement approval hearing" under the *CPA*. However, he was of the view that the criteria that a court applies when deciding whether to approve a negotiated settlement of a class action are relevant "when a court considers the issue of preferable procedure and the issues of behaviour modification, judicial economy and access to justice" (at para 252). After setting out the settlement approval criteria, the motion judge held, at para. 254, that, with one exception, the application of these criteria "favour the conclusion that the OSC proceeding was the preferable procedure."

31 Finally, before leaving the discussion of access to justice — which he saw as the definitive issue weighing against certification — the motion judge considered the plaintiffs' argument that the quality of the access to justice provided by the OSC proceedings was "in doubt because the OSC may have left the investors' money on the table" (para. 255). The motion judge refused to give effect to this argument and instead accepted the defendants' submission that, once the court is satisfied that the OSC's purpose was to obtain restitutionary compensation for the harm suffered by the investors and that the process to do so was adequate, the court should not "second-guess" the access to justice provided by the OSC proceedings (at paras. 256-57).

ii) The Divisional Court's Preferable Procedure Analysis

32 The Divisional Court allowed the plaintiffs' appeal from the motion judge's order refusing certification. In doing so, Molloy J. described three errors in the motion judge's preferable procedure analysis, at para. 33:

- 1) he failed to apply the low evidentiary burden on the plaintiffs at the certification stage;
- 2) he improperly found that the "completed OSC proceeding was a preferable proceeding for the remaining portion of the plaintiffs' claims going forward"; and
- 3) he erred in law by considering the criteria for approval of a settlement at the certification stage.

33 Molloy J. explained that the first two errors are closely related. On the one hand, the motion judge found that there was "some basis in fact" to support the investors' assertion that the OSC settlement only represented part of the total damages claimed by the investors. However, in Molloy J.'s view, the motion judge went on to disregard this finding in his analysis of the preferable procedure.

34 According to Molloy J., at para. 8, the plaintiffs' action "does not seek the recovery of the \$205 million already paid; it seeks recovery of the damages not recovered through the OSC proceeding." In her opinion: "Unless it can be said that the

plaintiffs have achieved full, or at the very least substantially full, recovery, they are entitled to maintain this action. There is no other viable alternative for recovering the shortfall after the OSC settlement".

35 Molloy J. went on to conclude, at para. 41, that the key point indicating that a class action is the preferable procedure is that "it is ... illogical to characterize the OSC proceeding as a preferable procedure for recovering that money which the OSC proceeding failed to recover in the first place. It is by definition not a preferable procedure in those circumstances."

36 Molloy J. held, at para. 47, that the motion judge further erred by applying the test for approval of a settlement in the context of a certification motion. She explained, at paras. 48-57, why these criteria should not be taken into account at the certification stage.

IV. Analysis

37 On appeal to this court, the appellants contend that the Divisional Court committed two errors:

- 1) the Divisional Court applied the incorrect standard of review to the motion judge's decision; and
- 2) the Divisional Court erred in its preferable procedure analysis.

38 I will first briefly deal with the standard of review issue and then turn to the issue of the preferable procedure analysis.

1) Standard of Review Applied by the Divisional Court

39 The appellants submit that the Divisional Court failed to accord the "special deference" owed to the motion judge's exercise of discretion in deciding that the preferable procedure requirement was not met, citing *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.), at para. 43, leave to appeal to S.C.C. refused, (S.C.C.). As stated in their factum, the motion judge "was sensitive to the applicable legal principles to be brought to bear in the preferable procedure analysis."

40 I agree with the appellants that substantial deference must be accorded to motion judges in certification proceedings and that a reviewing court should only intervene with a motion judge's certification decision when the judge makes a palpable and overriding error of fact or otherwise errs in principle. This standard of review is well-established in the jurisprudence: see *Pearson*, at para. 43; *Cassano v. Toronto Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401 (Ont. C.A.), at para. 23, leave to appeal to S.C.C. refused, (S.C.C.); *Markson*, at para. 33; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), at para. 39, leave to appeal to S.C.C. refused, (S.C.C.).

41 In my view, however, the Divisional Court did not err in its application of the standard of review. The court identified, at para. 58, errors in principle in the motion judge's approach to the preferable procedure inquiry, which provided the basis for appellate intervention. Among the errors in principle identified by the Divisional Court were the motion judge's application of "the wrong test in his consideration of the preferable procedure test for certification" and the motion judge's error in considering factors relevant to the approval of a settlement at the certification stage. Deference cannot shield errors in principle.

42 I agree with the Divisional Court's holding that the motion judge erred in principle in reaching the conclusion that the OSC proceedings provided the preferable procedure for resolving the class members' claims. However, as I will now discuss, my reasons for reaching this conclusion differ from those expressed by the Divisional Court.

2) The Preferable Procedure Inquiry

43 Turning to the merits of the Divisional Court's preferable procedure analysis, in my view, the error in principle that led to the motion judge's incorrect conclusion on preferability was more fundamental than his alleged failure to recognize that a substantial amount of the monetary damages claimed by investors went uncompensated in the completed OSC proceedings. The question whether the OSC settlements provided investors with all or substantially all of the monetary relief that they seek in the class action is not the proper focus of the preferable procedure inquiry.⁴ In other words, the Divisional Court did not ask itself the right question.

44 The second element of the preferability inquiry described in *Hollick* requires a comparative analysis as to whether a class action would be preferable to other reasonably available means of resolving the class members' claims.⁵ The preferability inquiry must necessarily take into account the central characteristics of the proposed alternative proceeding as a means of resolving the claims. This exercise includes, but is not limited to, considering the following characteristics of the alternative proceeding: the impartiality and independence of the forum; the scope and nature of the alternative forum's jurisdiction and remedial powers; the procedural safeguards that apply in the alternative proceeding, including the right to participate either in person or through counsel and the transparency of the decision-making process; and the accessibility of the alternative proceeding, including such factors as the costs associated with accessing the process and the convenience of doing so.

45 These characteristics must be considered in relation to the type of liability and damages issues raised by the class members' claims against the defendants in the putative class action and the manner in which they are addressed, if at all, in the alternative proceeding. The court must then compare these characteristics to those of a class proceeding through the lens of the goals of the *CPA*: judicial economy, access to justice and behaviour modification.

46 Not all of the characteristics outlined above will be material in a given case. Each case will of course turn on its own facts. The requisite comparative analysis in the instant case, however, reveals the following important differences between the OSC proceedings and the class proceeding, which support a conclusion that a class proceeding is preferable for resolving the class members' claims:

- i) The jurisdiction of the OSC under s. 127 of the *Securities Act* is regulatory (*i.e.*, protective and preventative), not compensatory. Accordingly, the remedial powers available to the OSC under the section are insufficient to enable it to fully address the class members' claims in the proposed class proceeding.
- ii) The OSC proceedings did not provide comparable rights of participation to the affected investors as the procedural rights enshrined in the *CPA*, or any participatory rights for that matter.

47 I will now elaborate on the significance of these distinctions, particularly in relation to the second element of the preferable procedure inquiry as described in *Hollick* (*i.e.*, whether a class action would be preferable to other reasonably available means of resolving the class members' claims). While I agree with the motion judge that the critical question in this regard is whether the OSC proceedings met the objective under the *CPA* of providing the proposed class members with access to justice, in my view, a comparative examination of the key characteristics of the OSC proceedings with the proposed class action reveals that the OSC proceedings did not provide class members with access to justice and thus cannot be the preferable procedure for resolving their claims.

1. The Essential Differences Between the OSC Proceedings and the Proposed Class Action

i) The Scope and Nature of the OSC's Jurisdiction and Remedial Powers

48 In arguing that the preferable procedure requirement was met, the plaintiffs provided evidence about the scope and purpose of the OSC's jurisdiction and remedial powers in the form of an affidavit from Professor Poonam Puri, an Associate Professor at Osgoode Hall Law School and Head of Research and Policy at the Capital Markets Institute of the Rotman School of Management. In her affidavit, Professor Puri explained:

Public enforcement by securities regulators and criminal enforcement by criminal law authorities, as well as private enforcement by investors through private suits and class action proceedings all play an important role in ensuring that public company managers and mutual fund managers act in the best interests of shareholders and unit holders, respectively. None of these mechanisms is mutually exclusive. [Footnote omitted.]

49 Professor Puri's evidence outlined the essential purposes of the OSC enforcement proceedings as well as the role of private enforcement, including class action litigation, in regulating the behaviour of capital market participants such as the defendants. As Professor Puri explained in her affidavit, the OSC's regulatory jurisdiction over the defendants under s. 127 of the *Securities*

Act was exercised in a different context and for a different purpose than the court's jurisdiction to adjudicate class actions and other civil claims concerning the defendants' conduct.

50 For ease of reference, s. 127 of the *Securities Act* provides in part as follows:

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.

2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.

.....

3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.

4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.

.....

6. An order that a person or company be reprimanded.

7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.

.....

8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

.....

(4) No order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act*.

51 The decision of the Supreme Court of Canada in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37, [2001] 2 S.C.R. 132 (S.C.C.), illustrates the distinction referred to by Professor Puri. In this decision, Iacobucci J. described the scope and purpose of the OSC's jurisdiction under s. 127 of the *Securities Act*. At para. 42, he cited with approval the following statement by Laskin J.A. in the decision under appeal: "The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets". Iacobucci J. elaborated on the nature and extent of the OSC's jurisdiction under s. 127 as follows, at para. 45:

In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the public interest is not unlimited. In

exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy *Securities Act* misconduct alleged to have caused harm or damages to private parties or individuals.

52 These passages from *Asbestos Minority Shareholders* make it clear that s. 127 is not intended to serve as a compensatory or remedial provision with respect to harm done to individual investors. Rather, this provision empowers the OSC to regulate capital markets in a way that protects investors and the efficiency of capital markets. For example, s. 127 permits the OSC to make orders to: cease trade; prohibit an individual from becoming an officer or director of a public company; issue reprimands; levy an administrative penalty of up to \$1 million for each failure to comply with Ontario securities law; and make an order for disgorgement to the OSC of any amounts obtained as a result of non-compliance with Ontario securities law. Section 127 does not empower the OSC to make orders requiring a party to make compensation or restitution or to pay damages to affected individuals.

53 In contrast, s. 128 of the *Securities Act* allows the OSC to apply to a judge of the Superior Court to make a variety of orders, including orders requiring compensation or restitution to the aggrieved person or company, and requiring payment of general or punitive damages to any person or company. The OSC did not bring a s. 128 application in relation to the market timing conduct in issue here.

54 The OSC proceedings and the civil action in the form of the proposed class proceeding are intended as parallel, not mutually exclusive, proceedings. It is worth noting, for purposes of analogy, that a court may make an order under s. 128 (including an order for restitution or punitive damages) despite the existence of any order made by the OSC under s. 127.

55 Unlike enforcement proceedings under s. 127 of the *Securities Act*, the purpose of the proposed class proceeding is to obtain relief for investors — monetary or otherwise — who claim to have suffered losses from the defendants' impugned conduct. While the OSC in this case approved settlement agreements that included a compensatory element for investors arising from the same impugned conduct, such voluntary payments by the defendants cannot alter the regulatory purpose of the OSC proceedings for purposes of the preferability analysis under the *CPA*. The role of the OSC proceedings was not to assess the liability issues raised in the statement of claim, such as the alleged breaches by the defendants of a fiduciary duty or a duty of care owed to the investors, or to quantify the harm allegedly caused by such breaches.

56 The disparate purpose of the OSC proceedings and the proposed class action is emphasized by comments made by Commission counsel during the settlement approval hearing. In response to a request by the Chair of the OSC for an explanation of the basis upon which the settlement quantum was determined, counsel stated:

We didn't include a formula for the calculation in the Settlement Agreement because there are different ways of determining the amount and different legitimate theories as to what the proper method of calculation would be. And it would be quite possible that the Respondents [the defendant mutual fund managers] would have chosen a different method that was also justified, or Staff could have chosen a different method that was also justified if this had been a contested proceeding. So the method that was used was the parties tried to relate it to the standard that would have been expected of the fund managers at the time of trading. These comments by Commission counsel reflect that the OSC did not attempt to quantify the payment arrived at in the settlement agreements in a manner analogous to the way in which damages might be calculated in a civil action brought by investors.

57 This comment also demonstrates another important distinction between the OSC proceedings and the proposed class action. As discussed next, the procedure adopted by the OSC was characterized by the marked lack of access — both participatory and informational — that was provided to the investors.

ii) Lack of Participatory Rights of Investors in the OSC Proceedings

58 In contrast to the procedure underpinning a class proceeding, which is premised on facilitating transparency and participation on a class-wide basis, the OSC proceedings provided little to no basis for investor participation.

59 While a general notice of the settlement hearings was posted on the OSC's website, there was no attempt to notify the affected investors that the hearings were being held. Neither the investors nor their counsel attended the hearings or made submissions. Moreover, the substantive portions of the hearings took place *in camera* and were thus closed to anyone but counsel for the defendants and the relevant regulatory commissions.

60 Similarly, the procedure by which the settlements were arrived at did not facilitate investor participation. The amount of compensation that the defendants agreed to pay to the affected investors as a term of the settlement agreements was calculated without any opportunity for the investors to participate and without any details in the record of the OSC proceedings as to how this amount was calculated.

61 In contrast, the purpose of the procedural vehicle of the class action is to allow for the appointment of a representative plaintiff who shares a sufficient common interest with members of the class. The representative plaintiff conducts the litigation on behalf of class members under court supervision⁶ and within the presumptive principle of an open court.

62 The observations about the accessibility of the OSC proceedings are not meant to suggest that the elements of confidentiality and lack of participation by the investors made the hearings and settlement agreements somehow inappropriate or nefarious. On the contrary, the point is that the OSC proceedings were not intended or designed to provide the investors with access to justice for purposes of adjudicating the claims advanced in the proposed class proceeding. In short, the investors were not, and were not intended to be, parties to the OSC process.

63 Indeed, it is worth repeating that the settlement agreements signed by the defendants expressly contemplated that they could face civil law suits in relation to the conduct that gave rise to the settlements. The OSC settlements simply resolved the proceedings taken by the OSC against the defendants. The settlements did not finally resolve the claims of the investors as against the defendants, nor did they purport to do so.

64 I will now explain how the courts below failed to consider these essential differences between the OSC proceedings and the class proceeding in the preferable procedure analysis.

2. Errors in the Preferable Procedure Analysis of the Courts Below

65 The motion judge's reasons, at paras. 57-69, for dismissing the plaintiffs' argument that they would be denied access to justice if the class proceeding were not certified reflect his failure to properly consider the defining characteristics of the OSC proceedings in his preferability analysis. The motion judge, at para. 60, dismissed the evidence and argument concerning the different and, indeed, complimentary purposes of the OSC regulatory proceedings and the proposed class proceeding as "largely irrelevant to the objective issues that I must decide". He classified this discussion as a debate about procedural fairness and gave three reasons for concluding that the issue of procedural fairness "is not material or is subsumed by the debate about access to justice":

- 1) The OSC proceedings did not bind the investors, who are free to commence a proposed class proceeding and seek its certification (para. 61).
- 2) The investors did not have the right to opt out of the OSC proceedings and they would have the right to opt out of class proceedings. Nevertheless, it is unlikely any member of the class would opt out, because a class proceeding would be the only viable means for them to exercise their private rights. Moreover, "it would be a pointless argument to suggest on behalf of the investors that a class proceeding provides procedural fairness and is the preferable procedure because one has the opportunity to opt out of it" (para. 62).
- 3) Procedural fairness considerations must include the fact that class members will not have their "day in court" in the conventional sense because it is only the representative plaintiff and class counsel who have a truly participatory role. The procedural fairness that justifies binding the class members to the outcome of the common issues trial or a negotiated settlement is only provided by proxy (para. 67).

66 These three factors — when properly analyzed — support, rather than militate against, a finding that a class action would be the preferable procedure for resolving the common issues raised by the class members' claims.

67 The fact that the OSC proceedings did not bind investors is a reflection of why it cannot be said that the investors have had access to justice. In the words of the motion judge, at para. 61: "the Defendants are not denying an investor's ability to seek private recourse through the court system." The only conclusion that could be drawn is that even the defendants contemplated the prospect of civil proceedings. The reasons for this are clear: no settlement on compensation was ever agreed to by the class members; nor was the matter of compensation adjudicated by any body of competent jurisdiction, such as might have the effect of limiting juridical recourse.

68 The motion judge's second reason also contains the recognition that a class action is the preferable procedure in light of the principle of access to justice. He observed that an individual action is not a viable process "given the small size of the individual claims and the difficulties of forensic proof" (para. 62). However, the motion judge concluded that because no one would want to opt out of the class action, the right to opt out is irrelevant to access to justice considerations.

69 While this speculation about future opting out may ultimately prove to be correct, it ignores the well-settled principle that a right to opt out is an important element of procedural fairness in class proceedings. It is not an illusory right that should be negated by speculation, judicial or otherwise. Further, on a practical level, the fact that the economics of judicial recourse is a potential barrier to proceeding individually is an argument in favour of — not against — certification of a class proceeding.

70 The motion judge's third reason for dismissing the plaintiffs' argument regarding procedural fairness misconstrues the very rationale for and approach to class proceedings in this province. According to the motion judge, at paras. 67-69, even if a class action were to be certified, investors would not truly have their day in court unless individual assessment trials were required. In support of this conclusion, the motion judge noted that class action litigation is prosecuted by representative plaintiffs and class counsel and, accordingly, investors "would be non-participants in the resolution of the common issues" (at para. 69). The motion judge then equated the non-participation by investors in the OSC proceedings with the so-called non-participation by investors in a class action, at para. 69:

In my opinion, the issue in this case is not whether the investors *who were non-participants in the OSC proceedings and who would be non-participants in the resolution of the common issues* had or would have procedural fairness. The issue is whether they have had access to justice and whether the other important values of the *Class Proceedings Act, 1992* have been satisfied. The considerable power of the subjective and emotive plea that the investors have not had their day in court misdirects the analysis from the access to justice and other policy issues that inform the preferable procedure debate...

[Emphasis added.]

71 The notion that class members would not have their day in court unless individual assessment trials were to take place is contrary to the very essence of a class proceeding. Were it to be accepted as a general principle, it would serve to defeat every certification motion. The fundamental purpose of the class proceeding is to provide access to justice, not to deny it. Equating the *total* lack of participation by investors in the OSC proceedings with their alleged non-participation in resolving the common issues in the class proceeding ignores the underlying representative structure of a class proceeding. The purpose of ensuring that there is an adequate representative plaintiff is to ensure that the rights of each class member are protected and the claims of each are advanced vigorously.

72 As stated in *Hollick*, at para. 15: "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". This economy is achieved, in part, by appointing a representative plaintiff who shares a sufficient common interest with other members of the class and by allowing the representative plaintiff, under court supervision, to conduct the litigation on behalf of class members. The notion of representation that is inherent in the procedural mechanism of a class proceeding is a very far cry from the complete absence of participation by investors in the OSC proceedings. The

motion judge erred in dismissing this critical distinction as simply a "subjective and emotive plea" that has nothing to do with access to justice.

73 Moreover, the above passage clearly reveals the motion judge's failure to properly consider the accessibility of the OSC proceedings insofar as the class members are concerned. To repeat, in his view, "the issue in this case is not whether the investors ... had or would have procedural fairness. The issue is whether they have had access to justice". Yet access to justice by the investors surely could not be achieved through the completion of a process that was not made accessible to them.

74 By ignoring the essential differences between the scope of the OSC's jurisdiction and remedial powers and by treating as irrelevant the lack of participation in those proceedings by class members or their representatives, the motion judge viewed the OSC proceedings as if they were a reasonable alternative to a class proceeding. He then analyzed the motion before him as though the key issue were the propriety of the settlements attained through the s. 127 proceedings. Thereafter, he applied the settlement approval criteria under the *CPA* to the settlements flowing from the OSC proceedings as a basis for finding that those proceedings were a reasonable alternative to the proposed class proceeding. This circular analysis compounded the initial error in principle.

75 The Divisional Court properly identified the motion judge's error in applying the test for approval of a settlement to the preferable procedure question under s. 5(1)(d) of the *CPA*. Molloy J. explained in detail, at paras. 48-57, why these criteria are not applicable at the certification stage. I would add that settlement criteria relative to a class action settlement cannot be applied to an OSC settlement for the simple reason that those criteria are based on a certification order appointing a representative plaintiff to represent the absent class members. An OSC proceeding lacks this fundamental quality.

76 However, at para. 44, Molloy J. made the observation: "There may even be situations where it would be appropriate to consider the appropriateness of a class action in light of a prior settlement that resulted in substantial compensation for the plaintiffs, even if not reaching 100 cents on the dollar." In my view, this observation reflects the same error that the motion judge committed. In order to assess if a settlement reached through an alternative procedure resulted in "substantial compensation" to the plaintiffs, it would be necessary to consider some of the same criteria that a court takes into account in deciding whether to approve a settlement, such as the likelihood of recovery, the recommendation and experience of counsel, and the future expense, likely duration of the litigation and risk. Yet, as Molloy J. explained, these criteria should not be applied when deciding the issue of preferable procedure.

77 Moreover, because "substantial compensation" is a relative term, in order to determine if an amount was "substantial" it must be contextualized. This requires measuring the compensation awarded in the alternative forum against some other amount, such as the potential amount of damages available in the proposed class action lawsuit. However, at the certification stage, in most instances, no reliable yardstick is available because the amount recoverable in the proposed class proceeding would be as yet unknown. Put another way, the preferability analysis should not be reduced to an *ex post facto* assessment of the adequacy of the award arrived at through the alternative procedure.

78 An even more fundamental reason why the preferability analysis should not be conducted in this way is the fact that a certification motion is a procedural matter. It is not a determination of the merits of the dispute: see s. 5(5) of the *CPA*. An evaluation of the adequacy of a prior settlement as a basis for reaching a decision on preferability would require a determination that is tantamount to making a finding on the merits of the dispute. An evaluation of this sort would be a marked departure from the stipulation in *Hollick* that there need only be "some basis in fact" to ground the conclusion that a class proceeding is the preferable procedure. Indeed, as McLachlin C.J. stated in *Hollick* at para 16: "the certification stage is decidedly not meant to be a test of the merits of the action."

79 In my view, as stated above, the preferable procedure inquiry must instead focus on the underlying purpose and nature of the alternative proceeding as compared with the class proceeding. The court must assess the capacity of the alternative procedure to adequately resolve the claims raised by the class members. The *CPA* mandates that this must be a procedural discussion. Hence the wording of the s. 5(1)(d), which provides "a class proceeding would be the preferable procedure for the resolution of the common issues".

V. Conclusion

80 In summary, the motion judge erred in principle by treating the negotiated payments that were made to investors in the OSC settlements as somehow eliminating the need to compare the purely regulatory function served by the OSC proceedings with the private remedial function to be played by the proposed class action. This fundamental error led the motion judge to wrongly dismiss as irrelevant important access to justice considerations, including that the OSC lacked the jurisdiction under its enabling provision of s. 127(1) of the *Securities Act* to decide the liability and damages issues raised in the private law action, as well as the consideration that the class members had no standing in the OSC proceedings and those proceedings were conducted behind closed doors.

81 Had the motion judge taken these considerations into account in his preferability analysis, it is clear from the balance of his reasons that he would have granted the order to certify the class action. As he said, at para. 273, "had the action been the preferable procedure, the appropriate thing to do would have been to certify the class action conditionally on the court approving a revised litigation plan."

82 Finally, I note that Molloy J. stated, at para. 58, that the motion judge "also erred by concluding that the test for preferable procedure could be met by a proceeding that had already been concluded. This was a fundamental error in principle." I do not agree with Molloy J. on this point as a general proposition.⁷ It seems to me that the analysis of whether an alternative proceeding is preferable to a class proceeding will depend on a thorough consideration of the central characteristics of the alternative proceeding, rather than on whether the other proceeding has concluded, is pending or remains ongoing.

VI. Disposition

83 For these reasons, I would dismiss the appeal from the Divisional Court's order granting certification of the proposed class action, on the condition that the motion judge approves a revised litigation plan.

84 The parties may make written submissions on costs to be delivered within 10 days of the release of these reasons.

G.J. Epstein J.A.:

I agree.

G. Pardu J. (*ad hoc*):

I agree.

Appeal dismissed.

Footnotes

1 As indicated in the reasons below, at para. 23, the three other defendants, IG Investment Management Ltd., Franklin Templeton Investments Corp. and AGF Funds Inc., entered into settlements with the plaintiffs after the motion to certify the class action was denied at first instance.

2 Market timing, as discussed further, at para. 11, involves short-term trading of mutual fund securities to take advantage of short-term discrepancies between the "stale" values of securities in a mutual fund's portfolio and the current market value of the securities.

3 Four days' notice was given for the first hearing and three days' notice was given for the second hearing.

4 I will explain this specific point in more detail, at paras. 75-79.

5 McLachlin C.J. noted in *Hollick*, at para. 29, that s. 5(1)(d) of the *CPA* requires that a class action be the preferable procedure for "the resolution of the *common issues*" (emphasis added), rather than the preferable procedure for the resolution of the class members'

claims. However, as she went on to explain, at para. 30, the question of preferability "must take into account the importance of the common issues in relation to the claims as a whole."

6 See *Fantl v. Transamerica Life Canada*, 2009 ONCA 377, 95 O.R. (3d) 767 (Ont. C.A.), at paras. 44-47.

7 As Molloy J. herself went on to note, at para. 59, she did "not wish to be taken as having ruled that the existence of a past settlement or a concluded proceeding relating to the same claims can never be taken into account at the certification stage."

TAB 12

2004 CarswellOnt 1266

Ontario Superior Court of Justice

Gorecki v. Canada (Attorney General)

2004 CarswellOnt 1266, 2004 C.E.B. & P.G.R. 8091 (headnote only), [2004]

O.J. No. 1315, [2004] O.T.C. 286, 130 A.C.W.S. (3d) 30, 47 C.P.C. (5th) 151

**DARIUSZ GORECKI (Plaintiff) and ATTORNEY
GENERAL OF CANADA (Defendant)**

DANIEL KING (Plaintiff) and ATTORNEY GENERAL OF CANADA (Defendant)

Rady J.

Heard: March 8, 2004

Judgment: March 30, 2004

Docket: 39924 CA

Counsel: Andrew F. Camman, Marcus Lennox for Plaintiff, Dariusz Gorecki

B.W. Brucker, M. Sullivan for Defendant

Peter Sengbusch, Frank Provenzano for Plaintiff, Daniel King

Subject: Civil Practice and Procedure; Public; Labour; Employment

MOTION by plaintiff for order to stay separate but similar class action.

Rady J.:

Introduction

1 These two lawsuits are class proceedings, seeking essentially the same relief, namely the payment of interest on awards made pursuant to the Canada Pension Plan. In each case, the plaintiff was initially denied a CPP disability pension but subsequently was granted a pension, either by virtue of settlement or following an appeal hearing. The plaintiffs each received a retroactive lump sum payment but no interest was paid.

2 The Gorecki action was started on August 19, 2002 in London. The statement of claim seeks damages, alleging that the defendant failed to administer the withheld funds for the plaintiff's benefit or in the alternative, the defendant breached its fiduciary duty to administer the Plan for the benefit of qualified pensioners. No further steps have been taken to advance the claim.

3 The claim bears a striking resemblance to the one issued in *Authorson (Litigation Guardian of) v. Canada (Attorney General)*[2003 CarswellOnt 2773 (S.C.C.)]. Counsel for Mr. Gorecki explained that the delay in prosecuting the case was purposeful because was making its way through various appeals, the disposition of which perhaps affecting the viability of the claim.

4 The King action was commenced in Sault Ste. Marie on July 15, 2003. King moved for certification and on October 16, 2003, Justice Pardu adjourned the motion, *sine die*, so that the carriage issue could first be resolved.

5 King's claim alleges breach of statutory contract, breach of statutory right and unjust enrichment.

King's Position

6 King argues that the Gorecki action should be stayed and his allowed to proceed. King is critical of the theory of liability advanced by Gorecki. He argues that Gorecki is a member of a subclass that is captured in the King action and that there are potential defences to the Gorecki claim or application for certification.

Gorecki's Position

7 Gorecki did not serve and file a cross motion for relief but in his factum, seeks an order staying the King action and permitting his to proceed. He defends the theory of his case and raises issue about the viability of a claim founded on breach of statutory contract.

Defendant's Position

8 The Attorney General does not favour one plaintiff over the other but submits that in the interests of efficiency and economy, all causes of action should be heard in one forum so that they may be definitively disposed of at one time. It is also submitted that the balance of convenience favours London.

The Law

9 Two class actions cannot proceed in respect of the same putative class against the same defendant for the same relief. The decision of Cumming J. in *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) sets out the approach to be taken by the Court in deciding carriage motions where different plaintiffs compete for carriage of a particular class action.

10 As a preliminary matter, the *Class Proceedings Act* confers upon the Court a broad discretion to case manage class proceedings. Section 12 of the *Class Proceedings Act* allows the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination . . ." Section 13 allows the court to stay a proceeding.

The Test in a Carriage Motion

11 The *Vitapharm* decision identifies several factors to consider in determining which plaintiff and which team of solicitors should be given carriage of a proposed class action, including:

- a) The nature of the causes of action advanced;
- b) The theories advanced to support these claims;
- c) The state of each class action, including preparation;
- d) The number, size and extent of involvement of the proposed representative plaintiffs;
- e) The relative priority of commencing the class actions; and
- f) The resources and experience of counsel.

12 When the court exercises its jurisdiction in a carriage motion, it must keep foremost in mind what resolution would be in the best interest of all putative class members, while at the same time considering what would be fair to the defendants.

Analysis

13 There is no issue with respect to the relative resources and experience of counsel and as a result, I move on to a consideration of the other factors.

14 It is true that different theories underlying the causes of action exist in the two proceedings. The defendant takes the position that none of the causes of action are tenable. Each plaintiff urges that his claim is preferable. It seems to me that it is inappropriate for a Court at this stage of the proceedings to embark on an analysis of which claim is more likely to succeed. A Court should be satisfied, as I am, that none of the theories advanced are fanciful or frivolous.

15 King brought a motion for certification but it stands adjourned. There was no evidence before me that the King action is in a superior state of preparation.

16 The putative class proposed by King is perhaps larger than in Gorecki. King advances a claim on behalf of all persons who received a retroactive payment under the CPP, whether it be for disability or one of the other benefits such as a survivor's or a death benefit. The breadth of the Gorecki claim is less clear and may be limited to those who received a retroactive disability benefit.

17 In my view, with the exception of the size of the proposed class, the King and Gorecki actions are on essentially equal footing. I have decided that the Gorecki action should go forward and the King action stayed. In coming to this conclusion, I am influenced by the fact that the Gorecki action was commenced first in time. More importantly, however, the class proposed by King strikes me as overbroad. The process involved in obtaining a disability pension is quite different than for a death, retirement or other benefit. Disability claims require individualized consideration based on medical evidence and subjective testimony. This is not so with other benefit claims. As a result, there are significant legal and factual differences between those who apply for a disability pension and the other types of claimants. I have some doubt whether King has standing to represent non-disability claimants.

18 It is my expectation and indeed my direction to counsel in the Gorecki matter that the action is to proceed on an expeditious basis. I further direct counsel to review the Statement of Claim and consider whether an amendment is necessary to ensure that all possible causes of action are included. Counsel may wish to consider obtaining a second opinion on this issue.

19 As a result, the Gorecki action is to proceed; the King action is stayed and no other action concerning claims for interest on lump sum retroactive payments made pursuant to the CPP are to proceed without leave of the Court.

Motion dismissed.

TAB 13

2003 CarswellOnt 692
Ontario Court of Appeal

Haskett v. Trans Union of Canada Inc.

2003 CarswellOnt 692, [2003] O.J. No. 771, 120 A.C.W.S. (3d) 1067, 15
C.C.L.T. (3d) 194, 169 O.A.C. 201, 224 D.L.R. (4th) 419, 63 O.R. (3d) 577

Glenn Haskett, Appellant and Equifax Canada Inc. and Equifax Inc., Respondents

Glenn Haskett, Appellant and Trans Union of Canada Inc. and Trans Union LLC, Respondents

Feldman, MacPherson, Armstrong J.J.A.

Heard: September 5, 2002

Judgment: March 6, 2003 *

Docket: CA C37573, C37574

Proceedings: reversing in part (2001), 2001 CarswellOnt 4450, 10 C.C.L.T. (3d) 128 (Ont. S.C.J.); additional reasons at (2003), 2003 CarswellOnt 1295 (Ont. C.A.)

Counsel: *Peter R. Jervis, Joel Vale and Melanie D. Schweizer*, for appellant

John Chapman and Michelle Wong, for respondent Equifax Canada Inc.

Michael Petrocco, for respondent Equifax Inc.

Lawrence E. Ritchie and Andrea Laing, for respondents Trans Union of Canada Inc. and Trans Union LLC

Subject: Contracts; Corporate and Commercial; Torts; Civil Practice and Procedure

APPEAL by plaintiff from judgment reported at 2001 CarswellOnt 4450, [2001] O.J. No. 4949, 10 C.C.L.T. (3d) 128 (Ont. S.C.J.), granting defendants' motion to strike out statement of claim in action for damages in breach of fiduciary duty, invasion of privacy, and negligence as disclosing no cause of action known to law.

The judgment of the court was delivered by *Feldman J.A.*:

1 The appellant is a representative plaintiff in two proposed class actions brought against the respondent credit reporting agencies. The appellant's actions were struck out on a motion under R. 21.01(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("R. 21"), as disclosing no reasonable cause of action. On the original motion, the motion judge dealt with three theories of liability: breach of fiduciary duty, invasion of privacy and negligence. After dismissing the first two theories, the motion judge dealt with the negligence claim by holding that, although the respondents could owe the appellant a duty of care, there were policy reasons for declining to consider a cause of action in negligence. On the appeal, the appellant did not challenge the first two rulings, but limited his claimed cause of action to negligence. For the reasons which follow, I would set aside the order of the motion judge and allow the appellant to proceed with the action at this stage against the Canadian respondents as a claim in negligence.

History of the Claim

2 As this is an appeal on a R. 21 motion, the "facts" are contained in the Statement of Claim and are taken to be true for the purpose of the analysis.

3 The appellant has an M.B.A. and is a real estate broker in Toronto. He was obliged to make a voluntary assignment in bankruptcy in the early 1990s when third parties breached their financial obligations to him during the recession. Both prior to the circumstances which caused his bankruptcy and since his discharge in November 1996, the appellant has met all of his

financial obligations. He was discharged from bankruptcy without conditions as his trustee was satisfied that his bankruptcy resulted from circumstances beyond his control.

4 However, since his discharge, the appellant has applied for and been denied credit, despite the fact that he had an uninterrupted earning record averaging in excess of \$75,000 per year, has been current on all debt, rent and car lease obligations and has had significant net worth from his post-bankruptcy earnings.

5 The appellant's claim is against two Canadian credit reporting agencies, Equifax Canada Inc. and Trans Union of Canada Inc., and their respective American parent companies, Equifax Inc. and Trans Union LLC. The appellant claims that he has been denied credit from credit grantors in Canada because the two Canadian respondent credit reporting agencies "have improperly and illegally included information in [the appellant's] credit report which they are not entitled to report and which is inaccurate." It is because of these actions by the respondents that the appellant has not been freed of the consequences of his bankruptcy, notwithstanding his discharge. The impugned information is of two related types: (1) pre-bankruptcy debts that are released as a consequence of the discharge (pursuant to s. 178(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3), and (2) accruing interest on those debts.

6 The reason this reporting is alleged to be illegal is because of s. 9(3)(a) and (f) of the *Consumer Reporting Act*, R.S.O. 1990, c. C.33, which provide:

9(3) A consumer reporting agency shall not include in a consumer report,

(a) any credit information based on evidence that is not the best evidence reasonably available;

.....

(f) information regarding any judgments, collections or debts that on their face are statute barred unless it is accompanied by evidence appearing in the file that recovery is not barred by the expiration of a limitation period; . . .

7 In respect of the proposed class action, the Statement of Claim goes on to claim that in Canada there are approximately 80,000 individuals per year who have debts that are effectively statute-barred by the *Bankruptcy and Insolvency Act* or other applicable legislation. The respondents routinely report this information in their credit reports for a minimum of seven years. The respondents report the statute-barred debts using a classification system that labels them as "R-5," "R-7," or "R-9." The appellant says that credit grantors routinely deny credit when one of these classifications appears on the report and that this is often done without giving the affected person an opportunity to explain his or her circumstances. The respondents also allow those debts to appear to accrue interest, which they do not, but which has the effect of making the individual's debt load appear larger than it was or is.

8 The appellant claims that the respondents are negligent and in breach of their duty to the appellant and the class members in failing to comply with the statutory requirement not to report statute-barred debts and in failing to implement procedures to remove the prohibited information from their reports. In consequence, that negligence has caused harm to the members of the class, as credit has been denied to them by credit grantors as a result of this improperly reported information. Furthermore, because it is very difficult for an individual to have the credit report corrected, the class members are often obliged to incur expenses by retaining counsel or a credit rehabilitation company to have the record corrected. The appellant claims that the damages suffered by the class members include mental suffering, anguish, embarrassment, humiliation and injury to reputation. The appellant also claims punitive damages.

9 In respect of the parent companies of the Canadian respondents, the claim is that they wholly own the subsidiaries and that they mandate their practices. Furthermore, they take the earnings from the Canadian respondents, thereby making the Canadian respondents financially unable to redress the wrongs alleged by the class members. The claim also alleges that the appellant's information has been reported worldwide, although there is no allegation that he has applied for or been rejected by any non-Canadian credit grantor. The appellant relies on any relevant U.S. legislation that is comparable to the Canadian and provincial legislation referred to in the claim.

The Motion

10 Although this matter is pleaded as a class action, the R. 21 motion was brought in the ordinary course before the delivery of a Statement of Defence or a certification motion in the class action proceeding. Therefore, the motion claims that the pleading discloses no cause of action that can be asserted by the individual appellant as well as by the members of the proposed class.

11 The motion judge dealt with all of the causes of action asserted in the Statement of Claim and articulated by counsel, including breach of fiduciary duty, invasion of privacy and negligence. The motion judge held that there could be no fiduciary relationship between the appellant and the respondents and that the Statement of Claim disclosed no reasonable cause of action for invasion of privacy. There is no appeal from those findings.

12 The motion judge then turned to whether the action could proceed as a negligence claim. He first noted that the action is not pleaded as a negligent misrepresentation claim, nor is it an action for defamation. Again, there is no dispute in this court with respect to those observations.

13 The motion judge articulated the test for determining whether the facts as pleaded can sustain a claim in negligence, referring to the two-part test from *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), approved by the Supreme Court of Canada in *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.), at 10:

- (1) a sufficient relationship of proximity to make it reasonably foreseeable that carelessness by one party may cause damage to the other;
- (2) if so, do policy considerations either negative or limit the scope of the duty, the class of persons to whom the duty is owed, or the damages caused by a breach of the duty?

14 The motion judge referred to La Forest J.'s articulation of the first branch of the test in *Hercules Management Ltd. v. Ernst & Young* (1997), 146 D.L.R. (4th) 577 (S.C.C.), at 591, which reads as follows:

[D]etermining whether "proximity" exists on a given set of facts consists in an attempt to discern whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business.

Applying this branch of the test to the facts before him, the motion judge concluded that in the circumstances there could be the necessary relationship of proximity to create a duty of care:

With respect to the first part of the test, on the facts pleaded, in my view there is arguably a sufficient proximity between the consumer reporting agency and the consumer plaintiff (even though they may have no direct communications) such that the agency could reasonably foresee that carelessness on its part in the reporting of inaccurate information might cause harm and loss to the consumer. The provisions of the Act may be seen as providing a reasonable standard to inform a common law *prima facie* duty of care.

15 However, the motion judge went on to hold that because the appellant's claimed losses are "pure economic" losses which are only recoverable in limited circumstances, the claim could not proceed unless it fit within or was analogous to one of the recognized categories which allows recovery for pure economic loss. The motion judge determined that the only possible recognized exceptional category of economic loss that could be pertinent to the pleaded facts was negligent misrepresentation upon which a person relies to his or her detriment; however, that cause of action did not apply because the representations made here were to third parties and not to the appellant.

16 The motion judge also rejected the claim at the second stage of the analysis based on two policy concerns. The first was the concern of potential indeterminate liability in terms of time, amount and class, which he viewed as a serious risk.

17 The second policy concern was that there are alternative statutory routes within the *Consumer Reporting Act* to address the problem, including (a) methods for disputing the accuracy or completeness of reported information and for having the file corrected (s. 13), (b) procedures for an aggrieved consumer to seek the assistance of the Registrar and to appeal any decision to a tribunal for a hearing (ss. 14, 16), and (c) provisions empowering the Director, as defined by the *Ministry of Consumer and Business Services Act*, R.S.O. 1990, c. M.21, to investigate and take action against transgressions of the *Consumer Reporting Act* (ss. 18, 21). The motion judge noted that the appellant had not pleaded any attempt to obtain relief under any of the statutory routes.

18 The motion judge concluded that it was plain and obvious that the appellant had no reasonable cause of action against the respondents in negligence.

The Issues

19 There are two issues on the appeal:

- (1) Can the action proceed at this stage as a claim in negligence?
- (2) If so, can the action, as pleaded, proceed against the two respondent American parent corporations?

Analysis

I. Can the action proceed as a claim in negligence?

(i) Legal Framework

20 The Supreme Court of Canada recently revisited the *Anns/Kamloops* two-stage test for determining if a duty of care exists and will found a cause of action in negligence in *Cooper v. Hobart*, [2001] 3 S.C.R. 537 (S.C.C.), and *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562 (S.C.C.). The court confirmed that the two-stage test remains the applicable test and analysis in Canada. In so doing, the court clarified the role of policy considerations at *both* stages of the application of the test. I quote from *Cooper*:

In brief compass, we suggest that at this stage in the evolution of the law, both in Canada and abroad, the *Anns* analysis is best understood as follows. At the first stage of the *Anns* test, two questions arise: (1) was the harm that occurred the reasonably foreseeable consequence of the defendant's act? and (2) are there reasons, notwithstanding the proximity between the parties established in the first part of this test, that tort liability should not be recognized here? The proximity analysis involved at the first stage of the *Anns* test focuses on factors arising from the relationship between the plaintiff and the defendant. These factors include questions of policy, in the broad sense of that word. If foreseeability and proximity are established at the first stage, a *prima facie* duty of care arises. At the second stage of the *Anns* test, the question still remains whether there are residual policy considerations outside the relationship of the parties that may negative the imposition of a duty of care. It may be, as the Privy Council suggests in [*Yuen Kun Yeu v. Attorney General of Hong Kong*, [1988] 1 A.C. 562] that such considerations will not often prevail. However, we think it useful expressly to ask, before imposing a new duty of care, whether despite foreseeability and proximity of relationship, there are other policy reasons why the duty should not be imposed. (para. 30)

21 The first part of the test includes both reasonable foreseeability of harm and the concept of "proximity." The court stated that the term proximity is used to characterize "the type of relationship in which a duty of care may arise" and that "sufficiently proximate relationships are identified through the use of categories" (para. 31). The categories are not closed and new ones may be identified as they arise. The use of categories provides certainty on the one hand, but, on the other hand, also allows the law to evolve with the introduction of new categories to fit novel situations as they arise.

22 The court lists the recognized categories, at para. 36, concluding that "[w]hen a case falls within one of these situations or an analogous one and reasonable foreseeability is established, a *prima facie* duty of care may be posited." The recognized categories the court listed are:

- (a) the defendant's act foreseeably causes physical harm to the plaintiff or the plaintiff's property, including nervous shock;
- (b) negligent misstatement;
- (c) misfeasance in public office;
- (d) duty to warn of the risk of danger;
- (e) a municipality owes a duty to prospective purchasers of real estate to inspect housing developments without negligence;
- (f) governmental authorities which have undertaken a policy of road maintenance owe a duty of care to execute that maintenance without negligence;
- (g) relational economic loss, related to the performance of a contract in situations such as where the claimant has a proprietary interest in property, the general averaging cases and joint venture cases (see for example *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.), *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.)).¹

23 At the second stage of the *Anns/Nielsen* test, a court must consider residual policy considerations. The residual considerations do not concern the relationship between the parties but, rather, look to the broader effect that recognition of the duty of care will have " . . . on other legal obligations, the legal system and society more generally" (para. 37). The policy issues at the second stage concern broader societal and legal interests and include more specific questions such as: "[d]oes the law already provide a remedy? Would recognition of the duty of care create the spectre of unlimited liability to an unlimited class? Are there other reasons of broad policy that suggest that the duty of care should not be recognized" (*Cooper*, para. 37)?

24 On a R. 21 motion, the court applies this two-stage analysis to the facts as pleaded in the Statement of Claim in order to determine not whether a duty of care will be recognized, but whether it is plain and obvious that no duty of care can be recognized. If it is not plain and obvious, then the action can proceed and the issue will be determined at a trial. See *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), at 980. In that context, the court may well recognize potential policy concerns at the second stage but should be circumspect in using those policy concerns to determine, without a Statement of Defence and without any evidence, that it is plain and obvious that there is no cause of action: *Hughes v. Sunbeam Corp. (Canada)* (2002), 61 O.R. (3d) 433 (Ont. C.A.), at para. 35, *Anger v. Berkshire Investment Group Inc.*, [2001] O.J. No. 379 (Ont. C.A.), at para. 8.

(ii) The Prima Facie Duty of Care

25 At the first stage, the motions judge concluded that there was a relationship of sufficient proximity to make it reasonably foreseeable that inaccurate reporting of information by the credit agency could cause harm to the subject of the credit report. He also referred to the provisions of the *Consumer Reporting Act* as providing a reasonable standard to inform a common law duty of care. This conclusion follows the approach set out in *Saskatchewan Wheat Pool v. Canada* (1983), 143 D.L.R. (3d) 9 (S.C.C.), which holds that, although a statutory directive does not, by implication, create a cause of action for breach of the statute, it can inform a common law duty of care.

26 I agree with the conclusion reached by the motion judge on the first stage of the test, based on the analysis set out by the Supreme Court in *Cooper* and *Edwards*:

- (1) the relationship of the parties is one of proximity and damage was reasonably foreseeable from the respondents' conduct,
- (2) the policy of the law should be to recognize the relationship as one of proximity,
- (3) the cause of action is analogous to the recognized category of negligent misrepresentation, or it is novel and ought to be recognized as a new category of negligence.

I do not agree with the conclusion of the motion judge on the second stage of the test, again, applying the Supreme Court analysis:

- (4) there are no policy reasons for limiting or denying the duty of care and any potential policy issues do not make it plain and obvious at this stage that the cause of action cannot be recognized.

(1) Relationship of Proximity

27 The relationship between the credit reporting agency and the appellant is that he is the subject of one or more credit reports prepared and published by the respondents. It is the respondents who have chosen to provide information about the appellant to third party credit grantors. It is reasonably foreseeable that if the respondents are negligent in the way they gather and report the information, and if they report inaccurate information, their actions could cause credit grantors to either deny credit or to charge more than they otherwise would. To the extent that a person, such as the appellant, authorizes, either expressly or impliedly, the gathering and reporting of credit information - and at this stage of the action we do not yet have evidence on that issue - it is fair to say that any such authorization would normally be limited to accurate and non-negligent reporting.

(2) Policy Issues Relating to Proximity

28 In considering the proximity issue at the first stage of the *Anns/Kamloops* test, one must also address whether, as a matter of policy, it is appropriate to find these parties to be in a relationship of proximity giving rise to a duty of care. In my view, the first stage policy analysis also supports recognition of the duty of care.

29 Credit is an integral part of everyday life in today's society. Not only people seeking loans, mortgages, insurance or car leases, but those who wish, for example, to rent an apartment or even obtain employment may be the subject of a credit report,² and its contents could well affect whether they are able to obtain the loan, the job or the accommodation. Credit cards are a basic form of payment but their availability is also limited by one's creditworthiness. Without credit, one is unable to conduct any financial transactions over the telephone or on the internet. As credit is so ubiquitous, there is nothing exceptional about consumer reliance on credit reporters to carry out their function not only honestly, but accurately, with skill and diligence and in accordance with statutory obligations.

30 The importance of the role of credit reporting agencies is reflected in legislation enacted specifically to regulate and govern their operations - in Ontario, the *Consumer Reporting Act*.³ Section 9 of the Act limits the information which can be reported in a consumer report. The overall purpose of the limitations imposed appears to be to try to ensure that credit grantors will treat consumers fairly based on the information they receive. For example, the prohibition against reporting information more than seven years old attempts to ensure that credit grantors are acting on current information about a consumer. There is also a prohibition on reporting information as to race, creed, colour, sex, ancestry, ethnic origin, or political affiliation (s. 9(3)(l)). This prohibition is in accordance with the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1, and exists to protect consumers from a denial of credit based on discriminatory factors. The fact that fairness to the consumer is a clear legislative imperative within this legislation further supports the policy basis for recognition of a relationship of proximity and a duty of care on consumer reporting agencies to consumers about whom reports are made.

(3) Analogous Category or New Category

31 The relationship of a credit reporting agency to the consumers about whom reports are made is not the type of relationship which fits exactly into one of the recognized categories. However, in my view, the situation in this case is analogous to the relationship that founds a cause of action for negligent misrepresentation and a *prima facie* duty of care may be posited on that basis. Otherwise, this is a novel situation in which a new duty of care could be recognized.

32 The traditional elements for a successful negligent misrepresentation claim were set out in the seminal case of *Hedley Byrne & Co. v. Heller & Partners Ltd.*, [1963] 2 All E.R. 575 (U.K. H.L.), and were affirmed by the Supreme Court in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at 110:

The required elements for a successful *Hedley Byrne* claim . . . (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.

33 On the issue of reliance, Dean Feldthusen, in his book *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed. (Scarborough: Carswell, 2000), at p. 131, makes the point that reliance on the representation by the plaintiff is not a necessary factor *per se*, but is required in the analysis to demonstrate the causal sequence leading to liability, and the effective assumption of responsibility by the representor.

34 In this case we have the elements of negligent misrepresentation without reliance by the affected consumer,⁴ but where the representor has effectively assumed responsibility for the accuracy of the information because of the potential harm which could be caused to the consumer if the contents are inaccurate. This makes the case one that arguably does not fit exactly within negligent misrepresentation, but one that is analogous to it.

35 An example of a duty of care found to be owed to the subject of a negligent misstatement in analogous circumstances is in the case of *Spring v. Guardian Assurance plc*, [1994] 3 All E.R. 129 (U.K. H.L.), where the House of Lords considered the issue of liability to subject employees for the negligent preparation of letters of reference for employment. It held that there was a duty of care owed to the subject of the reference by the provider of the reference not to prepare the reference negligently. In their analyses, both Lord Goff and Lord Woolf referred to the case of *Hedley Byrne, supra*, in holding that the relationship was one which gave rise to a duty of care. Lord Goff opined that a duty of care arises not only where the recipient of a statement acts in reliance upon it, but also where employees who do not receive the representation nevertheless rely upon the employer to exercise care in preparing the reference before making it available to the recipient (pp. 146-147). In this regard, he wrote:

The fact that the inquiry in *Hedley Byrne* itself was directed . . . to whether the maker of the statement was liable to a recipient of it who had acted in reliance upon it, may have given the impression that this is the only way in which liability can arise under the principle in respect of a mis-statement. But, having regard to the breadth of the principle as stated in *Hedley Byrne* itself, I cannot see why this should be so. (p. 146)

Applying these observations to the case before him, Lord Goff wrote:

. . . when the employer provides a reference to a third party in respect of his employee, he does so not only for the assistance of the third party, but also, for what it is worth, for the assistance of the employee . . . when such a reference is provided by an employer, it is plain that the employee relies upon him to exercise due skill and care in the preparation of the reference before making it available to the third party. In these circumstances, it seems to me that all the elements requisite for the application of the *Hedley Byrne* principle are present. (pp. 146-147)

36 This analysis can be applied to credit reporting agencies. They make statements to third parties about consumers, knowing that the third parties are going to rely on those statements in making important decisions that will affect the particular consumers. They also, therefore, assume responsibility for the contents of those statements because of the consequences of the reliance by the representee, not to the representee itself, but to the subject of the report, who can be denied credit, a job, or a place to live.

37 However, even if the facts of the present case do not fit the existing category of negligent misrepresentation, or are not analogous to it, that does not end the matter. As the Supreme Court recently affirmed in *Cooper* and in *Edwards*, the categories of negligence are not closed, and courts may make reference to the appropriate analytic criteria for determining whether a novel situation gives rise to a duty of care.

38 In *Robinson v. Ontario New Home Warranty Program* (1994), 18 O.R. (3d) 269 (Ont. Gen. Div.), MacPherson J. was also obliged to analyze whether a claim for pure economic loss arose where a negligent misrepresentation was made but caused harm to a third party who did not rely on it to his detriment. There the holder of a letter of credit had called on the letter improperly, knowing that the plaintiff was a guarantor to the bank of the letter that was called on.

39 In performing the two-stage analysis, MacPherson J. first ruled out negligent misrepresentation as a category for the cause of action because there was no reliance by the third party guarantor on the improper statement to the bank. He then considered whether the situation was a novel one where a duty of care was owed. To determine proximity, he applied the proximity analysis from the judgment of McLachlin J. in *Norsk Pacific Steamship*, *supra*, at p. 1153, which identified two components of proximity: sufficient proximity of relationship and proximity of causation of harm:

In determining whether liability should be extended to a new situation, courts will have regard to the factors traditionally relevant to proximity such as the relationship between the parties, physical propinquity, assumed or imposed obligations and close causal connection. And they will insist on sufficient special factors to avoid the imposition of indeterminate and unreasonable liability. (p. 286)

40 MacPherson J. concluded that there was both relational and causal proximity between the parties in the case before him: the parties were neighbours in the *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), sense, who knew of each other's interests, and the action of the person who called on the letter of credit improperly directly harmed the third party guarantor. Similarly, in this case, the relationship between the credit reporting agency and the consumer who is the subject of the report is one of proximity both in the relational and causal sense, if the facts alleged in the Statement of Claim are proved to be true.

41 In my view, whether as an analogous category to negligent misrepresentation or as a new category, on the proximity analysis there is the basis to find a duty of care owed in this case.

(4) Stage Two Policy Issues

42 In the *Cooper* and *Edwards* cases, the Supreme Court has narrowed the applicability of the second stage of the *Anns/Kamloops* test. The court explained that the second stage of the test generally arises only where a new category is asserted and not where the case falls within either an established or analogous category. This is because where the category is already recognized, the policy considerations that might negative recognition of such a duty have already been considered and rejected as a bar to recognition.

43 Although I view the circumstances here as analogous to the recognized category of negligent misrepresentation so that it is unnecessary to consider the second branch of the *Anns/Kamloops* test, in my view, it is nevertheless appropriate to consider and weigh the policy issues which concerned the motion judge, on the basis that the circumstances could be viewed as a new category. It is particularly useful to canvass these concerns at this stage, as we are not deciding the issue definitively, but only determining whether the action must be struck out as clearly unavailable.

44 Both policy issues that concerned the motion judge have been identified by the Supreme Court of Canada as matters which might militate against recognition of a duty of care. The first is indeterminate liability. The motion judge concluded that to extend liability in this case "would create a serious risk of imposing liability in an indeterminate amount for an indefinite time to an indeterminate class."

45 I do not agree with that conclusion. First, the class of persons to whom the duty would be owed is a group that is not only wholly within the knowledge, but also the control, of the respondents. It is the consumers about whom reports are made. La

Forest J. dealt conclusively with this point in *Hercules Management, supra*, where he held that the defendant's knowledge of the plaintiff is critical to the policy issue of indeterminate liability and that the issue of indeterminacy becomes of no concern when the plaintiff's identity is known and the defendant's statements are used for their intended purpose (para. 37). See also *NBD Bank, Canada v. Dofasco Inc.* (1999), 181 D.L.R. (4th) 37 (Ont. C.A.), at para. 59. In this case, although the group may potentially be a large one, it is not indeterminate in any way.

46 Second, the timing of the potential harm, and therefore of liability, is not indefinite. Generally, a credit report is made for a particular purpose and would be acted upon in the normal course. If errors are corrected by the credit reporting agency for future reports, then normally the adverse effect of the inaccurate report would be spent.

47 Finally, the amount of liability is also limited by the purposes for which the report is sought, which purposes are known to the credit agency. The Supreme Court made a similar analysis in *Martel, supra*, noting that while the quantum of damages "may be quite high, it is limited by the nature of the transaction being negotiated" (at para. 59). Furthermore, although there is a claim for consequential damages, it is by no means clear that such damages would be recoverable as reasonably foreseeable rather than too remote or otherwise not legally available.

48 In my view, this is not a case like *Hercules Management*, where the Supreme Court refused to recognize a duty of care owed by auditors to all shareholders in their individual capacities as investors, because it would "create the spectre of unlimited liability to an unlimited class" (*Cooper*, at para. 37).

49 The second policy issue recognized by the Supreme Court in *Cooper* and considered by the motion judge was whether the plaintiff has recourse to alternative legal remedies. The motion judge was of the view that there was no need to recognize the cause of action because the legislation provides alternative means to deal with the problem. The *Consumer Reporting Act* provides a mechanism for a consumer to determine the data being kept about him or her, for disputing the accuracy of the data, for seeking the assistance of the Registrar to investigate and order that information be deleted or amended, and appeal to the tribunal under the Act for a hearing. There is also provision in the Act for the Director (as defined by the *Ministry of Consumer and Business Services Act*) to investigate a contravention of the *Consumer Reporting Act* and seek a restraining order.

50 In my view, these provisions, although potentially helpful to a consumer, should not bar recognition of a cause of action in damages, at least at this stage. I take this view for four reasons. First, and most significantly, these provisions do not provide a remedy in damages to a consumer. As the loss to a consumer could be significant and cannot be overcome by the corrective measures available, the alternative means may not be equivalent to recognition of the cause of action. In this regard, I also note that the Act does not purport to bar any civil cause of action. Second, and related to the first, the Act does not provide for punitive damages, a remedy that can be potentially useful in the context of class actions where one of the purposes of the action is deterrence of illegal conduct. See *Hollick v. Metropolitan Toronto (Municipality)*, [2001] 3 S.C.R. 158 (S.C.C.) (para. 27).

51 Third, the appellant has pleaded the difficulties, expense and inconvenience of attempting to use the statutory procedures. This pleading can be explored at a trial and, if substantiated, could weigh significantly in the policy analysis against recognizing the statutory procedures as an acceptable alternative and therefore a complete bar to a cause of action.

52 Fourth, and related to the third, at trial the parties will be able to lead evidence on the effectiveness of the statutory procedures, how often they are used, how quickly they proceed and with what results. This information will be available from the Ministry and can form the factual background necessary to weigh the necessary policy considerations. A court should be reluctant to dismiss a claim as disclosing no reasonable cause of action based on policy reasons at the motion stage before there is a record on which a court can analyze the strengths and weaknesses of the policy arguments. See *Anger v. Berkshire Investment Group Inc., supra*, at para. 15, and *Hughes v. Sunbeam Corp. (Canada), supra*, at para. 35.

53 Another issue raised by the respondents in opposing recognition of a duty of care in these circumstances is, I believe, best addressed at this stage of the analysis in the context of policy considerations. The issue was also raised and addressed by the Law Lords in *Spring, supra*, that recognition of such a cause of action would be an encroachment on the law of defamation and would preclude reliance on certain defences available in that cause of action, such as qualified privilege. The argument

is that the policy of the law should be to preserve the common law cause of action for defamation which has been developed and, in many ways, has become, in effect, codified within the common law. The Law Lords rejected this argument. Lord Woolf reasoned that the subject of an inaccurate letter of reference is not protected by the law of defamation because where qualified privilege applies, the person would have to prove malice, placing a disproportionate burden on the employee. He concluded that the law of defamation provided an inadequate remedy to such an employee and therefore, extending the law of negligence was justified in the circumstances (p. 172).

54 I agree that, at least at this stage of the proceedings, the law of defamation should not preclude recognition of the relationship of proximity between credit reporting agencies and consumers who are the subjects of credit reports. At issue is not a person's general reputation in the community, but specific facts which affect a consumer's creditworthiness in the context of a specific inquiry. Furthermore, in this case the statutory prohibition at issue is in respect of reporting certain information post-bankruptcy, which may arguably be viewed as true, depending on how the information is reported, that is, the existence of outstanding judgments even though they have been released by the order of discharge from bankruptcy. In the defamation context, truth is a complete defence to an action. However, where the prohibition in the statute informs the common law duty of care, the cause of action in negligence could encompass reporting of such arguably "true" information.

55 A thorough analysis of other policy considerations which could defeat the extension of negligence in economic loss situations was recently conducted by the Supreme Court in *Martel, supra*, where the court was not prepared to extend the law to recognise a duty of care in the context of alleged negligence in the conduct of commercial negotiations. Even in the absence of serious potential for indeterminate liability, a number of secondary policy considerations led the court to decline to extend the tort of negligence into commercial negotiations. I note that this is not a case like that one, where the law is being asked to regulate a commercial situation between two parties after the fact. There are no social or economic benefits to be preserved by precluding consumers from obtaining compensation for losses they suffered caused by improperly based credit reports by credit reporting agencies.

Conclusion on the Negligence Issue

56 In my view, the motion judge erred in concluding that it was plain and obvious that the appellant has no cause of action against the respondents in negligence and that the action must be struck out at this stage. I would allow the appeal on that issue.

57 In reaching this conclusion, I wish to make it clear that this finding in no way speaks to the issue of the suitability of this action as a class action. To strike the action at this stage would mean that no individual consumer could bring an action against a credit reporting agency for damages suffered as a result of a harmfully false credit report. However, whether the action can meet the tests for certification of a class action, including appropriate common issues, the determination of preferable procedure and damages is left for another day. In respect to common issues, clearly every denial of credit to the persons in the proposed class may not be attributable to the inclusion of the information identified in this action but could be attributable to other contents of the report. Proof of causation is an issue both for an individual claim and in the class action context.

58 The appellant has asked for an opportunity to amend the Statement of Claim to remove the causes of action that were struck out by the motion judge and were not pursued on appeal and to clarify the pleading in negligence. In this regard, the respondent Equifax Canada Inc. also submits that the claim could have been struck out for failure to plead the necessary material facts to ground a claim in negligence, including what information was published concerning the appellant, when and to whom the impugned report(s) were made, whether and, if so, when credit was denied on that basis and the loss suffered. I would therefore grant the appellant's request for an opportunity to amend the pleading to properly plead the negligence claim.

II. The Action against the American Respondents

59 The motion judge did not have to deal with this issue as he dismissed the entire claim. The American parent companies say that if the claim can proceed against the Canadian corporations, it must still be struck out against the parent corporations for three reasons: (1) the pleading does not plead material facts necessary to support a cause of action against them, (2) there

is no cause of action against a parent company for failing to control a subsidiary company, and (3) the pleading does not plead facts that would allow a court to pierce the corporate veil and on that basis attribute liability for the conduct of the subsidiary.

60 As to the first issue, the pleading is clearly deficient in setting out the material facts on which the claim against the parent company is based. The only allegation involving the appellant is in para. 18 of the Statement of Claim, which says that the American parent corporations have reported the same prohibited and inaccurate information about the appellant "worldwide." There is no allegation that the appellant has applied for or been denied credit "worldwide" as a result of this action by the American parent corporations. Further, counsel for the appellant conceded in oral argument that the reference to unspecified American legislation analogous to the Canadian statutes referred to should be struck out.

61 The second and third issues can be dealt with together. The pleading not only claims that the parent companies failed to control the actions of the subsidiaries, but goes further and asserts that it is the parent companies which mandate the policy of the subsidiaries to report the post-bankruptcy information the way they do in the face of the relevant legislation. 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: *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (Ont. C.A.), at 439-440, *Gregorio v. Intrans-Corp.* (1994), 115 D.L.R. (4th) 200 (Ont. C.A.), at 208, *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Ont. Gen. Div.), affirmed (Ont. C.A.).

62 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.

63 For the above reasons, the claims against the companies as pleaded must be struck out as disclosing no reasonable cause of action.

Conclusion on the Second Issue

64 I would strike out the portion of the pleading that asserts a claim against the American parent corporations.

Costs

68 The appellant shall have his costs of the appeals as against the Canadian respondents Equifax Canada and Trans Union of Canada. The U.S. respondents, Equifax Inc. and Trans Union LLC, shall have their costs of the appeal against the appellant. Counsel may provide bills of costs within 7 days of release of these reasons, and brief responding submissions on costs may be provided within 7 days thereafter.

Appeal allowed in part.

Footnotes

* On April 14, 2003, the court released additional reasons for judgment regarding costs, Doc. CA C37573, C37574, Feldman, MacPherson and Armstrong JJ.A. (Ont. C.A.), reported at 2003 CarswellOnt 1295.

1 I do not take this list as intended to be exhaustive. This list includes both the traditional basic category of damage arising from physical harm to personal property as well as some of the developed categories for recognizing a cause of action when the loss is purely economic. However, previous Supreme Court cases approved the list of five recognized categories to recover for pure economic loss, first articulated by Dean Feldthusen in "Economic Loss in the Supreme Court of Canada: Yesterday and Tomorrow" (1990-91), 17 Can. Bus. L.J. 356, at 357-358, which includes negligent performance of a service (see *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228 (S.C.C.)) and negligent provision of shoddy goods or workmanship (see *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.), at 876-878).

2 These and other uses of credit reports are listed in s. 8(d) of the *Consumer Reporting Act*.

- 3 Similar legislation in some other provinces regulates and governs the operations of credit reporting agencies. See *Credit Reporting Act*, R.S.B.C. 1996, c. C-81, *Credit Reporting Agencies Act*, R.S.S. 1978, c. C-44, *Consumer Reporting Act*, R.S.N.S. 1989, c. C-93, *Consumer Reporting Agencies Act*, R.S.N. c. C-32, *Consumer Reporting Act*, R.S.P.E.I. 2000, c. C-20.
- 4 The reliance is by the credit grantor who receives the report.

TAB 14

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Supreme Court of Canada

Hercules Managements Ltd. v. Ernst & Young

1997 CarswellMan 198, 1997 CarswellMan 199, [1997] 2 S.C.R. 165, [1997] 8 W.W.R. 80, [1997] S.C.J. No. 51, 115 Man. R. (2d) 241, 139 W.A.C. 241, 146 D.L.R. (4th) 577, 211 N.R. 352, 31 B.L.R. (2d) 147, 35 C.C.L.T. (2d) 115, 71 A.C.W.S. (3d) 169, J.E. 97-1151

Hercules Managements Ltd., Guardian Finance of Canada Ltd. and Max Freed, Appellants (Applicants/Plaintiffs) v. Friendly Family Farms Ltd., Woodvale Enterprises Ltd., Arlington Management Consultants Ltd., Emarjay Holdings Ltd. and David Korn, Plaintiffs v. Ernst & Young and Alexander Cox, Respondents (Respondents/Defendants) v. Max Freed, David Korn and Marshall Freed, Third Parties v. The Canadian Institute of Chartered Accountants, Intervener

La Forest, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: December 6, 1996
Judgment: May 22, 1997
Docket: 24882

Proceedings: affirming (1995), [1995] 6 W.W.R. 301 (Man. C.A.)

Counsel: *Mark M. Schulman, Q.C.*, and *Brian A. Crane, Q.C.*, for the appellants.
Robert P. Armstrong, Q.C., and *Thor J. Hansell*, for the respondents.
W. Ian C. Binnie, Q.C., and *Geoff R. Hall*, for the intervenor.

Subject: Torts; Public; Insolvency; Corporate and Commercial

APPEAL by plaintiffs from judgment reported at [1995] 6 W.W.R. 301 (Man. C.A.), dismissing plaintiffs' appeal from summary judgment dismissing plaintiffs' action in negligence.

POURVOI des demandeurs à l'encontre de l'arrêt publié à [1995] 6 W.W.R. 301 (Man. C.A.), rejetant l'appel des demandeurs à l'encontre du jugement sommaire rejetant l'action des demandeurs en négligence.

The judgment of the court was delivered by *La Forest J.*:

1 This appeal arises by way of motion for summary judgment. It concerns the issue of whether and when accountants who perform an audit of a corporation's financial statements owe a duty of care in tort to shareholders of the corporation who claim to have suffered losses in reliance on the audited statements. It also raises the question of whether certain types of claims against auditors may properly be brought by shareholders as individuals or whether they must be brought by the corporation in the form of a derivative action.

Facts

2 Northguard Acceptance Ltd. ("NGA") and Northguard Holdings Ltd. ("NGH") carried on business lending and investing money on the security of real property mortgages. The appellant Guardian Finance of Canada Ltd. ("Guardian") was the sole shareholder of NGH and it held non-voting class B shares in NGA. The appellants Hercules Managements Ltd. ("Hercules") and Max Freed were also shareholders in NGA. At all relevant times, ownership in the corporations was separated from management. The respondent Ernst & Young (formerly known as Clarkson Gordon) is a firm of chartered accountants that was originally hired by NGA and NGH in 1971 to perform annual audits of their financial statements and to provide audit reports to the companies'

shareholders. The partner in charge of the audits for the years 1980 and 1981 is the respondent William Alexander Cox. Mr. Cox held personal investments in some of the syndicated mortgages administered by NGA and NGH.

3 In 1984, both NGA and NGH went into receivership. The appellants, as well as Friendly Family Farms Ltd. ("F.F. Farms"), Woodvale Enterprises Ltd. ("Woodvale"), Arlington Management Consultants Ltd. ("Arlington"), Emarjay Holdings Ltd. ("Emarjay") and David Korn (all of whom were shareholders or investors in NGA) brought an action against the respondents in 1988 alleging that the audit reports for the years 1980, 1981 and 1982 were negligently prepared and that in reliance on these reports, they suffered various financial losses. More specifically, the appellant Hercules sought damages for advances totalling \$600,000 which it made to NGA in January and February of 1983, and the appellant Freed sought damages for monies he added to an investment account in NGH in 1982. All the plaintiffs claimed damages in tort for the losses they suffered in the value of their existing shareholdings. In addition to their tort claims, the plaintiffs also alleged that a contract existed between themselves and the respondents in which the respondents explicitly undertook, as of 1978, to protect the shareholders' individual interests in the audits as distinct from the interests of the corporations themselves.

4 After a series of amendments to the initial statement of claim, over 40 days of discovery, and numerous pre-trial conferences and case management sessions, the respondents brought a motion for summary judgment in the Manitoba Court of Queen's Bench seeking to have the plaintiffs' claims dismissed. The grounds for the motion were (a) that there was no contract between the plaintiffs and the respondents; (b) that the respondents did not owe the individual plaintiffs any duty of care in tort; and (c) that the claims asserted by the plaintiffs could only properly be brought by the corporations themselves and not by the shareholders individually. The motions judge granted the motion with respect to the plaintiffs Hercules, F.F. Farms, Woodvale, Guardian and Freed and dismissed their actions on the basis that they raised no genuine issues for trial. By agreement, the claims of the remaining plaintiffs were adjourned *sine die*. An appeal to the Manitoba Court of Appeal by Hercules, Guardian and Freed was unanimously dismissed with costs. Leave to appeal to this Court was granted on March 7, 1996 and the appeal was heard on December 6, 1996.

Judicial History

Manitoba Court of Queen's Bench

5 Dureault J. began his reasons by noting that only the claims of Hercules, F.F. Farms, Woodvale, Guardian and Freed had to be addressed since, by agreement, the claims of the other plaintiffs had been adjourned. He then proceeded to set out the appropriate test to be applied in summary judgment motions. Referring to Rule 20.03(1) of the Manitoba *Court of Queen's Bench Rules*, Reg. 553/88, (which governs summary judgment motions) and citing *Fidkalo v. Levin* (1992), 76 Man. R. (2d) 267 (Man. C.A.), he explained that while the defendant bears the initial burden of proving that the case is one where the question whether there exists a genuine issue for trial can properly be raised, the plaintiff bears the subsequent burden of establishing that his claim has a real chance of success.

6 After rejecting the claim of the plaintiff F.F. Farms on the ground that it failed from the outset to establish any cause of action, Dureault J. turned to the more substantive issues in the motion. He began by addressing the question whether the plaintiffs *qua* shareholders may properly bring an action for the devaluation in their shareholdings in NGA and NGH, and held that

... shareholders have no cause of action in law for any wrongs which may have been inflicted upon a corporation. This principle of law is often referred to as "the rule in *Foss v. Harbottle*". The plaintiff shareholders are trying to get around this principle. At best, if any wrong was done in the conduct of the defendants' audits, it was done to [NGA] and [NGH] and cannot be considered an injury sustained by the shareholders.

Dureault J. found on this basis that the claims of Hercules, Guardian, Woodvale and Freed did not disclose any genuine issue for trial since they ought to have been brought by the corporations and not by the plaintiffs as individual shareholders.

7 The motions judge next addressed the question whether any duty of care in tort was owed by the defendants to the plaintiffs in their capacities as either shareholders or investors in the audited corporations. He noted that

[g]enerally speaking, the law requires more than foreseeability and reliance. Actual knowledge on the part of the accountant/auditor of the limited class that will use and rely on the statements, referred to as the "proximity test", is also required.

Adopting the defendants' submissions on this issue, Dureault J. found that no duty of care was owed the plaintiffs because the audited statements were not prepared specifically for the purpose of assisting them in making investment decisions.

8 Finally, Dureault J. addressed the plaintiffs' claim that their losses stemmed from a breach of contract by the defendants. He recognised that the engagement of the auditors by the corporations is a contractual relationship, but rejected the contention that this relationship can be extended to include the shareholders so as to permit them to bring personal actions against the auditors in the event of breach. Finding that none of the plaintiffs' claims raised a genuine issue for trial, Dureault J. granted the motion with costs.

Manitoba Court of Appeal (1995), 102 Man. R. (2d) 241 (Man. C.A.) (Philip, Lyon and Helper JJ.A.)

9 An appeal was brought to the Manitoba Court of Appeal by Hercules, Guardian and Freed. Helper J.A., writing for the court, began her reasons by finding that the learned motions judge had correctly applied the *Fidkalo* test for summary judgment motion under Rule 20.03(1) She also distinguished that test from that applicable on a motion to strike pleadings on the ground that, unlike the situation on a motion to strike, a Rule 20 motion requires an examination of the evidence in support of the plaintiff's claim.

10 Turning to the question whether the respondents owed a duty of care in tort to the appellants, Helper J.A. noted the latter's two alternative submissions. The first (at p. 244) was that

... a common law duty of care arose ... because the respondents knew or ought to have known: i) that the appellants were relying on the audited statements and the services and advice provided by the respondents; ii) the purpose for which the appellants would rely upon the respondents' services and statements; iii) that the appellants did so rely upon those audited statements for investment and other purposes; and iv) that the respondents breached their duties to the appellants thereby causing them a financial loss.

In response to this claim, Helper J.A. explained, the respondents contended that the appellants were simply trying to avoid the rule in *Foss v. Harbottle* (1843), 2 Hare 461, 67 E.R. 189 (U.K. H.L.), by asserting their claims as individual shareholders rather than by way of derivative action. The respondents also argued that they had no knowledge that investments would be made on the basis of the audited statements and that there was no evidence to support the contention that they ought to have known that their reports would be relied upon in this manner. Finally, Helper J.A. noted, the respondents asserted that there was no evidence demonstrating that the appellants had, in fact, relied on the audited statements at issue.

11 In analysing this first main submission, Helper J.A. undertook a thorough review of *Caparo Industries plc v. Dickman*, [1990] 1 All E.R. 568 (U.K. H.L.), where the House of Lords considered the question of the scope of the duty of care owed by auditors to shareholders and investors. After reviewing the Canadian case law on the matter, she concluded, at p. 248, that

[t]he appellants were unable to direct this court to any evidence in support of their position which was ignored by the motions judge. Nor am I persuaded that the order dismissing the appellants' claims is contrary to the existing jurisprudence.

The evidence showed that the auditors had prepared the annual reports to comply with their statutory obligations. There was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose or that the appellants did rely upon the reports before infusing more capital into their companies. The appellants were content to allow management to continue running the companies despite a drop in profitability reflected in the 1982 audited report and invested more capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue.

In the view of the Manitoba Court of Appeal, then, the first of the appellants' submissions regarding the existence of a duty of care could not succeed.

12 The appellants' second main submission concerning the existence of a duty of care consisted in an allegation that the respondent auditors contravened the statutory independence requirements set out in s. 155 of the Manitoba *Corporations Act*, S.M. 1976, c. 40, and that this in itself gave rise to a cause of action in the individual shareholders. The relevant portions of s. 155 are as follows:

155(1) Subject to subsection (5), a person is disqualified from being an auditor of a corporation if he is not independent of the corporation, all of its affiliates, and the directors or officers of the corporation and its affiliates.

155(2) For the purposes of this section,

(a) independence is a question of fact; and

(b) a person is deemed not to be independent if he or his business partner

(i) is a business partner, a director, an officer or an employee of the corporation or any of its affiliates, or a business partner of any director, officer or employee of the corporation or any of its affiliates, or

(ii) beneficially owns or controls, directly or indirectly, a material interest in the securities of the corporation or any of its affiliates, or

(iii) has been a receiver, receiver-manager, liquidator or trustee in bankruptcy of the corporation or any of its affiliates within two years of his proposed appointment as auditor of the corporation.

.....

155(6) The shareholders of a corporation may resolve to appoint as auditor, a person otherwise disqualified under subsections (1) and (2) if the resolution is consented to by all the shareholders including shareholders not otherwise entitled to vote.

Specifically, the appellants alleged that because s. 155(6) of the Act allows a single shareholder to exercise a veto power over the appointment of the auditors, each shareholder also has a right of action against the auditors where damage has been occasioned by a breach of the independence requirement in s. 155(2). Helper J.A. rejected this submission both on the ground that it was unsupported by authority and on the basis that the wording of s. 155 as a whole does not suggest the interpretation urged by the appellants.

13 Finally, Helper J.A. addressed the appellants' contractual claim and held that the respondents' engagement to audit the financial statements of NGA and NGH in accordance with the Act did not give rise to a contractual relationship between them and the appellants. Similarly, she found the appellants could not sue on the contract between the corporations and the respondent Ernst & Young because of the lack of privity. Finding no evidence to support the existence of the requisite contractual relationship, Helper J.A. rejected the appellants' claim in this regard. For all these reasons, the Court of Appeal unanimously dismissed the appeal with costs.

Issues

14 The issues in this case may be stated as follows:

(1) Do the respondents owe the appellants a duty of care with respect to

(a) the investment losses they incurred allegedly as a result of reliance on the 1980-82 audit reports; and

(b) the losses in the value of their existing shareholdings they incurred allegedly as a result of reliance on the 1980-82 audit reports?

(2) Does the rule in *Foss v. Harbottle* affect the appellants' action?

Analysis

Preliminary Matters

15 Four preliminary matters should be addressed before turning to the principal issues in this appeal. The first concerns the procedure to be followed in a motion for summary judgment brought under Rule 20.03(1) of the Manitoba *Court of Queen's Bench Rules*. That rule provides as follows:

20.03(1) Where the court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the court shall grant summary judgment accordingly.

I would agree with both the Court of Appeal and the motions judge in their endorsement of the procedure set out in *Fidkalo, supra*, at p. 267, namely:

The question to be decided on a rule 20 motion is whether there is a genuine issue for trial. Although a defendant who seeks dismissal of an action has an initial burden of showing that the case is one in which the existence of a genuine issue is a proper question for consideration, it is the plaintiff who must then, according to the rule, establish his claim as being one with a real chance of success.

In the instant case, then, the appellants (who were the plaintiff-respondents on the motion) bore the burden of establishing that their claim had "a real chance of success". They bear the same burden in this Court.

16 The second preliminary matter concerns the appellants' claim that as a result of a meeting in the summer of 1978 between David Korn, Max Freed and the respondent Cox and in light of an engagement letter sent by the respondents to NGA and NGH in 1981, a contract was formed between the shareholders of the audited corporations, on the one hand, and the respondents, on the other. This purported contract ostensibly required the respondents to conduct their audits for the benefit of the shareholders themselves and not merely for the benefit of the corporations. I have reviewed the portions of the record upon which the appellants base this submission and I am unable to find that the requisite elements of contract formation inhere on the facts. In any event, as the respondents pointed out, the appellants' request to amend their pleadings before trial to include a claim for breach of contract was denied by Kennedy J. and no appeal was brought from that decision. (See: *Hercules Management Ltd. v. Clarkson Gordon* (1994), 91 Man. R. (2d) 216 (Man. Q.B.).) I would find, therefore, that the claim in breach of contract is not properly before this Court and that the appellants' submissions in this regard must fail.

17 Thirdly, the appellants allege that the respondent Cox's investments in certain syndicated mortgages administered by NGA and NGH constituted a breach of the statutory independence requirements set out in s. 155 of the Manitoba *Corporations Act* and that such a breach either gives rise to a private law cause of action or, alternatively, that it provides an independent basis for finding a duty of care in a tort action. Assuming without deciding that the respondent Cox was in breach of the independence requirements set out in that section, I would agree with Helper J.A. in finding that the section does not, in and of itself, give rise to a cause of action in negligence; see: *Saskatchewan Wheat Pool v. R.*, [1983] 1 S.C.R. 205 (S.C.C.). Similarly, I cannot see how breach of the independence requirements could establish a duty of care in tort. This does not mean, of course, that the statutory audit requirements set out in the Manitoba *Corporations Act* are entirely irrelevant to the appellants' claim. Rather, it simply means that a breach of the independence provisions does not, by itself, give rise either to an independent right of action or to a duty of care.

18 The final preliminary matter concerns whether or not the appellants actually relied on the 1980-82 audited reports prepared by the respondents. More specifically, the appellants allege that the Court of Appeal erred in finding, at p. 248, that

[t]here was a total absence of evidence to indicate the respondents knew the appellants would rely upon the reports for any specific purpose or that the appellants did rely upon the [1980-82] reports before infusing more capital into their companies. The appellants were content to allow management to continue running the companies despite a drop

in profitability reflected in the 1982 audited report and invested capital in the face of that report. The evidence filed in opposition to the motion did not support the appellants' claim on this issue. [Emphasis added.]

Needless to say, actual reliance is a necessary element of an action in negligent misrepresentation and its absence will mean that the plaintiff cannot succeed in holding the defendant liable for his or her losses; see: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.), at p. 110. In light of my disposition on the duty of care issue, however, it is unnecessary to inquire into this matter here — the absence of a duty of care renders inconsequential the question of actual reliance. Having dealt with all four preliminary matters, then, I can now turn to a discussion of the principal issues in this appeal.

Issue 1: Whether the Respondents owe the Appellants a Duty of Care

(i) Introduction

19 It is now well established in Canadian law that the existence of a duty of care in tort is to be determined through an application of the two-part test first enunciated by Lord Wilberforce in *Anns v. Merton London Borough Council* (1977), [1978] A.C. 728 (U.K. H.L.), at pp. 751-52:

First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a *prima facie* duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise ...

While the House of Lords rejected the *Anns* test in *Murphy v. Brentwood District Council* (1990), [1991] 1 A.C. 398 (U.K. H.L.), and in *Caparo, supra*, at p. 574, *per* Lord Bridge and at pp. 585-86, *per* Lord Oliver (citing Brennan J. in *Sutherland Shire Council v. Heyman* (1985), 60 A.L.R. 1 (Australia H.C.), at pp. 43-44), the basic approach that test embodies has repeatedly been accepted and endorsed by this Court. (See, e.g.: *Nielsen v. Kamloops (City)*, [1984] 2 S.C.R. 2 (S.C.C.); *Hofstrand Farms Ltd. v. British Columbia*, [1986] 1 S.C.R. 228 (S.C.C.); *Canadian National Railway v. Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021 (S.C.C.); *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 (S.C.C.); *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85 (S.C.C.).)

20 In *Kamloops, supra*, at p. 10, Wilson J. restated Lord Wilberforce's test in the following terms:

(1) is there a sufficiently close relationship between the parties (the [defendant] and the person who has suffered the damage) so that, in the reasonable contemplation of the [defendant], carelessness on its part might cause damage to that person? If so,

(2) are there any considerations which ought to negative or limit (a) the scope of the duty and (b) the class of persons to whom it is owed or (c) the damages to which a breach of it may give rise?

As will be clear from the cases earlier cited, this two-stage approach has been applied by this Court in the context of various types of negligence actions, including actions involving claims for different forms of economic loss. Indeed, it was implicitly endorsed in the context of an action in negligent misrepresentation in *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, [1993] 3 S.C.R. 206 (S.C.C.), at pp. 218-1. The same approach to defining duties of care in negligent misrepresentation cases has also been taken in other Commonwealth courts. In *Scott Group Ltd. v. McFarlane*, [1978] 1 N.Z.L.R. 553 (New Zealand C.A.), for example, a case that dealt specifically with auditors' liability for negligently prepared audit reports, the *Anns* test was adopted and applied by a majority of the New Zealand Court of Appeal.

21 I see no reason in principle why the same approach should not be taken in the present case. Indeed, to create a "pocket" of negligent misrepresentation cases (to use Professor Stapleton's term) in which the existence of a duty of care is determined differently from other negligence cases would, in my view, be incorrect; see: Jane Stapleton, "Duty of Care and Economic

Loss: A Wider Agenda" (1991), 107 *L.Q.R.* 249. This is not to say, of course, that negligent misrepresentation cases do not involve special considerations stemming from the fact that recovery is allowed for pure economic loss as opposed to physical damage. Rather, it is simply to posit that the same general framework ought to be used in approaching the duty of care question in both types of case. Whether the respondents owe the appellants a duty of care for their allegedly negligent preparation of the 1980-82 audit reports, then, will depend on (a) whether a *prima facie* duty of care is owed, and (b) whether that duty, if it exists, is negated or limited by policy considerations. Before analysing the merits of this case, it will be useful to set out in greater detail the principles governing this appeal.

(ii) *The Prima Facie Duty of Care*

22 The first branch of the *Anns/Kamloops* test demands an inquiry into whether there is a sufficiently close relationship between the plaintiff and the defendant that in the reasonable contemplation of the latter, carelessness on its part may cause damage to the former. The existence of such a relationship — which has come to be known as a relationship of "neighbourhood" or "proximity" — distinguishes those circumstances in which the defendant owes a *prima facie* duty of care to the plaintiff from those where no such duty exists. In the context of a negligent misrepresentation action, then, deciding whether or not a *prima facie* duty of care exists necessitates an investigation into whether the defendant-representor and the plaintiff-representee can be said to be in a relationship of proximity or neighbourhood.

23 What constitutes a "relationship of proximity" in the context of negligent misrepresentation actions? In approaching this question, I would begin by reiterating the position I took in *Norsk, supra*, at pp. 1114-15, that the term "proximity" itself is nothing more than a label expressing a result, judgment or conclusion; it does not, in and of itself, provide a principled basis on which to make a legal determination. This view was also explicitly adopted by Stevenson J. in *Norsk, supra*, at p. 1178, and McLachlin J. also appears to have accepted it when she wrote, at p. 1151, of that case that "[p]roximity may usefully be viewed, not so much as a test in itself, but as a broad concept which is capable of subsuming different categories of cases involving different factors"; see also: M. H. McHugh, "Neighbourhood, Proximity and Reliance", in P. D. Finn, *Essays on Torts* (1989), 5, at pp. 36-37; and John G. Fleming, "The Negligent Auditor and Shareholders" (1990), 106 *L.Q.R.* 349, at p. 351, where the author refers to proximity as a "vacuous test". While *Norsk, supra*, was concerned specifically with whether or not a defendant could be held liable for "contractual relational economic loss" (as I called it, at p. 1037), I am of the view that the same observations with respect to the term "proximity" are applicable in the context of negligent misrepresentation. In order to render "proximity" a useful tool in defining when a duty of care exists in negligent misrepresentation cases, therefore, it is necessary to infuse that term with some meaning. In other words, it is necessary to set out the basis upon which one may properly reach the conclusion that proximity inheres between a representor and a representee.

24 This can be done most clearly as follows. The label "proximity", as it was used by Lord Wilberforce in *Anns, supra*, was clearly intended to connote that the circumstances of the relationship inhering between the plaintiff and the defendant are of such a nature that the defendant may be said to be under an obligation to be mindful of the plaintiff's legitimate interests in conducting his or her affairs. Indeed, this idea lies at the very heart of the concept of a "duty of care", as articulated most memorably by Lord Atkin in *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.), at pp. 580-81. In cases of negligent misrepresentation, the relationship between the plaintiff and the defendant arises through reliance by the plaintiff on the defendant's words. Thus, if "proximity" is meant to distinguish the cases where the defendant has a responsibility to take reasonable care of the plaintiff from those where he or she has no such responsibility, then in negligent misrepresentation cases, it must pertain to some aspect of the relationship of reliance. To my mind, proximity can be seen to inhere between a defendant-representor and a plaintiff-representee when two criteria relating to reliance may be said to exist on the facts: (a) the defendant ought reasonably to foresee that the plaintiff will rely on his or her representation; and (b) reliance by the plaintiff would, in the particular circumstances of the case, be reasonable. To use the term employed by my colleague, Iacobucci J., in *Cognos, supra*, at p. 110, the plaintiff and the defendant can be said to be in a "special relationship" whenever these two factors inhere.

25 I should pause here to explain that, in my view, to look to whether or not reliance by the plaintiff on the defendant's representation would be reasonable in determining whether or not a *prima facie* duty of care exists in negligent misrepresentation cases as opposed to looking at reasonable foreseeability alone is not, as might first appear, to abandon the basic tenets underlying the first branch of the *Anns/Kamloops* formula. The purpose behind the *Anns/Kamloops* test is simply to ensure that enquiries

into the existence of a duty of care in negligence cases is conducted in two parts: The first involves discerning whether, in a given situation, a duty of care would be imposed by law; the second demands an investigation into whether the legal duty, if found, ought to be negated or ousted by policy considerations. In the context of actions based on negligence causing physical damage, determining whether harm to the plaintiff was reasonably foreseeable to the defendant is alone a sufficient criterion for deciding proximity or neighbourhood under the first branch of the *Anns/Kamloops* test because the law has come to recognise (even if only implicitly) that, absent a voluntary assumption of risk by him or her, it is always reasonable for a plaintiff to expect that a defendant will take reasonable care of the plaintiff's person and property. The duty of care inquiry in such cases, therefore, will always be conducted under the assumption that the plaintiff's expectations of the defendant are reasonable.

26 In negligent misrepresentation actions, however, the plaintiff's claim stems from his or her detrimental reliance on the defendant's (negligent) statement, and it is abundantly clear that reliance on the statement or representation of another will not, in all circumstances, be reasonable. The assumption that always inheres in physical damage cases concerning the reasonableness of the plaintiff's expectations cannot, therefore, be said to inhere in reliance cases. In order to ensure that the same factors are taken into account in determining the existence of a duty of care in both instances, then, the reasonableness of the plaintiff's reliance must be considered in negligent misrepresentation actions. Only by doing so will the first branch of the *Kamloops* test be applied consistently in both contexts.

27 As should be evident from its very terms, the reasonable foreseeability / reasonable reliance test for determining a *prima facie* duty of care is somewhat broader than the tests used both in the cases decided before *Anns, supra*, and in those that have rejected the *Anns* approach. Rather than stipulating simply that a duty of care will be found in any case where reasonable foreseeability and reasonable reliance inhere, those cases typically require (a) that the defendant know the identity of either the plaintiff or the class of plaintiffs who will rely on the statement, and (b) that the reliance losses claimed by the plaintiff stem from the particular transaction in respect of which the statement at issue was made. This narrower approach to defining the duty can be seen in a number of the more prominent English decisions dealing either with auditors' liability specifically or with liability for negligent misstatements generally. (See, e.g.: *Candler v. Crane, Christmas & Co.*, [1951] 2 K.B. 164 (Eng. C.A.), at pp. 181-82 and p. 184, *per* Denning L.J. (dissenting); *Hedley Byrne & Co. v. Heller & Partners Ltd.* (1963), [1964] A.C. 465 (U.K. H.L.); *Caparo, supra, per* Lord Bridge, at p. 576, and *per* Lord Oliver, at pp. 589.) It is also evident in the approach taken by this Court in *Haig v. Bamford*, [1977] 1 S.C.R. 466 (S.C.C.).

28 While I would not question the conclusions reached in any of these judgments, I am of the view that inquiring into such matters as whether the defendant had knowledge of the plaintiff (or class of plaintiffs) and whether the plaintiff used the statements at issue for the particular transaction for which they were provided is, in reality, nothing more than a means by which to circumscribe — for reasons of policy — the scope of a representor's potentially infinite liability. As I have already tried to explain, determining whether "proximity" exists on a given set of facts consists in an attempt to discern whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business. Requiring, in addition to proximity, that the defendant know the identity of the plaintiff (or class of plaintiffs) and that the plaintiff use the statements in question for the specific purpose for which they were prepared amounts, in my opinion, to a tacit recognition that considerations of basic fairness may sometimes give way to other pressing concerns. Plainly stated, adding further requirements to the duty of care test provides a means by which policy concerns that are extrinsic to simple justice — but that are, nevertheless, fundamentally important — may be taken into account in assessing whether the defendant should be compelled to compensate the plaintiff for losses suffered. In other words, these further requirements serve a policy-based limiting function with respect to the ambit of the duty of care in negligent misrepresentation actions.

29 This view is confirmed by the judgments themselves. In *Caparo, supra*, at p. 576, for example, Lord Bridge refers to the criteria of knowledge of the plaintiff (or class of plaintiffs) and use of the statements for the intended transaction as a "*limit or control mechanism* ... imposed on the liability of the wrongdoer towards those who have suffered some economic damage as a consequence of his negligence" (emphasis added). Similarly, in *Haig, supra*, at p. 476, Dickson J. (as he then was) explicitly discusses the policy concern arising from unlimited liability before finding that the statements at issue in *Haig* were used for the very purpose for which they were prepared and that the appropriate test for a duty of care in the case before him was "actual knowledge of the limited class that will use and rely on the statement". (See also *Candler, supra*, at p. 183,

per Denning L.J. (dissenting).) Certain scholars have adopted this view of the case law as well. (See, e.g.: Bruce Feldthusen, *Economic Negligence* (3rd ed. 1994), at pp. 93-100, where the author explains that the approach taken in both *Haig, supra*, and *Caparo, supra*, toward defining the duty of care was motivated by underlying policy concerns; see also: Earl A. Cherniak and Kirk F. Stevens, "Two Steps Forward or One Step Back? Anns at the Crossroads in Canada" (1992), 20 *C.B.L.J.* 164, and Ivan F. Ivankovich, "Accountants and Third Party Liability — Back to the Future" (1991), 23 *Ottawa L. Rev.* 505, at p. 518.)

30 In light of this Court's endorsement of the *Anns/Kamloops* test, however, enquiries concerning (a) the defendant's knowledge of the identity of the plaintiff (or of the class of plaintiffs) and (b) the use to which the statements at issue are put may now quite properly be conducted in the second branch of that test when deciding whether or not policy considerations ought to negative or limit a *prima facie* duty that has already been found to exist. In other words, criteria that in other cases have been used to define the legal test for the duty of care can now be recognised for what they really are — policy-based means by which to curtail liability — and they can appropriately be considered under the policy branch of the *Anns/Kamloops* test. To understand exactly how this may be done and how these criteria are pertinent to the case at bar, it will first be useful to set out the prevailing policy concerns in some detail.

(iii) Policy Considerations

31 As Cardozo C.J. explained in *Ultramar Corp. v. Touche Niven & Co.*, 174 N.E. 441 (U.S. C.A. 1931), at p. 444, the fundamental policy consideration that must be addressed in negligent misrepresentation actions centres around the possibility that the defendant might be exposed to "liability in an indeterminate amount for an indeterminate time to an indeterminate class". This potential problem can be seen quite vividly within the framework of the *Anns/Kamloops* test. Indeed, while the criteria of reasonable foreseeability and reasonable reliance serve to distinguish cases where a *prima facie* duty is owed from those where it is not, it is nevertheless true that in certain types of situations these criteria can, quite easily, be satisfied and absent some means by which to circumscribe the ambit of the duty, the prospect of limitless liability will loom.

32 The general area of auditors' liability is a case in point. In modern commercial society, the fact that audit reports will be relied on by many different people (e.g., shareholders, creditors, potential takeover bidders, investors, etc.) for a wide variety of purposes will almost always be reasonably foreseeable to auditors themselves. Similarly, the very nature of audited financial statements — produced, as they are, by professionals whose reputations (and, thereby, whose livelihoods) are at stake — will very often mean that any of those people would act wholly reasonably in placing their reliance on such statements in conducting their affairs. These observations are consistent with the following remarks of Dickson J. in *Haig, supra*, at pp. 475-76, with respect to the accounting profession generally:

The increasing growth and changing role of corporations in modern society has been attended by a new perception of the societal role of the profession of accounting. The day when the accountant served only the owner-manager of a company and was answerable to him alone has passed. The complexities of modern industry combined with the effects of specialization, the impact of taxation, urbanization, the separation of ownership from management, the rise of professional corporate managers, and a host of other factors, have led to marked changes in the role and responsibilities of the accountant, and in the reliance which the public must place upon his work. The financial statements of the corporations upon which he reports can affect the economic interests of the general public as well as of shareholders and potential shareholders.

(See also: Cherniak and Stevens, *supra*, at pp. 169-70.) In light of these considerations, the reasonable foreseeability/reasonable reliance test for ascertaining a *prima facie* duty of care may well be satisfied in many (even if not all) negligent misstatement suits against auditors and, consequently, the problem of indeterminate liability will often arise.

33 Certain authors have argued that imposing broad duties of care on auditors would give rise to significant economic and social benefits in so far as the spectre of tort liability would act as an incentive to auditors to produce accurate (i.e., non-negligent) reports. (See, e.g.: Howard B. Wiener, "Common Law Liability of the Certified Public Accountant for Negligent Misrepresentation" (1983), 20 *San Diego L. Rev.* 233.) I would agree that deterrence of negligent conduct is an important policy consideration with respect to auditors' liability. Nevertheless, I am of the view that, in the final analysis, it is outweighed by the socially undesirable consequences to which the imposition of indeterminate liability on auditors might lead. Indeed, while

indeterminate liability is problematic in and of itself inasmuch as it would mean that successful negligence actions against auditors could, at least potentially, be limitless, it is also problematic in light of certain related problems to which it might give rise.

34 Some of the more significant of these problems are thus set out in Brian R. Cheffins, "Auditors' Liability in the House of Lords: A Signal Canadian Courts Should Follow" (1991), 18 *C.B.L.J.* 118, at pp. 125-27:

In addition to providing only limited benefits, imposing widely drawn duties of care on auditors would probably generate substantial costs.

One reason [for this] is that auditors would expend more resources trying to protect themselves from liability. For example, insurance premiums would probably rise since insurers would anticipate more frequent claims. Also, auditors would probably incur higher costs since they would try to rely more heavily on exclusion clauses. Hiring lawyers to draft such clauses might be expensive because only the most carefully constructed provisions would be likely to pass judicial scrutiny.

....
Finally, auditors' opportunity costs would increase. Whenever members of an accounting firm have to spend time and effort preparing for litigation, they forego revenue generating accounting activity. More trials would mean that this would occur with greater frequency.

....
The higher costs auditors would face as a result of broad duties of care could have a widespread impact. For example, the supply of accounting services would probably be reduced since some marginal firms would be driven to the wall. Also, because the market for accounting services is protected by barriers to entry imposed by the profession, the surviving firms would pass [*sic*] at least some of the increased costs to their clients.

Professor Ivankovich describes similar sources of concern. While he acknowledges certain social benefits to which expansive auditors' liability might conduce, he also recognises the potential difficulties associated therewith (at pp. 520-21):

... [expansive auditors' liability] is likely to increase the time expended in the performance of accounting services. This will trigger a predictable negative impact on the timeliness of the financial information generated. It is equally likely to increase the cost of professional liability insurance and reduce its availability, and to increase the cost of accounting services which, as a result, may become less generally available. Additionally, it promotes "free ridership" on the part of reliant third parties and decreases their incentive to exercise greater vigilance and care and, as well, presents an increased risk of fraudulent claims.

Even though I do not share the discomfort apparently felt by Professors Cheffins and Ivankovich with respect to using an *Anns*-type test in the context of negligent misrepresentation actions (See: Cheffins, *supra*, at pp. 129-31, and Ivankovich, *supra*, at p. 530), I nevertheless agree with their assessment of the possible consequences to both auditors and the public generally if liability for negligently prepared audit reports were to go unchecked.

35 I should, at this point, explain that I am aware of the arguments put forth by certain scholars and judges to the effect that concerns over indeterminate liability have sometimes been overstated. (See, e.g.: J. Edgar Sexton and John W. Stevens, "Accountants' Legal Responsibilities and Liabilities", in *Professional Responsibility in Civil Law and Common Law* (Meredith Memorial Lecture, McGill University, 1983-84) (1985), 88, at pp. 101-102; and *H. Rosenblum Inc. v. Adler*, 461 A.2d 138 (U.S. 1983), at p. 152, *per* Schreiber J.) Arguments to this effect rest essentially on the premise that actual *liability* will be limited in so far as a plaintiff will not be successful unless both negligence and reliance are established in addition to a duty of care. While it is true that damages will not be owing by the defendant unless these other elements of the cause of action are proved, neither the difficulty of proving negligence nor that of proving reliance will preclude a disgruntled plaintiff from bringing an action against an auditor and such actions would, we may assume, be all the more common were the establishment of a duty of care in any given case to amount to nothing more than a mere matter of course. This eventuality could pose serious problems both for auditors, whose legal costs would inevitably swell, and for courts, which, no doubt, would feel the pressure of increased litigation. Thus, the prospect of burgeoning negligence suits raises serious concerns, even if we assume that the

arguments positing proof of negligence and reliance as a barrier to liability are correct. In my view, therefore, it makes more sense to circumscribe the ambit of the duty of care than to assume that difficulties in proving negligence and reliance will afford sufficient protection to auditors, since this approach avoids both "indeterminate liability" and "indeterminate litigation".

36 As I have thus far attempted to demonstrate, the possible repercussions of exposing auditors to indeterminate liability are significant. In applying the two-stage *Anns/Kamloops* test to negligent misrepresentation actions against auditors, therefore, policy considerations reflecting those repercussions should be taken into account. In the general run of auditors' cases, concerns over indeterminate liability will serve to negate a *prima facie* duty of care. But while such concerns may exist in most such cases, there may be particular situations where they do not. In other words, the specific factual matrix of a given case may render it an "exception" to the general class of cases in that while (as in most auditors' liability cases) considerations of proximity under the first branch of the *Anns/Kamloops* test might militate in favour of finding that a duty of care inheres, the typical concerns surrounding indeterminate liability do *not* arise. This needs to be explained.

37 As discussed earlier, looking to factors such as "knowledge of the plaintiff (or an identifiable class of plaintiffs) on the part of the defendant" and "use of the statements at issue for the precise purpose or transaction for which they were prepared" really amounts to an attempt to limit or constrain the scope of the duty of care owed by defendants. If the purpose of the *Anns/Kamloops* test is to determine (a) whether or not a *prima facie* duty of care exists and then (b) whether or not that duty ought to be negated or limited, then factors such as these ought properly to be considered in the second branch of the test once the first branch concerning "proximity" has been found to be satisfied. To my mind, the presence of such factors in a given situation will mean that worries stemming from indeterminacy should not arise, since the scope of potential liability is sufficiently delimited. In other words, in cases where the defendant knows the identity of the plaintiff (or of a class of plaintiffs) and where the defendant's statements are used for the specific purpose or transaction for which they were made, policy considerations surrounding indeterminate liability will not be of any concern since the scope of liability can readily be circumscribed. Consequently, such considerations will not override a positive finding on the first branch of the *Anns/Kamloops* test and a duty of care may quite properly be found to exist.

38 As I see it, this line of reasoning serves to explain the holding of Cardozo J. (as he then was) in *Glanzer v. Shepard*, 135 N.E. 275 (U.S. C.A. 1922). There, the New York Court of Appeals held that the defendant weigher was liable in damages for having negligently prepared a weight certificate he knew would be given to the plaintiff, who relied upon it for the specific purpose for which it was issued. In reaching his decision, Cardozo J. explicitly noted that the weight certificate was used for the very "end and aim of the transaction" and not for any collateral or unintended purpose. (*Glanzer, supra*, at p. 275.) On the facts of *Glanzer, supra*, then, the scope of the defendant's liability could readily be delimited and indeterminacy, therefore, was not a concern.

39 The same idea serves to explain the rationale underlying the seminal judgment of the House of Lords in *Hedley Byrne, supra*. While that case did not involve an action against auditors, similar concerns about indeterminate liability were, nonetheless, clearly relevant. On the facts of *Hedley Byrne, supra*, the defendant bank provided a negligently prepared credit reference in respect of one of its customers to another bank which, to the knowledge of the defendants, passed on the information to the plaintiff for a stipulated purpose. The plaintiff relied on the credit reference for the specific purpose for which it was prepared. The House of Lords found that but for the presence of a disclaimer, the defendants would have been liable to the plaintiff in negligence. While indeterminate liability would have raised some concern to the Lords had the plaintiff not been known to the defendants or had the credit reference been used for a purpose or transaction other than that for which it was actually prepared, no such difficulties about indeterminacy arose on the particular facts of the case.

40 This Court's decision in *Haig, supra*, can be seen to rest on precisely the same basis. There, the defendant accountants were retained by a Saskatchewan businessman, one Scholler, to prepare audited financial statements of Mr. Scholler's corporation. At the time they were engaged, the accountants were informed by Mr. Scholler that the audited statements would be used for the purpose of attracting a \$20,000 investment in the corporation from a limited number of potential investors. The audit was conducted negligently and the plaintiff investor, who was found to have relied on the audited statements in making his investment, suffered a loss. While Dickson J. was clearly cognizant of the potential problem of indeterminacy arising in the context of auditors' liability (at p. 476), he nevertheless found that the defendants owed the plaintiff a duty of care. In my view, his conclusion was eminently sound given that the defendants were informed by Mr. Scholler of the class of persons who would

rely on the report and the report was used by the plaintiff for the specific purpose for which it was prepared. Dickson J. himself expressed this idea as follows, at p. 482:

The case before us is closer to *Glanzer* than to *Ultramarines*. The very end and aim of the financial statements prepared by the accountants in the present case was to secure additional financing for the company from [a Saskatchewan government agency] and an equity investor; the statements were required primarily for these third parties and only incidentally for use by the company.

On the facts of *Haig*, then, the auditors were properly found to owe a duty of care because concerns over indeterminate liability did not arise. I would note that this view of the rationale behind *Haig, supra*, is shared by Professor Feldthusen. (See Feldthusen, *supra*, at pp. 98-100.)

41 The foregoing analysis should render the following points clear. A *prima facie* duty of care will arise on the part of a defendant in a negligent misrepresentation action when it can be said (a) that the defendant ought reasonably to have foreseen that the plaintiff would rely on his representation and (b) that reliance by the plaintiff, in the circumstances, would be reasonable. Even though, in the context of auditors' liability cases, such a duty will often (even if not always) be found to exist, the problem of indeterminate liability will frequently result in the duty being negated by the kinds of policy considerations already discussed. Where, however, indeterminate liability can be shown not to be a concern on the facts of a particular case, a duty of care will be found to exist. Having set out the law governing the appellants' claims, I now propose to apply it to the facts of the appeal.

(iv) *Application to the Facts*

42 In my view, there can be no question that a *prima facie* duty of care was owed to the appellants by the respondents on the facts of this case. As regards the criterion of reasonable foreseeability, the possibility that the appellants would rely on the audited financial statements in conducting their affairs and that they may suffer harm if the reports were negligently prepared must have been reasonably foreseeable to the respondents. This is confirmed simply by the fact that shareholders generally will often choose to rely on audited financial statements for a wide variety of purposes. It is further confirmed by the fact that under ss. 149(1) and 163(1) of the Manitoba *Corporations Act*, it is patently clear that audited financial statements are to be placed before the shareholders at the annual general meeting. The relevant portions of those sections read as follows:

149(1) The directors of a corporation shall place before the shareholders at every annual meeting

.....
(b) the report of the auditor, if any; and ...

163(1) An auditor of a corporation shall make the examination that is in his opinion necessary to enable him to report in the prescribed manner on the financial statements required by this Act to be placed before the shareholders, except such financial statements or part thereof as relate to the period referred to in sub-clause 149(1)(a)(ii).

In my view, it would be untenable to argue in the face of these provisions that some form of reliance by shareholders on the audited reports would be unforeseeable.

43 Similarly, I would find that reliance on the audited statements by the appellant shareholders would, on the facts of this case, be reasonable. Professor Feldthusen (at pp. 62-63) sets out five general *indicia* of reasonable reliance; namely:

- (1) The defendant had a direct or indirect financial interest in the transaction in respect of which the representation was made.
- (2) The defendant was a professional or someone who possessed special skill, judgment or knowledge.
- (3) The advice or information was provided in the course of the defendant's business.
- (4) The information or advice was given deliberately, and not on a social occasion.

(5) The information or advice was given in response to a specific enquiry or request.

While these *indicia* should not be understood to be a strict "test" of reasonableness, they do help to distinguish those situations where reliance on a statement is reasonable from those where it is not. On the facts here, the first four of these *indicia* clearly inhere. To my mind, then, this aspect of the *prima facie* duty is unquestionably satisfied on the facts.

44 Having found a *prima facie* duty to exist, then, the second branch of the *Anns/Kamloops* test remains to be considered. It should be clear from my comments above that were auditors such as the respondents held to owe a duty of care to plaintiffs in *all* cases where the first branch of the *Anns/Kamloops* test was satisfied, the problem of indeterminate liability would normally arise. It should be equally clear, however, that in certain cases, this problem does not arise because the scope of potential liability can adequately be circumscribed on the facts. An investigation of whether or not indeterminate liability is truly a concern in the present case is, therefore, required.

45 At first blush, it may seem that no problems of indeterminate liability are implicated here and that this case can easily be likened to *Glanzer, Hedley Byrne, and Haig, supra*. After all, the respondents knew the very identity of all the appellant shareholders who claim to have relied on the audited financial statements through having acted as NGA's and NGH's auditors for nearly 10 years by the time the first of the audit reports at issue in this appeal was prepared. It would seem plausible to argue on this basis that because the identity of the plaintiffs was known to the respondents at the time of preparing the 1980-82 reports, no concerns over indeterminate liability arise.

46 To arrive at this conclusion without further analysis, however, would be to move too quickly. While knowledge of the plaintiff (or of a limited class of plaintiffs) is undoubtedly a significant factor serving to obviate concerns over indeterminate liability, it is not, alone, sufficient to do so. In my discussion of *Glanzer, Hedley Byrne, and Haig, supra*, I explained that indeterminate liability did not inhere on the specific facts of those cases not only because the defendant knew the identity of the plaintiff (or the class of plaintiffs) who would rely on the statement at issue, but also because the statement itself was used by the plaintiff *for precisely the purpose or transaction for which it was prepared*. The crucial importance of this additional criterion can clearly be seen when one considers that even if the specific identity or class of potential plaintiffs is known to a defendant, use of the defendant's statement for a purpose or transaction other than that for which it was prepared could still lead to indeterminate liability.

47 For example, if an audit report which was prepared for a corporate client for the express purpose of attracting a \$10,000 investment in the corporation from a known class of third parties was instead used as the basis for attracting a \$1,000,000 investment or as the basis for inducing one of the members of the class to become a director or officer of the corporation or, again, as the basis for encouraging him or her to enter into some business venture with the corporation itself, it would appear that the auditors would be exposed to a form of indeterminate liability, even if they knew precisely the identity or class of potential plaintiffs to whom their report would be given. With respect to the present case, then, the central question is whether or not the appellants can be said to have used the 1980-82 audit reports for the specific purpose for which they were prepared. The answer to this question will determine whether or not policy considerations surrounding indeterminate liability ought to negate the *prima facie* duty of care owed by the respondents.

48 What, then, is the purpose for which the respondents' audit statements were prepared? This issue was eloquently discussed by Lord Oliver in *Caparo, supra*, at p. 583:

My Lords, the primary purpose of the statutory requirement that a company's accounts shall be audited annually is almost self-evident. ... The management is confided to a board of directors which operates in a fiduciary capacity and is answerable to and removable by the shareholders who can act, if they act at all, only collectively and only through the medium of a general meeting. Hence the legislative provisions requiring the board annually to give an account of its stewardship to a general meeting of the shareholders. This is the only occasion in each year on which the general body of shareholders is given the opportunity to consider, to criticise and to comment on the conduct by the board of the company's affairs, to vote the directors' recommendation as to dividends, to approve or disapprove the directors' remuneration and, if thought

desirable, to remove and replace all or any of the directors. *It is the auditors' function to ensure, so far as possible, that the financial information as to the company's affairs prepared by the directors accurately reflects the company's position in order first, to protect the company itself from the consequences of undetected errors or, possibly, wrongdoing ... and, second, to provide shareholders with reliable intelligence for the purpose of enabling them to scrutinise the conduct of the company's affairs and to exercise their collective powers to reward or control or remove those to whom that conduct has been confided.* [Emphasis added.]

Similarly, Farley J. held in *Roman Corp. v. Peat Marwick Thorne* (1992), 11 O.R. (3d) 248 (Ont. Gen. Div. [Commercial List]), at p. 260 (hereinafter *Roman I*) that

as a matter of law, the only purpose for which shareholders receive an auditor's report is to provide the shareholders with information for the purpose of overseeing the management and affairs of the corporation and not for the purpose of guiding personal investment decisions or personal speculation with a view to profit.

(See also: *Roman Corp. v. Peat Marwick Thorne* (1993), 12 B.L.R. (2d) 10 (Ont. Gen. Div. [Commercial List]).) Lord Oliver was referring to the relevant provisions of the U.K. *Companies Act 1985*, 1985 (U.K.), c. 6, in making his pronouncements, and Farley J. rendered his judgment against the backdrop of the statutory audit requirements set out in the Ontario *Business Corporations Act*, R.S.O. 1990, c. B.16.

49 To my mind, the standard purpose of providing audit reports to the shareholders of a corporation should be regarded no differently under the analogous provisions of the Manitoba *Corporations Act*. Thus, the directors of a corporation are required to place the auditors' report before the shareholders at the annual meeting in order to permit the shareholders, as a body, to make decisions as to the manner in which they want the corporation to be managed, to assess the performance of the directors and officers, and to decide whether or not they wish to retain the existing management or to have them replaced. On this basis, it may be said that the respondent auditors' purpose in preparing the reports at issue in this case was, precisely, to assist the collectivity of shareholders of the audited companies in their task of overseeing management.

50 The appellants, however, submit that, in addition to this statutorily mandated purpose, the respondents further agreed to perform their audits for the purpose of providing the appellants with information on the basis of which they could make personal investment decisions. They base this claim largely on a conversation that allegedly took place at the 1978 meeting between Mr. Cox, Mr. Freed and Mr. Korn, as well as on certain passages of the engagement letter sent to them by the respondents. I have read the relevant portions of the record on this question and I am unable to accept the appellants' submission. Indeed, on examination for discovery, Mr. Freed discussed the engagement letter of the respondents and stated as follows:

Q It is this that you say is the document that says, it will speak for itself, but you interpret it to mean that they [the respondents] will look after your interests specifically [sic]?

A I am saying that I took it for granted that that was their duty.

Q I see. All right. Was there ever anything in writing specifically that says that is your duty, is to look after my interests, I am away all the time?

A I am not aware.

Q Either, from you, or to you in that respect?

A I am not aware of any.

Q This letter happens to say, "We are always prepared upon instruction to extend our services beyond these required procedures." Did you ever give them any additional instructions?

A No. I never saw them.

Q Nor did you communicate with them in writing, or otherwise? Is that right?

A Not that I recall.

Similarly, the transcript of Mr. Korn's examination for discovery reveals the following exchange:

Q You emphasized [at the 1978 meeting] you say to Mr. Cox that because you were no longer in the management stream or chain, you would be relying more on the audited statements?

A Yes, and that — well, I wanted a sort of commitment that he understood that he was the shareholders' auditor and I did refer to the fact that he had [a] close personal association with Mr. Morris and he said no, he fully understood, have no fear.

Q Did you consider that to be a change from the normal kind of audit engagement, or were you just emphasising something that was part of the normal audit engagement?

A I just pointed out the change. As a matter of fact, he already knew about the change.

. . . .

Q But my question was whether you considered that to be any kind of alteration from the usual audit engagement process?

A Well, that's what happened. That's the fact that I said it to him and those are the words I said, and however he took it, that's however he took it.

Q But I'm asking you if you considered that to be a change from the normal audit engagement.

A Well, I'm not — whether that was — whether those words were some sort of special instructions, those were the words and I guess there will be experts to say what consequences should have flown [*sic*] from them, and I'm not here as an expert on audit —

Q I'm entitled to know what you consider to be the case.

A Well, I made it clear that he should remember that he's the shareholders' auditor, that Clarkson was the shareholders' auditor, notwithstanding his personal relationship with Murray Morris.

Q Auditors are always the shareholders' auditors, are they not?

A And that's what I — if they are, they are.

Q And that's in fact what they are always?

A Well, that's good, I'm glad to hear that, glad to hear you say it.

Q Do you agree?

A That the auditors are the shareholders' auditors?

Q Yes.

A I agree precisely.

To my mind, these passages serve to demonstrate that despite the appellants' submissions, the respondents did not, in fact, prepare the audit reports in order to assist the appellants in making personal investment decisions or, indeed, for any purpose

other than the standard statutory one. This finding accords with that of Helper J.A. in the Court of Appeal, and nothing in the record before this Court suggests the contrary.

51 It follows from the foregoing discussion that the only purpose for which the 1980-82 reports could have been used in such a manner as to give rise to a duty of care on the part of the respondents is as a guide for the shareholders, as a group, in supervising or overseeing management. In assessing whether this was, in fact, the purpose to which the appellants purport to have put the audited reports, it will be useful to take each of the appellants' claims in turn. First, the appellant Hercules seeks compensation for its \$600,000 injection of capital into NGA over January and February of 1983 and the appellant Freed seeks damages commensurate with the amount of money he contributed in 1982 to his investment account in NGH. Secondly, all the appellants seek damages for the losses they suffered in the value of their existing shareholdings.

52 The claims of Hercules and Mr. Freed with respect to their 1982-83 investments can be addressed quickly. The essence of these claims must be that these two appellants relied on the respondents' reports in deciding whether or not to make further investments in the audited corporations. In other words, Hercules and Mr. Freed are claiming to have relied on the audited reports for the purpose of making personal investment decisions. As I have already discussed, this is not a purpose for which the respondents in this case can be said to have prepared their reports. In light of the dissonance between the purpose for which the reports were actually prepared and the purpose for which the appellants assert they were used, then, the claims of Hercules and Mr. Freed with respect to their investment losses are not such that the concerns over indeterminate liability discussed above are obviated; *viz.*, if a duty of care were owed with respect to these investment transactions, there would seem to be no logical reason to preclude a duty of care from arising in circumstances where the statements were used for any other purpose of which the auditors were equally unaware when they prepared and submitted their report. On this basis, therefore, I would find that the *prima facie* duty that arises respecting this claim is negated by policy considerations and, therefore, that no duty of care is owed by the respondents in this regard.

53 With respect to the claim concerning the loss in value of their existing shareholdings, the appellants make two submissions. First, they claim that they relied on the 1980-82 reports in monitoring the value of their equity and that, owing to the (allegedly) negligent preparation of those reports, they failed to extract it before the financial demise of NGA and NGH. Secondly, and somewhat more subtly, the appellants submit that they each relied on the auditors' reports in overseeing the management of NGA and NGH and that had those reports been accurate, the collapse of the corporations and the consequential loss in the value of their shareholdings could have been avoided.

54 To my mind, the first of these submissions suffers from the same difficulties as those regarding the injection of fresh capital by Hercules and Mr. Freed. Whether the reports were relied upon in assessing the prospect of further investments or in evaluating existing investments, the fact remains that the purpose to which the respondents' reports were put, on this claim, concerned individual or personal investment decisions. Given that the reports were not prepared for that purpose, I find for the same reasons as those earlier set out that policy considerations regarding indeterminate liability inhere here and, consequently, that no duty of care is owed in respect of this claim.

55 As regards the second aspect of the appellants' claim concerning the losses they suffered in the diminution in value of their equity, the analysis becomes somewhat more intricate. The essence of the appellants' submission here is that the shareholders would have supervised management differently had they known of the (alleged) inaccuracies in the 1980-82 reports, and that this difference in management would have averted the demise of the audited corporations and the consequent losses in existing equity suffered by the shareholders. At first glance, it might appear that the appellants' claim implicates a use of the audit reports which is commensurate with the purpose for which the reports were prepared, i.e., overseeing or supervising management. One might argue on this basis that a duty of care should be found to inhere because, in view of this compatibility between actual use and intended purpose, no indeterminacy arises. In my view, however, this line of reasoning suffers from a subtle but fundamental flaw.

56 As I have already explained, the purpose for which the audit reports were prepared in this case was the standard statutory one of allowing shareholders, *as a group*, to supervise management and to take decisions with respect to matters concerning the proper overall administration of the corporations. In other words, it was, as Lord Oliver and Farley J. found in the cases cited

above, to permit the shareholders to exercise their role, *as a class*, of overseeing the *corporations'* affairs at their annual general meetings. The purpose of providing the auditors' reports to the appellants, then, may ultimately be said to have been a "collective" one; that is, it was aimed not at protecting the interests of individual shareholders but rather at enabling the shareholders, acting as a group, to safeguard the interests of the corporations themselves. On the appellants' argument, however, the purpose to which the 1980-82 reports were ostensibly put was not that of allowing the shareholders as a class to take decisions in respect of the overall running of the corporation, but rather to allow them, as *individuals*, to monitor management so as to oversee and protect their own personal investments. Indeed, the nature of the appellants' claims (i.e. personal tort claims) *requires* that they assert reliance on the auditors' reports *qua* individual shareholders if they are to recover any personal damages. In so far as it must concern the interests of each individual shareholder, then, the appellants' claim in this regard can really be no different from the other "investment purposes" discussed above, in respect of which the respondents owe no duty of care.

57 This argument is no different as regards the specific case of the appellant Guardian, which is the sole shareholder of NGH. The respondents' purpose in providing the audited reports in respect of NGH was, we must assume, to allow Guardian to oversee management for the better administration of the corporation itself. If Guardian in fact chose to rely on the reports for the ultimate purpose of monitoring its own investment it must, for the policy reasons earlier set out, be found to have done so at its own peril in the same manner as shareholders in NGA. Indeed, to treat Guardian any differently simply because it was a sole shareholder would do violence to the fundamental principle of corporate personality. I would find in respect of both Guardian and the other appellants, therefore, that the *prima facie* duty of care owed to them by the respondents is negated by policy considerations in that the claims are not such as to bring them within the "exceptional" cases discussed above.

Issue 2: The Effect of the Rule in Foss v. Harbottle

58 All the participants in this appeal — the appellants, the respondents, and the intervener — raised the issue of whether the appellants' claims in respect of the losses they suffered in their existing shareholdings through their alleged inability to oversee management of the corporations ought to have been brought as a derivative action in conformity with the rule in *Foss v. Harbottle* rather than as a series of individual actions. The issue was also raised and discussed in the courts below. In my opinion, a derivative action — commenced, as required, by an application under s. 232 of the Manitoba *Corporations Act* — would have been the proper method of proceeding with respect to this claim. Indeed, I would regard this simply as a corollary of the idea that the audited reports are provided to the shareholders as a group in order to allow them to take collective (as opposed to individual) decisions. Let me explain.

59 The rule in *Foss v. Harbottle* provides that individual shareholders have no cause of action in law for any wrongs done to the corporation and that if an action is to be brought in respect of such losses, it must be brought either by the corporation itself (through management) or by way of a derivative action. The legal rationale behind the rule was eloquently set out by the English Court of Appeal in *Prudential Assurance Co. v. Newman Industries Ltd.*, [1982] 1 All E.R. 354 (Eng. C.A.), at p. 367, as follows:

The rule [in *Foss v. Harbottle*] is the consequence of the fact that a corporation is a separate legal entity. Other consequences are limited liability and limited rights. The company is liable for its contracts and torts; the shareholder has no such liability. The company acquires causes of action for breaches of contract and for torts which damage the company. No cause of action vests in the shareholder. When the shareholder acquires a share he accepts the fact that the value of his investment follows the fortunes of the company and that he can only exercise his influence over the fortunes of the company by the exercise of his voting rights in general meeting. The law confers on him the right to ensure that the company observes the limitations of its memorandum of association and the right to ensure that other shareholders observe the rule, imposed on them by the articles of association. If it is right that the law has conferred or should in certain restricted circumstances confer further rights on a shareholder the scope and consequences of such further rights require careful consideration.

To these lucid comments, I would respectfully add that the rule is also sound from a policy perspective, inasmuch as it avoids the procedural hassle of a multiplicity of actions.

60 The manner in which the rule in *Foss v. Harbottle*, *supra*, operates with respect to the appellants' claims can thus be demonstrated. As I have already explained, the appellants allege that they were prevented from properly overseeing the

management of the audited corporations because the respondents' audit reports painted a misleading picture of their financial state. They allege further that had they known the true situation, they would have intervened to avoid the eventuality of the corporations' going into receivership and the consequent loss of their equity. The difficulty with this submission, I have suggested, is that it fails to recognise that in supervising management, the shareholders must be seen to be acting *as a body* in respect of the corporation's interests rather than as individuals in respect of their own ends. In a manner of speaking, the shareholders assume what may be seen to be a "managerial role" when, as a collectivity, they oversee the activities of the directors and officers through resolutions adopted at shareholder meetings. In this capacity, they cannot properly be understood to be acting simply as individual holders of equity. Rather, their collective decisions are made in respect of the corporation itself. Any duty owed by auditors in respect of this aspect of the shareholders' functions, then, would be owed not to shareholders *qua* individuals, but rather to all shareholders as a group, acting in the interests of the corporation. And if the decisions taken by the collectivity of shareholders are in respect of the corporation's affairs, then the shareholders' reliance on negligently prepared audit reports in taking such decisions will result in a wrong to the corporation for which the shareholders cannot, as individuals, recover.

61 This line of reasoning finds support in Lord Bridge's comments in *Caparo, supra*, at p. 580:

The shareholders of a company have a collective interest in the company's proper management and in so far as a negligent failure of the auditor to report accurately on the state of the company's finances deprives the shareholders of the opportunity to exercise their powers in general meeting to call the directors to book and to ensure that errors in management are corrected, the shareholders ought to be entitled to a remedy. *But in practice no problem arises in this regard since the interest of the shareholders in the proper management of the company's affairs is indistinguishable from the interest of the company itself and any loss suffered by the shareholders ... will be recouped by a claim against the auditors in the name of the company, not by individual shareholders.* [Emphasis added.]

It is also reflected in the decision of Farley J. in *Roman I, supra*, the facts of which were similar to those of the case at bar. In that case, the plaintiff shareholders brought an action against the defendant auditors alleging, *inter alia*, that the defendant's audit reports were negligently prepared. That negligence, the shareholders contended, prevented them from properly overseeing management which, in turn, led to the winding up of the corporation and a loss to the shareholders of their equity therein. Farley J. discussed the rule in *Foss v. Harbottle* and concluded that it operated so as to preclude the shareholders from bringing personal actions based on an alleged inability to supervise the conduct of management.

62 One final point should be made here. Referring to the case of *Goldex Mines Ltd. v. Revill* (1974), 7 O.R. (2d) 216 (Ont. C.A.), the appellants submit that where a shareholder has been directly and individually harmed, that shareholder may have a personal cause of action even though the corporation may also have a separate and distinct cause of action. Nothing in the foregoing paragraphs should be understood to detract from this principle. In finding that claims in respect of losses stemming from an alleged inability to oversee or supervise management are really derivative and not personal in nature, I have found only that shareholders cannot raise individual claims in respect of a wrong done *to the corporation*. Indeed, this is the limit of the rule in *Foss v. Harbottle*. Where, however, a separate and distinct claim (say, in tort) can be raised with respect to a wrong done to a shareholder *qua* individual, a personal action may well lie, assuming that all the requisite elements of a cause of action can be made out.

63 The facts of *Haig, supra* provide the basis for an example of where such a claim might arise. Had the investors in that case been shareholders of the corporation, and had a similarly negligent report knowingly been provided to them by the auditors for a specified purpose, a duty of care separate and distinct from any duty owed to the audited corporation would have arisen in their favour, just as one arose in favour of Mr. Haig. While the corporation would have been entitled to claim damages in respect of any losses it might have suffered through reliance on the report (assuming, of course, that the report was also provided for the corporation's use), the shareholders in question would also have been able to seek personal compensation for the losses they suffered *qua* individuals through their personal reliance and investment. On the facts of this case, however, no claims of this sort can be established.

Conclusion

64 In light of the foregoing, I would find that even though the respondents owed the appellants (*qua* individual claimants) a *prima facie* duty of care both with respect to the 1982-83 investments made in NGA and NGH by Hercules and Mr. Freed and with respect to the losses they incurred through the devaluation of their existing shareholdings, such *prima facie* duties are negated by policy considerations which are not obviated by the facts of the case. Indeed, to come to the opposite conclusion on these facts would be to expose auditors to the possibility of indeterminate liability, since such a finding would imply that auditors owe a duty of care to any known class of potential plaintiffs regardless of the purpose to which they put the auditors' reports. This would amount to an unacceptably broad expansion of the bounds of liability drawn by this Court in *Haig, supra*. With respect to the claim regarding the appellants' inability to oversee management properly, I would agree with the courts below that it ought to have been brought as a derivative action. On the basis of these considerations, I would find under Rule 20.03(1) of the Manitoba *Queen's Bench Rules* that the appellants have failed to establish that their claims as alleged would have "a real chance of success".

65 I would dismiss the appeal with costs.

Appeal dismissed.

Pourvoi rejeté.

TAB 15

2017 ONSC 3958
Ontario Superior Court of Justice

Lavender v. Miller Bernstein

2017 CarswellOnt 10841, 2017 ONSC 3958, 282 A.C.W.S. (3d) 432

Barry Lavender (Plaintiff / Moving Party) and Miller Bernstein LLP (Defendant / Responding Party)

Edward P. Belobaba J.

Heard: June 27, 2017; June 29, 2017

Judgment: July 12, 2017

Docket: 05-CV-300430-CP

Counsel: Daniel Bach, Paul Bates, Serge Kalloghlian, for Plaintiff
Robert Staley, Gavin Finlayson, Nathan Shaheen, for Defendant

Subject: Civil Practice and Procedure; Public; Torts

MOTION by investor for partial summary judgment on liability issues in class proceeding against auditor of defunct securities dealer.

Edward P. Belobaba J.:

1 This class action against the auditor of a defunct securities dealer was certified as a class proceeding in 2010. The representative plaintiff now moves for summary judgment on five of the six common issues.

2 There is no serious dispute about the availability or appropriateness of summary judgment on the facts herein. I am confident that the five common issues before the court can be decided summarily without trial.

Background

3 Buckingham Securities was a securities dealer that held the investments and savings of 1002 retail clients. On July 6, 2001, the Ontario Securities Commission ("OSC") placed Buckingham into receivership because it failed to segregate investor (class member) assets and maintain a minimum net free capital in breach of regulatory requirements. BDO Dunwoody ("BDO") was appointed receiver and manager of Buckingham's assets. Although the OSC intervened as soon as it learned of these breaches, it was too late. The unsegregated assets had been appropriated and used by Buckingham for its own purposes. The class members lost some \$10.6 million.¹

4 In 2004, the OSC initiated proceedings against Buckingham and several of its principals. The principals admitted that they failed to comply with Ontario securities law by making materially untrue statements in its 1999 and 2000 Form 9 reports. Form 9 reports were to be audited and filed each year with the OSC confirming the segregation of assets and the minimum capital. The Form 9s for fiscal years 1998, 1999 and 2000 were audited and filed by Buckingham's auditor, the defendant Miller Bernstein.²

5 Disciplinary proceedings were brought by the OSC and the Institute of Chartered Accountants against the defendant and Howard Kornblum, the partner who audited and filed the false Form 9s. Mr. Kornblum admitted his conduct including the falsity of the Form 9s for fiscal years 1999 and 2000, but not for fiscal year 1998.

The class action

6 The plaintiff commenced this class action in November, 2005 on behalf of every person who had an investment account with Buckingham on July 6, 2001 when the securities dealer was placed into receivership. In addition to the main class, two subclasses were also certified: the first for the class members who corresponded directly with the defendant about discrepancies in their investment accounts; and the second for class members who corresponded with the defendant without referring to any discrepancies in their investment accounts. The sub-classes do not figure in any of the analysis herein.

7 The plaintiff says that in each of fiscal years 1998 to 2000 the defendant auditor negligently signed off on Form 9 reports that falsely stated that Buckingham was in compliance with the segregation and minimum capital requirements. In doing so, the defendant breached the duty of care that it owed to the class members (as clients of Buckingham) causing more than \$10 million in foreseeable losses for which the defendant is now liable.

8 The defendant rejects the plaintiff's characterization of what happened and asks that the common issues be answered in its favour. The defendant says the plaintiff is attempting to dress up a negligent misrepresentation claim as something else because he is unable to establish reliance; that no duty of care ("to the defendant auditor's client's clients") can be imposed on the facts of this case; that neither breach nor causation nor even damages can be established on the evidence that is before the court. The defendant asks that this motion for summary judgment be dismissed.

The common issues

9 The five common issues that provide the focus for this summary judgment motion can be restated as follows:

- (a) Was Buckingham required to segregate the cash and securities of the class member investors from its own cash and securities?
- (b) Did Buckingham fail to do so?
- (c) Did the defendant owe a duty of care to class members when it audited and filed the Form 9s?
- (d) Did the defendant breach this duty of care?
- (e) Was this breach of duty a cause of damages to the class members? If so, can such damages be determined on a class-wide basis? How should the damages be calculated?

10 There was no real dispute about the first two questions — Buckingham was required to segregate client assets and failed to do so. I will explain this in more detail shortly. Nor was there much disagreement about the causation or damages questions, once these questions were canvassed with counsel during the hearing of the motion. The primary area of disagreement was the duty of care question - whether the defendant auditor on the particular facts of this case owed a duty of care to the class members.

11 Before I turn to the five common issues, I will set out the analysis relating to the core question of duty of care.

The core dispute — duty of care

12 This is not a negligent misrepresentation case. The plaintiff is not saying that the class members relied on or even saw the Form 9s — they did not. The plaintiff's claim is in negligence *simpliciter* — that the defendant owed and breached a duty of care causing foreseeable losses for which it should now be found liable.

13 Canadian courts have explained that on certain facts it is possible for a plaintiff in a negligent misstatement case to proceed against the defendant on the basis of a simple negligence claim. For example, in *Yorkshire Trust Co.*,³ Justice McLachlin, as she then was, cited with approval the following passage from a leading text on the law of misrepresentation.⁴ The authors are discussing "misrepresentation giving rise to actions at the suit of persons other than the representee" and they note that "a very modern cause of action" is emerging — "the cause of action in negligence which arises from making a negligent misrepresentation in a situation in which a duty of care exists":

In some of these situations there will be found to be a duty of care owed by the representor not only to the representee, but also to third parties; and where this is the case such a third party may have a cause of action notwithstanding that he is not the representee, and even in a case where he never had notice of the representation at all. But this cause of action, as will be seen, is not really an action for misrepresentation at all, but one *in negligence* in circumstances in which the negligence consists in making a representation without due care.⁵

14 In *Lipson v. Cassels Brock & Blackwell LLP*,⁶ class members participated in an income tax reduction program which resulted in reassessments. The class members sued the law firm that provided the negligent tax opinion. The law firm argued that the plaintiff's negligence claim was a disguised negligent misrepresentation action that attempted to circumvent the reliance and causation requirements. The Court of Appeal explained why a free-standing claim for negligence could proceed:

[T]he claim in simple negligence is distinct from [the plaintiff's] claim in negligent misrepresentation, which required proof of reliance on the opinion by individual class members in deciding to participate in the program. Framed in this way, the cause of action in simple negligence does not require a showing of reliance on the Cassels Brock opinion by individual class members. The allegation is that class members suffered damage because they participated in the program, which, but for Cassels Brock's negligent opinion, would not have been marketed by the promoters and thus not available to class members.⁷

15 Here as well, the plaintiff's negligence claim is based on the allegation that class members sustained losses which, but for the defendant's false audit of the Form 9s, would not have been sustained. If the defendant had filed accurate Form 9s documenting the regulatory breaches (or had not filed at all) the OSC, on the evidence, would in all likelihood have intervened before all the assets and monies were lost. In short, I am satisfied that on these facts and in principle that the negligence claim is appropriate.

16 The more pressing issue is whether on the facts herein the plaintiff can establish a duty of care. This is a case about an auditor's misstatement that was filed with the OSC, was never seen by the class members, and arguably caused pure economic loss to the auditor's client's clients. This is obviously not a conventional negligence case. Nor is it sufficient for the plaintiff to say that the case fits within the "negligence performance of a service" category in which courts have recognized duties of care in certain third-party-benefit situations.⁸ The underlying facts in the cases that have been grouped by academic commentators under the "negligent performance of a service" category are varied and the applicable law has not yet been uniformly articulated or accepted.⁹

17 In any event, as the Supreme Court noted in *Martel*,¹⁰ the categories of recovery in tort for pure economic loss, such as the 'negligence performance of a service' category, are "merely analytical tools" that may provide structure to the varied factual situations that can arise.¹¹ If the case (such as the case here) does not fall within a relationship that has been previously recognized as giving rise to a duty of care, the two-stage *Anns-Cooper*¹² analysis must be undertaken.¹³

18 The first stage of the *Anns-Cooper* analysis asks whether the facts disclose a sufficient level of foreseeability and proximity to establish a *prima facie* duty of care. The second stage of the analysis asks whether there are residual policy considerations that would justify denying liability in tort even though a *prima facie* duty of care has been established.¹⁴ The onus at the first stage is on the plaintiff; at the second stage, on the defendant.¹⁵

Stage one — prima facie duty of care

19 The first stage of the analysis, reasonable foreseeability and proximity (or neighborhood), requires the court to "evaluate the closeness of the relationship between the plaintiff and the defendant and to determine whether it is just and fair having regard to that relationship to impose a duty of care in law upon the defendant."¹⁶ As the Supreme Court noted in *Hercules Management*,¹⁷ the question of proximity, in essence, is "whether, as a matter of simple justice, the defendant may be said to have had an obligation to be mindful of the plaintiff's interests in going about his or her business."¹⁸

20 Here on the evidence, I find that the foreseeability and proximity requirements are satisfied. Even though the class members never saw or even knew, at the time, about the Form 9s, the defendant auditor as a matter of simple justice had an obligation to be mindful of the plaintiff's interests when auditing and filing the Form 9 reports with the OSC.

21 My analysis is based on the auditing standards applicable at the time and the evidence and admissions of the parties and their experts. The defendant understood that the Form 9s were used by the OSC to police the securities dealers and protect their investors. If the Form 9s indicated a breach of the segregation or minimum capital requirements, the OSC would intervene. If the defendant was negligent in its audit and filed false Form 9s, causing the OSC to believe that the securities dealer was in compliance with the regulatory requirements when the truth was otherwise, monies invested by clients of the securities dealer could well be lost. In short, the defendant (and in particular Mr. Kornblum) well understood the consequences to "its client's clients" if the segregation or capital deficiency information was misstated in the Form 9s - that a negligent audit of these Form 9s could expose the class members to the very loss that they incurred.

22 The Supreme Court explained the relationship between foreseeability and proximity in *Imperial Tobacco*:¹⁹

Proximity and foreseeability are two aspects of one inquiry - the inquiry into whether the facts disclose a relationship that gives rise to a *prima facie* duty of care at common law. Foreseeability is the touchstone of negligence law. However, not every foreseeable outcome will attract a commensurate duty of care. Foreseeability must be grounded in a relationship of sufficient closeness, or proximity, to make it just and reasonable to impose an obligation on one party to take reasonable care not to injure the other.²⁰

23 In my view, on the particular facts herein, a relationship of sufficient closeness has been established. The defendant was retained by Buckingham to audit and file the Form 9s. In doing this "assurance audit" for its client, the defendant had access to the individual names and investor accounts of every class member. The defendant knew the exact amounts involved, and even corresponded with some of the class members to verify that Buckingham's internal client account records were complete and accurate. Some of the class members responded to the auditor's letter and alerted the defendant to serious discrepancies between Buckingham's internal account records and the actual holdings and activity within their accounts. The defendant also knew, without being told, that even if the class members knew nothing about the Form 9s, they would reasonably expect Buckingham and its auditor to provide any information required under provincial law accurately and honestly, particularly if that information could affect their financial interests.

24 I therefore have no difficulty concluding on the particular facts of this case, that it is just and reasonable to impose a *prima facie* duty of care on the defendant auditor. Tracking the language used by the Supreme Court in *Hercules Management*, I am satisfied that "as a matter of simple justice, the defendant [had] an obligation to be mindful of the plaintiff's interests in going about his or her business."²¹

25 The plaintiff has established a *prima facie* duty of care under the first stage of the *Anns-Cooper* analysis.

Stage two — indeterminate liability

26 The reason for stage two is especially important in cases such as this where the plaintiff's claim is for pure economic loss. The court's primary concern when imposing a duty of care in cases of pure economic loss is the spectre of indeterminate or unlimited liability.²² Unlike physical injury or property loss claims that are almost always circumscribed, pure financial loss can materialize and spread quickly involving a wide range of direct and indirect claimants and exposing the defendant to unbounded liability. At stage two of the *Anns-Cooper* analysis, as the Court of Appeal noted in *Canadian Imperial Bank of Commerce v. Deloitte & Touche*,²³ "[t]he overriding question is whether indeterminate liability can be shown not to be a concern on the facts of a particular case."²⁴

27 If the defendant can show that indeterminate liability is a genuine concern, the *prima facie* duty of care will be negated. However, if indeterminate liability cannot be established *on the facts of the particular case*, then a duty of care will be found to exist.²⁵

28 The case law has made clear that indeterminate liability will not be a concern under the second stage of the *Anns-Cooper* analysis in cases where the auditor knows the identity of the plaintiff (or a class of plaintiffs) *and* where the defendant's statements are used for the specific purpose for which they were made. Indeterminate liability will not be a concern if these facts are present because the defendant's scope of liability can be circumscribed. If the plaintiff-identity and specific-purpose conditions are satisfied the *prima facie* duty of care established at the first stage of the *Anns-Cooper* analysis will not be negated and a duty of care may properly be found to exist.²⁶

29 Here, on the uncontested evidence before me, both the plaintiff-identity and specific purpose conditions are satisfied. First, the defendant knew the names and addresses of each of Buckingham's clients at the time of its audits. It was also required, between audits, to stay informed of any major changes to Buckingham's business, such as a significant change in customers, or the value of their accounts. The defendant therefore knew of the narrowly circumscribed class of people to whom it could be liable for a negligent audit. Second, the Form 9s on the facts herein were used for the very purpose for which they were prepared - to be relied on by the OSC in protecting investor (class member) assets.

30 Further, the evidence shows that the defendant's potential monetary liability was also narrowly circumscribed. It knew its precise potential liability (the sum of all customer accounts) at the time of each audit, and it was required to stay informed of any major changes. Indeed, the plaintiff notes that the defendant's liability is actually much less today than it would have been at the time of the 2000 audit. The Form 9 for March 31, 2000 indicated that the aggregate value of customer securities at that time was approximately \$47.7 million — more than four times the \$10.6 million that was lost.

31 One final point. The defendant's submission that it has statutory immunity under s. 141(2) of the OSA because it "intended" to comply with securities laws does not succeed. Section 141(2) provides as follows:

No person or company has any rights or remedies and no proceedings lie or shall be brought against any person or company for any act or omission of the last-mentioned person or company done or omitted in compliance with Ontario securities law.

32 This court made clear in *Sells v. Manulife Securities Inc.*²⁷ that the immunity under s. 141(2) is only available to a defendant for acts or omissions that are "in compliance with Ontario securities law."²⁸ The defendant's filing of false Form 9s was obviously not in compliance with the OSA or the regulations thereunder, and thus s. 141(2) does not apply.

33 In sum, I find that a *prima facie* duty of care has been established and has not been negated by any policy concerns of indeterminate liability. I find on the facts of this particular case that the defendant owed a duty of care to the class members.

34 I will now answer each of the five common issues.

The common issues answered

(a) Did the Securities Act, R.S.O. 1990, c. S.5 and the regulations thereunder require Buckingham to segregate the cash and securities of its clients from its own cash and securities?

35 The answer to (a) is yes.

36 The evidence is undisputed and the parties agree. As a registered securities dealer, Buckingham was required under the OSA and the regulations thereunder to segregate and hold in trust the cash and securities of the class on a client by client basis at all times.

(b) Did Buckingham fail to segregate its clients' cash and securities in violation of the OSA and, if so, when did Buckingham fail to do so?

37 The answer to (b) is yes. Buckingham failed to segregate its clients' cash and securities at all times during its operation.

38 The evidence shows that Buckingham never segregated its clients' cash and securities. In their settlement agreements with the OSC, Buckingham and its principals admitted that during the entire period of its registration as a securities dealer "Buckingham failed to segregate fully paid or excess margin securities owned by its clients and held in Buckingham's omnibus accounts with other brokerage firms." Mr. Kornblum also admitted that Buckingham failed to segregate at the time of the 1999 and 2000 Form 9s and he testified that Buckingham was "consistent" in the way it handled segregation prior to March 2000 (in other words, it did not segregate).

(c) Did the defendant owe a duty of care to the class and/or one or more of the sub-classes and what is the nature and extent of that duty?

39 The answer to (c) is yes. Under the *Anns-Cooper* analysis, as set out above, the defendant owed a duty of care to the class to conduct an audit of Buckingham's Form 9 reports with the skill and care of a competent practitioner.

(d) If the answer to (c) is yes, did the defendant breach that duty of care to the class and/or one or more of the sub-classes, either negligently or recklessly?

40 The answer to (d) is yes.

41 The defendant signed audit reports addressed to the OSC for fiscal years 1998, 1999 and 2000, falsely stating that its examinations of the Form 9s "were made in accordance with generally accepted auditing standards and accordingly included such tests and other procedures as we considered necessary in the circumstances, including the audit procedures prescribed by the Ontario Securities Commission." The defendant has admitted that it breached its duty of care in the 1999 and 2000 Form 9 audits. The uncontested opinion of the plaintiff's expert is that the defendant also breached its duty of care in the 1998 Form 9 audit. The defendant has not filed any expert evidence to rebut that opinion.

(e) If the answer to (d) is yes, was the defendant's breach of that duty a cause of damages to all of the class and/or all of one or more of the sub-classes?

42 The answer to (e) is yes.

43 The uncontested evidence is that shortly after the 1998 Form 9 was submitted, Buckingham was failing to segregate but had adequate net free capital. This means that if the OSC had intervened at that point to correct the segregation deficiency there would have been enough money to pay out all of Buckingham's clients in full. In other words, says the plaintiff, if the defendant had conducted a proper audit in 1998 there would have been no losses, based upon his admission that there were sufficient funds in 1998 and on the likelihood that the OSC would have (at a minimum) imposed segregation, protecting client assets on a go-forward basis.

44 In any event, common issue (e) only asks whether the defendant's breach of the duty of care was a cause of the damages sustained by the class. It cannot be disputed that the defendant's filing of the false Form 9s was at least a cause of the losses sustained by the class members.

(e)(1) If the answer to (e) is yes, can such damages be determined on a class wide basis in respect of the class and/or one or more of the sub-classes?

45 The answer to (e)(1) is no.

46 The plaintiff has a "corrected spreadsheet" prepared by the Receiver that shows each individual class member's loss as of July 6, 2001. However, this corrected spreadsheet is not in the evidence that is before the court. There is therefore no evidence of the class members' actual losses, whether on an individualized or class-wide basis, and no proposed methodology for making this determination. The expert reports purporting to estimate aggregate losses do not assist because actual loss is needed to establish liability in a tort claim and aggregate damages cannot be used to establish actual loss/liability.²⁹ The answer to common issue (e)(1) must therefore be no.

47 The plaintiff has indicated that it may bring a follow up motion for summary judgment based on this corrected spreadsheet. The defendant has cautioned the plaintiff that if such a motion is brought, it will question both the contents of the corrected spreadsheet and the assessment of each class member's alleged loss. Needless to say, this motion is not before me today.

(e)(2) If the answer to (e)(1) is yes, how should the damages to be payable by the defendant be calculated?

48 Given the answer to (e)(1), there is no need to answer (e)(2).

Conclusion

49 The common issues, with the exception of damages, are answered in favour of the plaintiff. Buckingham Securities was required to segregate the class members' cash and securities and failed to do. The defendant owed a duty of care to the class members when it audited and filed the Form 9s and breached this duty of care. This breach of duty was a cause of the losses that were sustained herein. However, the class members' losses cannot be determined on the record before the court, whether on an individual or class-wide basis.

50 The plaintiff has indicated that he may bring a follow-up motion based on the "corrected spreadsheet" so that these losses may be determined - but this remains to be seen.

Disposition

51 The motion for summary judgment on the five common issues is granted. Common issues (a), (b), (c), (d) and (e) are answered "yes". Common issue (e)(1) is answered "no" and common issue (e)(2) is not answered.

52 If the parties cannot agree on costs on a partial indemnity basis, I would be pleased to receive brief written submissions — from the plaintiff within 14 days and from the defendant within 14 days thereafter. The defendant is reminded that if it intends to challenge the reasonableness of the plaintiff's dockets, it should provide a certified copy of its own dockets showing the time expended on this motion.

53 My thanks to counsel on both sides for their assistance.

Motion granted.

Footnotes

1 The actual amount of the loss will need further clarification because of a court-approved distribution by the Receiver to class members in 2005 in the amount of \$2.3 million. There are questions about the interest owing at that point on the \$10.6 million and the consequent value of the 2005 distribution. For the purposes of the narrative herein and for ease of reference, I will continue to use the \$10.6 million amount to describe the class members' overall loss as of July 6, 2001.

2 The defendant auditor at the time in question was Miller Bernstein & Partners LLP not the named defendant Miller Bernstein LLP. The parties have advised that they are trying to resolve the misnomer matter on consent and are optimistic that this will be done shortly.

3 *Yorkshire Trust Co. v. Empire Acceptance Corp.*, [1986] B.C.J. No. 3254 (B.C. S.C.).

4 Spencer Bower and Turner, *The Law of Actionable Misrepresentation*, (3rd ed.), at 395-6.

5 *Ibid.*, at para. 12.

6 *Lipson v. Cassels Brock & Blackwell LLP*, 2013 ONCA 165 (Ont. C.A.).

7 *Ibid.*, at paras. 96 to 98.

8 See generally Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, (6th ed., 2012) at 129 *et seq.* and the case law discussed therein.

9 *Ibid.*

10 *Martel Building Ltd. v. R.*, [2000] 2 S.C.R. 860 (S.C.C.).

11 *Ibid.*, at para. 45.

12 *Anns v. Merton London Borough Council*, [1978] A.C. 728 (U.K. H.L.); *Cooper v. Hobart*, 2001 SCC 79 (S.C.C.).

13 *Childs v. Desormeaux*, [2006] 1 S.C.R. 643 (S.C.C.) at para. 15; *Knight v. Imperial Tobacco Canada Ltd.*, [2011] 3 S.C.R. 45 (S.C.C.) at para. 38.

14 *Imperial Tobacco*, *supra*, note 13, at para. 39.

15 *J. (J.) (Litigation guardian of) v. C. (C.)*, 2016 ONCA 718 (Ont. C.A.) at para. 34.

16 *Cooper*, *supra*, note 12, at para. 34.

17 *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.).

18 *Ibid.*, at para. 28.

19 *Imperial Tobacco*, *supra*, note 13.

20 *Ibid.*, at para. 41.

21 *Hercules Management*, *supra*, note 17, at para. 28.

22 *Mandeville v. Manufacturers Life Insurance Co.*, 2014 ONCA 417 (Ont. C.A.) at para 173; *Hercules Management* *supra*, note 17, at para 31.

23 *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922 (Ont. C.A.).

24 *Ibid.*, at para. 66.

25 *Hercules Management*, *supra*, note 17, at 41.

26 *Ibid.*, at paras. 30 and 37; *Deloitte*, *supra*, note 23, at para. 55.

27 *Sells v. Manulife Securities Inc.*, 2014 ONSC 715 (Ont. S.C.J.).

28 *Ibid.*, at para. 38.

29 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at paras. 128 and 135. Also see the discussion in *Kalra v. Mercedes Benz*, 2017 ONSC 3795 (Ont. S.C.J.) at paras. 48-50.

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TAB 16

2012 ONCA 797
Ontario Court of Appeal

McCracken v. Canadian National Railway

2012 CarswellOnt 14475, 2012 ONCA 797, 225 A.C.W.S. (3d) 629, 5 C.C.E.L. (4th) 327

Michael Ian McCracken, Plaintiff (Appellant/Respondent by Cross-Appeal) and Canadian National Railway Company, Defendant (Respondent/Appellant by Cross-Appeal)

W.K. Winkler C.J.O., John Laskin J.A., E.A. Cronk J.A.

Heard: February 28, 2012; February 29, 2012

Judgment: November 20, 2012

Docket: CA C52635

Proceedings: additional reasons to *McCracken v. Canadian National Railway* (2012), 21 C.P.C. (7th) 57, 2012 ONCA 445, 2012 CarswellOnt 8010, 100 C.C.E.L. (3d) 27, 2012 C.L.L.C. 210-041, 293 O.A.C. 274, 111 O.R. (3d) 745 (Ont. C.A.); reversing in part *McCracken v. Canadian National Railway* (2010), 3 C.P.C. (7th) 81, 2010 C.L.L.C. 210-044, 2010 CarswellOnt 5919, 2010 ONSC 4520 (Ont. S.C.J.); varying *McCracken v. Canadian National Railway* (2010), 100 C.P.C. (6th) 334, 2010 ONSC 6026, 2010 CarswellOnt 8330 (Ont. S.C.J.); additional reasons at *McCracken v. Canadian National Railway* (2010), 3 C.P.C. (7th) 81, 2010 C.L.L.C. 210-044, 2010 CarswellOnt 5919, 2010 ONSC 4520 (Ont. S.C.J.)

Counsel: Louis Sokolov, Peter L. Roy, Steven Barrett, David F. O'Connor, Sean M. Grayson, for Appellant / Respondent by cross-appeal

Guy J. Pratte, Morton G. Mitchnick, Sylvie Rodrigue, Jeremy J. Devereux, Michael Kotrly, for Respondent / Appellant by cross-appeal

Scott Hutchinson, Aaron Dantowitz, Benjamin Kates, for Law Foundation of Ontario

Subject: Civil Practice and Procedure; Employment; Public; Torts

ADDITIONAL REASONS to judgment reported at *McCracken v. Canadian National Railway* (2012), 21 C.P.C. (7th) 57, 2012 ONCA 445, 2012 CarswellOnt 8010, 100 C.C.E.L. (3d) 27, 2012 C.L.L.C. 210-041, 293 O.A.C. 274, 111 O.R. (3d) 745 (Ont. C.A.).

W.K. Winkler C.J.O.:

1 This court's judgment in 2012 ONCA 445 (Ont. C.A.), was released concurrently with two other appeals in a trilogy of class actions against federally-regulated employers claiming unpaid overtime pay: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (Ont. C.A.), and *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 (Ont. C.A.). In *McCracken*, this court overturned the motion judge's order certifying the proposed action. The parties are to return before the motion judge to make oral submissions on the costs of the certification motion.

2 The court has now had the opportunity to review submissions on the costs of the appeal of the successful appellant, Canadian National Railway Company, as well as the joint submissions of the proposed representative plaintiff, Michael McCracken, and the Law Foundation of Ontario. The Class Proceedings Committee of the Law Foundation approved the proposed class action for funding support from its Class Proceedings Fund.

3 CN seeks partial indemnity costs of the appeal in the amount of \$300,000, including disbursements in the amount of \$13,293.49 and taxes. CN's counsel indicate that this amount represents approximately one-third of the actual costs incurred (\$931,464) and reflects a discount from the maximum allowable on a partial indemnity scale (\$487,799).

4 The plaintiff and the Law Foundation submit that no costs should be awarded for the appeal, but if they are, the award should not exceed \$50,000.

5 The plaintiff and the Foundation complain that as much as \$229,074 of the actual fees appearing in CN's costs outline (\$127,050 on partial indemnity) and an unspecified portion of the claimed disbursements, arise from work done in connection with the Divisional Court proceedings. These proceedings were resolved on consent and on a no-costs basis and are not properly claimed as costs of the proceedings in this court. As noted above, however, CN reduced the amount of its alleged actual costs on a partial indemnity basis by approximately \$180,000, which neutralizes the concern raised by the plaintiff and the Foundation.

6 I would not accept the position of the plaintiff and the Law Foundation that no costs should be awarded to CN for the appeal in this court. The outcome of the appeal, its complexity, the principle of indemnity and the reasonable expectations of the plaintiff all militate in favour of a significant partial indemnity costs award.

7 This was a two-day hearing and each side raised a host of issues by way of appeal and cross-appeal. It should come as no surprise to the plaintiff or the Law Foundation — given the \$300 million claimed in the action and the almost \$750,000 in costs that the plaintiff was awarded on the certification motion — that the appeal would be hard-fought and would be argued by experienced counsel on behalf of CN.

8 However, in furtherance of the goals of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the court will also consider whether any of the factors set out in s. 31(1) of that Act — a test case, a novel point of law, a matter of public interest — apply: see *Ruffolo v. Sun Life Assurance Co. of Canada* (2009), 95 O.R. (3d) 709 (Ont. C.A.). I agree with the position of the plaintiff and the Law Foundation that this appeal involved novel points of law. Indeed, in its factum filed in support of the request for leave to appeal the certification order to the Divisional Court, CN took the position that the proposed action "engages serious, novel legal issues. It raises important questions regarding how misclassification can be heard collectively, if at all."

9 I also agree with the plaintiff and the Foundation that the proposed action was animated by public interest concerns insofar as this class proceeding was intended to afford an efficient means to obtain collective redress for employees of a federally-regulated company. The public interest issue is whether or not a misclassification case can properly be made the subject matter of a class proceeding. This public interest purpose is consistent with the fundamental objective of the *CPA* of providing enhanced access to justice: *Pearson v. Inco Ltd.* (2006), 79 O.R. (3d) 427 (Ont. C.A.), at para. 13.

10 I reject CN's argument that access to justice considerations are not involved because the Class Proceedings Fund will indemnify the representative plaintiff for any costs award. The Fund was created to facilitate access to justice. If the Fund were required to absorb steep cost awards imposed on litigants even though the proposed action displays the factors in s. 31(1) of the *CPA*, this would have an undesirable chilling effect on class proceedings.

11 On the other hand, it must be recognized that class actions come at a cost to defendants. Indemnifying parties — such as class counsel or the Law Foundation — must assess the risks of an unsuccessful litigation strategy and balance them against the possible rewards: see *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 1737, 87 C.P.C. (6th) 345 (Ont. S.C.J.), at para. 20. The risk of adverse cost awards must factor into the decision to fund and indemnify a proceeding. The *CPA* was never intended to insulate representative plaintiffs from the possible costs consequences of unsuccessful litigation: *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.* (2008), 93 O.R. (3d) 257 (Ont. C.A.), at para. 29.

12 Considering that the appeal raised novel legal issues and that the proposed class action engaged the access to justice rationale animating the *CPA*, I would fix costs at a significantly lower amount than is being claimed by CN. However, I would not give effect to the plaintiff and the Foundation's submission that an order of no costs — or, in the alternative, an award of not more than \$50,000 — would be fair and reasonable in this case. Given the complexity of the appeal, the amount at stake

in the litigation, and CN's complete success on appeal, in my view, costs of the appeal should be fixed on a partial indemnity scale at \$60,000, inclusive of disbursements and taxes.

John Laskin J.A.:

I agree

E.A. Cronk J.A.:

I agree

Order accordingly.

TAB 17

2015 ABQB 281
Alberta Court of Queen's Bench

McDonald v. Brookfield Asset Management Inc.

2015 CarswellAlta 864, 2015 ABQB 281, [2015] A.W.L.D. 2808, [2015] A.W.L.D. 2809, [2015] A.W.L.D. 2814, [2015] A.W.L.D. 2822, [2015] A.W.L.D. 2883, [2015] A.W.L.D. 2884, [2015] A.J. No. 531, 254 A.C.W.S. (3d) 92, 42 B.L.R. (5th) 255

Lanny K. McDonald, Plaintiff and Brookfield Asset Management Inc., Brookfield Special Situations Partners Ltd., and Hammerstone Corporation, Defendants

J. Strekaf J.

Heard: October 9, 2014

Judgment: April 30, 2015

Docket: Calgary 1401-05797

Counsel: John W. McDonald, for Plaintiff

Howard A. Gorman, Q.C., Allison Kuntz, for Defendants

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Securities; Torts

APPLICATION by defendants to have claim in putative class action struck and/or for summary dismissal.

J. Strekaf J.:

I Introduction

1 This claim involves a putative class action in which the proposed representative Plaintiff, Lanny K. McDonald, seeks to bring an action for oppression, breach of good faith and negligent misrepresentation on behalf of all primary and secondary market purchasers who held common shares in Birch Mountain Resources Limited ("Birch Mountain") between April 1, 2005 and November 5, 2008. Mr. McDonald is a shareholder and was a director of Birch Mountain from the time it was incorporated in 1995 until 2009.

2 The Defendants are Brookfield Asset Management Inc. (known as "Tricap"), its parent Brookfield Capital Partners Ltd. ("Brookfield Capital") and its wholly-owned subsidiary Hammerstone Corporation (previously known as 149342 Alberta Ltd and referred to herein as "Hammerstone").

3 This is an application by the Defendants to have the claim struck and/or for summary dismissal on the basis that the claim has no merit.

4 The claim alleges that Birch Mountain discovered a major limestone deposit on its oil sands properties in 2002 which was valued in August 2006 at \$1.6 billion and that Brookfield Capital, Tricap and Hammerstone engaged in oppressive conduct which included death spiral stock trading that caused the price of Birch Mountain shares on the TSX to collapse from \$7.99 on May 25, 2006 to \$0.01 on November 5, 2008, as well as a contrived interest default and contrived receivership which culminated in Hammerstone acquiring Birch Mountain for less than \$50 million. It is alleged that the Defendants breached duties of good faith owed to Birch Mountain and made negligent representations regarding the extent of their commitment to Birch Mountain. The claim alleges that Birch Mountain is an affiliate of the Defendants and that the members of the proposed class qualify as a "complainant" for the purpose of bringing an oppression action under the *Alberta Business Corporations Act*, RSA 2000, c B-9 (the "ABCAct") to recover damages for oppressive conduct and breach of their reasonable shareholder expectations.

5 The Defendants submit that the essence of the action is a collateral attack on orders granted in the receivership proceedings which were not appealed and that judicial acts are not actionable. They further submit that the action is *res judicata* and barred by cause of action estoppel as the current objections could have been put forward in the course of the receivership proceeding and as an Ontario Court already has determined that members of the proposed class do not have standing to bring the action under the similar oppressions provisions in the *Ontario Business Corporations Act*, RSO 1990, c B-16 (the "OBCA"). They deny that any negligent representations were made or that any duties of good faith were owed or breached.

II Facts

6 Birch Mountain was incorporated in 1995 and was a publicly-traded company that had focused since 2003 on developing a limestone quarry in the Athabasca region of northern Alberta. Birch Mountain had obtained a valuation of its limestone deposits at a pre-tax net present value of \$1.6 billion in 2006; however, it sustained operating losses from the outset.

7 On November 20, 2006 Birch Mountain issued \$30 million of 6.0% Convertible Unsecured Subordinated Debentures.

8 On March 30, 2007, Birch Mountain obtained a \$15.5 million senior secured one-year term credit facility from Brookfield Bridge Lending Fund Inc. ("Brookfield Bridge Lending") to bridge an expected increase in sales from operations estimated at 5.9 million tonnes from April through December 2007.

9 Sales during the period were only 750,000 tonnes and Birch Mountain committed several events of default between May and August 2007. Brookfield Bridge Lending agreed to waive events of default for the months ending July 31, 2007, August 31, 2007 and September 30, 2007 subject to the conditions set out in waiver letters dated September 27, 2007 and November 14, 2007.

10 On September 20, 2007, Birch Mountain issued a press release advising that it had established a special committee of its Board of Directors to explore strategic alternatives to enhance shareholder value, including a joint venture, merger, sale of the company or other corporate transactions and had appointed RBC Financial Markets as financial advisor.

11 On December 21, 2007, Tricap subscribed for a Convertible Secured Senior Debenture in the principal amount of \$31.5 million to enable Birch Mountain to repay the bridge loan and to provide additional capital. The Loan Agreement of the same date included an "entire agreement" clause. The Birch Mountain Board of Directors approved the Debenture and recommended to the Birch Mountain shareholders that they do so, which resolution was approved by 94% of the shareholders at the May 30, 2008 meeting.

12 In June and July 2008, Birch Mountain defaulted on interest payments due under the Debenture. Tricap and Birch Mountain entered into a Waiver and Amending Agreement dated August 1, 2008 for a fee of \$3 million by way of an increase to the principal indebtedness.

13 Birch Mountain issued a Press Release on August 14, 2008 stating that it had been advised that the American Stock Exchange intended to delist its shares because "the Company had sustained losses that are so substantial in relation to its overall operations, or its financial condition has become so impaired, that it appeared questionable as to whether the Company would be able to continue its operations and/or meet its obligations as they mature". In a Press Release issued on August 27, 2008 Birch Mountain advised that it was experiencing "serious financial difficulty" and provided details of the Waiver and Amending Agreement.

14 Tricap delivered a demand for repayment and Notice of Intention to enforce its security on October 31, 2008 pursuant to s. 244 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "BIA"). Birch Mountain executed a waiver of the notice period and consented to enforcement of Tricap's security.

15 On November 3, 2008, Birch Mountain issued a Press Release stating that it had received a demand from Tricap to enforce its security and that it was unable to pay its indebtedness to Tricap at that time. The Press Release went on to state:

It is expected that Tricap will begin enforcement proceedings this week. Whether or not a receiver will be appointed and whether or not such a receiver would continue the business operations of the Corporation is not known. ... At this time there appears to be little likelihood that there will be any recovery by the shareholders in the event of a liquidation or sale of the Corporation's assets. Upon appointment of a receiver, the powers of the board of directors will be suspended and ongoing decisions related to the Corporation will be undertaken by the receiver.

16 On November 4, 2008, Tricap commenced action #0801-13706 in the Court of Queen's Bench of Alberta against Birch Mountain to appoint a receiver. On November 5, 2008, Justice LoVecchio appointed Pricewaterhouse Coopers Inc. as Interim Receiver and Manager of Birch Mountain, the application having been on notice to Birch Mountain and unopposed by it or any other party.

17 On November 28, 2008, Tricap entered into an Assignment and Option Agreement whereby Great Pacific Capital Corp., the holder of \$29.28 million of the Convertible Unsecured Debentures, assigned its interest to 1439442 Alberta Ltd (now Hammerstone).

18 On December 17, 2008, Tricap offered to purchase all the assets of Birch Mountain for approximately \$42.4 million through a combination of forgiveness of debt and the assumption of certain third party claims against Birch Mountain.

19 The Receiver filed a report recommending acceptance of the Tricap offer and applied to the Court for an order approving the offer. That application was heard and granted on January 8, 2009 at which time the Court granted an order vesting all of Birch Mountain's assets free and clear (subject to the interests of Canadian Western Bank), in Tricap or its designated nominee, Hammerstone.

20 None of the orders granted in the receivership proceedings was appealed or otherwise challenged in that action by Birch Mountain or any other party.

III Analysis

A. The modern test for summary dismissal and striking pleadings

21 The Defendants apply for summary dismissal of the claim pursuant to Rule 7.3 and/or to strike the claim pursuant to Rule 3.68. Rule 7.3(1)(b) provides that a party may apply to the Court for summary judgment on the basis that "there is no merit to the claim or part of it". Rule 3.68(2)(c) and (d) provide that the Court may order all or any part of a claim to be struck out where the pleading is frivolous, irrelevant or improper or where it constitutes an abuse of process.

22 Recent decisions of the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 (S.C.C.) and of the Alberta Court of Appeal in *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108, 572 A.R. 317 (Alta. C.A.) provide guidance as to the modern approach to applications for summary judgment or to strike pleadings. As was noted in *Windsor* at paras. 12 and 13:

Modern civil procedure has come to recognize that a full trial is not always the sensible and proportionate way to resolve disputes. In *Canada (Attorney General) v Lameman* 2008 SCC 14 at para. 10, [2008] 1 SCR 372 the Supreme Court reacted to the traditional restrictive view by stating: "The summary judgment rule serves an important purpose in the civil litigation system. It prevents claims or defences that have no chance of success from proceeding to trial." In *R v Imperial Tobacco Canada Ltd.*, 2011 SCC 42 at para. 19, [2011] 3 SCR 45 the Supreme Court made similar comments about striking pleadings: "The power to strike out claims that have no reasonable prospect of success is a valuable housekeeping measure essential to effective and fair litigation. It unclutters the proceedings, weeding out the hopeless claims and ensuring that those that have some chance of success go on to trial." The test is whether there is "a reasonable prospect that the claim will succeed", not whether it is "plain and obvious" that no claim is disclosed (paras. 17, 21).

This modern trend has now been confirmed in *Hryniak v Mauldin*:

Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.

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

Summary judgment motions provide one such opportunity. ...

In interpreting these [new summary Judgment] provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial.

To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.

Summary judgment is now an appropriate procedure where there is no genuine issue requiring a trial:

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

The modern test for summary judgment is therefore to examine the record to see if a disposition that is fair and just to both parties can be made on the existing record.

23 Once an applicant for summary judgment establishes its case on a balance of probabilities, the evidentiary burden shifts to the respondent. As was noted by the Supreme Court of Canada in *Papaschase Indian Band No. 136 v. Canada (Attorney General)* [2008 SCC 14 (S.C.C.)] [hereinafter Lameman] at para 11:

For this reason, the bar on a motion for summary judgment is high. The defendant who seeks summary dismissal bears the evidentiary burden of showing that there is "no genuine issue of material fact requiring trial".... The defendant must prove this; it cannot rely on mere allegations or the pleadings... If the defendant does prove this, the plaintiff must either refute or counter the defendant's evidence, or risk summary dismissal... Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried... The chambers judge may make inferences of fact based on the undisputed facts before the court, as long as the inferences are strongly supported by the facts... [Citations omitted.]

B Evidence on the Application

24 The evidence put forward by the Defendants on this application is the affidavit of Richard Eng, Vice-President of Tricap, sworn June 19, 2014. The Plaintiff filed no evidence other than an affidavit of a consultant, David Johnston, who had no personal involvement in any of the matters alleged in the Amended Statement of Claim. Mr. Johnson had no involvement with Birch Mountain until he was retained in the fall of 2010 to prepare a report based upon his review of various documents. He was not presented or qualified as an expert. His affidavit consists entirely of hearsay and his nonexpert interpretation of various documents. It is of little or no evidentiary value. Both Mr. Eng and Mr. Johnson were questioned on their affidavits.

25 The Plaintiff, who was present in Court at the application, provided no affidavit evidence, despite having been a shareholder of Birch Mountain and a director thereof from its inception until the receivership in 2009. His counsel represented at the hearing of the application that Mr. McDonald would provide evidence in due course. The prospect of additional evidence being submitted at a later date is of no assistance to the Respondent in opposing the application before the Court, which is to be decided on the basis of the evidence that has been tendered. As the Supreme Court of Canada noted in *Lameman* at para. 19:

We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. ...

C Collateral Attack

26 The Plaintiff submits that Justice LoVecchio was not informed of various matters in the course of the receivership proceedings and that the default on the convertible debenture and the receivership were "contrived", with the result that Hammerstone was able to acquire the assets of Birch Mountain that had been valued at \$1.6 billion for \$50 million. The Plaintiff claims that the proposed class should be entitled to damages as a result.

27 The Defendants submit that the essence of the action constitutes a collateral attack on the receivership proceedings that culminated in a Court order approving the sale of Birch Mountain's assets to Hammerstone.

28 Birch Mountain, its directors and its shareholders (to the extent they reviewed public documents and press releases issued by Birch Mountain) were well aware of the financial difficulties Birch Mountain was facing and the steps being taken by the Defendants to realize on the Debenture, including seeking the appointment of a receiver and the sale of the assets. The Order appointing the receiver and subsequent orders were not opposed by Birch Mountain, by the Plaintiff, by any members of the proposed class or by any other party, and were not appealed or otherwise challenged by any party.

29 The well-established principle which prohibits a collateral attack on a final valid court order was summarized by McIntyre J in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.) at pp 502-503:

In the Manitoba Court of Appeal, Monnin J.A. said:

The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment. Where appeals have been exhausted and other means of direct attack upon a judgment or order, such as proceedings by prerogative writs or proceedings for judicial review, have been unavailing, the only recourse open to one who seeks to set aside a court order is an action for review in the High Court where grounds for such a proceeding exist. Without attempting a complete list, such grounds would include fraud or the discovery of new evidence.

30 In *Nash v. CIBC Trust Corp.* (1996), 7 C.P.C. (4th) 263 (Ont. Gen. Div.), Ground J applied the prohibition against collateral attack and summarily dismissed a class action brought on behalf of investors in certain companies where a receiver and manager had been appointed by court order. He stated at para. 38:

Essentially, the principle of collateral attack states that an order made by a court having jurisdiction is binding and conclusive, and cannot be attacked in a proceeding where the object of that proceeding is other than the reversal, variation or nullification of the order or judgment.

31 The Plaintiff submits that the collateral attack doctrine was not applied in *Royal Bank v. W. Got & Associates Electric Ltd.* (1994), 150 A.R. 93 (Alta. Q.B.) and should not be applied in this case. However, there is a key distinction between this case and *Got* where, as noted by McDonald J at para. 11, the challenge to the propriety of the *ex parte* receivership order was brought by way of a counterclaim in the receivership action:

As the application was essentially *ex parte*, the plaintiff had to act in the utmost good faith and make full, fair and candid disclosure of the facts. See the authorities cited in Stevenson & Côté, Civil Procedure Guide, R. 387(2) (p. 958). Such disclosure must include facts which would militate against the application: *Caisse Pop. de Morinville v Pasay*, (1982) 47 A.R. 311, at 316. If the order was obtained by fraud, or non-disclosure or misleading disclosure, the order might be challenged directly, as by an application to set it aside, or by appeal, but not collaterally i.e. not in a proceeding in which an attack is made on the order incidentally to the cause: *Wilson v R*, [1983] 2 S.C.R. 594 at 603. In my view, where, as in the present case, the validity of the order is challenged directly in the very action in which it was made, the challenge being made in the statement of defence and counterclaim, such a challenge may be the equivalent of a direct attack by an application to set the order aside or an appeal. I do not say that the challenge is bound to succeed if made in that manner, only that it is not barred if made in that manner. Whether, at trial, the challenge should succeed will depend upon a variety of circumstances.

32 I agree with the conclusion of the Court in *Nash* at para. 37 that *Got* is distinguishable because the challenge there was made directly in the receivership action, rather than collaterally.

33 To the extent that this action purports to challenge the propriety of the sale of the Birch Mountain assets to Hammerstone, it constitutes a collateral attack on the order for sale granted in the receivership action and the Defendants are entitled to summary dismissal of those aspects of the claim.

D Res Judicata and Issue Estoppel

34 The Defendants submit that the oppression claims advanced in the Statement of Claim are *res judicata* because the Ontario Courts have determined that members of the proposed class did not have standing to bring this action under the comparable provisions of the OBCA.

35 In *Bond v. Brookfield Asset Management Inc.*, 2011 ONSC 2529 (Ont. S.C.J.), affd 2011 ONCA 730, 18 C.P.C. (7th) 74 (Ont. C.A.), Perell J granted an order staying a similar action against the same defendants brought by another Birch Mountain shareholder on the grounds that the action had no real and substantial connection to Ontario and that Alberta was the proper forum.

36 In the course of his decision, Perell J concluded that even if Birch Mountain was a corporation for purposes of the OBCA, the plaintiff did not qualify as a "complainant" under the OBCA because she had not established that any of the Defendants was an "affiliate" of Birch Mountain. However, his decision on a procedural issue and his *obiter* comments on the meaning of "affiliate" under the OBCA, while they may be persuasive, do not give rise to *res judicata* in respect of an action brought in Alberta under the ABCA by another plaintiff.

37 The Defendants also submit that this action is barred by cause of action estoppel because the facts upon which the action is based were known to the Plaintiff at the time of the receivership and, with reasonable diligence, could have been put before the Court in that action. Cause of action estoppel arises where a question has been the subject of a final judicial decision involving the same parties where the basis of the subsequent cause of action was or could have been argued in the prior action if the parties had exercised reasonable diligence: *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2002 ABQB 238, 319 A.R. 119 (Alta. Q.B.). The essence of the Ontario decision was a procedural determination that Alberta, rather than Ontario, was the appropriate forum. The Plaintiff and the proposed class were not parties to the receivership action. As a result, this doctrine does not apply in the circumstances.

E Oppression Claim

38 The Plaintiff submits that he and the proposed class qualify as a "complainant" for the purpose of bringing an oppression claim under s. 242 of the ABCA. Section 239(b) defines complainant:

- (b) "complainant" means
 - (i) a registered holder or beneficial owner, or a former registered holder or beneficial owner, of a security of a corporation or any of its affiliate,
 - (ii) a director or an officer or a former director or officer of a corporation or of any of its affiliates,
 - (iii) a creditor
 - (A) in respect of an application under section 240, or
 - (B) in respect of an application under section 242, if the Court exercises its discretion under subclause (iv), or
 - (iv) any other person who, in the discretion of the Court, is a proper person to make an application under this Part.

39 The Defendants submit that neither Mr. McDonald nor the proposed class qualify as "complainants" as they are not shareholders, former shareholders, directors, former directors or creditors of the Defendants or of an affiliate of the Defendants. The Defendants deny that Birch Mountain was an "affiliate" of any of them as defined in the ABCA.

40 The Plaintiff submits that he and the proposed class qualify as "complainants" as they were shareholders of Birch Mountain, which they submit was an affiliate of the Defendants as defined in the Loan Agreement dated December 21, 2007. I need not determine whether the Plaintiffs meet that definition and make no comment in that regard. For the Plaintiff and/or the class to qualify as "complainants" for purposes of the oppression remedies under the ABCA, Birch Mountain must be an "affiliate" of the Defendants under the terms of that statute. Falling within the definition of "affiliate" under the Loan Agreement is not sufficient. Whether Birch Mountain in an "affiliate" of the Defendants for purposes of ss. 239(b) and 242 of the ABCA must be determined based upon the definitions in section 1(1)(b) and 2(1) the ABCA, which are:

In this Act,

...

- (b) "affiliate" means an affiliated body corporate within the meaning of section 2(1);

2(1) For the purposes of this Act,

- (a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person, and
- (b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

(2) For the purposes of this Act, a body corporate is controlled by a person if

- (a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and
- (b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

(3) For the purposes of this Act, a body corporate is the holding body corporate of another if that other body corporate is its subsidiary.

(4) For the purposes of this Act, a body corporate is a subsidiary of another body corporate if

(a) it is controlled by

(i) that other,

(ii) that other and one or more bodies corporate, each of which is controlled by that other, or

(iii) 2 or more bodies corporate, each of which is controlled by that other, or

(b) it is a subsidiary of a body corporate that is that other's subsidiary.

41 The Plaintiff submits that if the Convertible Debentures were converted to Birch Mountain shares, Tricap would have held more than 50% of the votes that may be cast to elect Birch Mountain's directors. The Plaintiff further submits that the Convertible Debentures were held as an "investment" rather than "by way of security".

42 I do not accept this submission as the Convertible Debentures were never converted into Birch Mountain shares and, until that occurred, the affiliate test was not met. I need not decide whether the shares were held "by way of security only".

43 I note that Justice Perell reached the same conclusion in *Bond* at paras. 60-62 when considering the comparable provisions of the OBCA, which finding was upheld by the Ontario Court of Appeal at para. 1.

44 The Plaintiff then submits that the Court should exercise its discretion under s. 239(b)(iv) of the ABCA to qualify the Plaintiff as a complainant for the purpose of bringing an oppression action. There is no evidence before me that would justify doing so in these circumstances.

45 As a result, neither the Plaintiff nor the proposed class qualifies as a "complainant" entitled to bring an oppression claim under the ABCA. Accordingly, the Defendants' application for summary dismissal of the portions of the claim based upon alleged oppression and s. 242 of the ABCA is granted.

F Breach of Good Faith

46 The Plaintiff submits he is relying on the good faith doctrine pursuant to which courts have found that a party who acts in a manner that substantially nullifies the objectives of a contract contrary to the original expectations of the parties breaches the implied duty of good faith in the performance of an agreement. He alleges that the Defendants eviscerated or defeated the objectives of the Loan Agreement, the Unsecured Subordinated Convertible Debenture and the Senior Secured Convertible Debenture for their own monetary gain.

47 The Supreme Court of Canada recently reviewed the scope of the doctrine of good faith in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.). However, the doctrine has no application in the circumstances of this case where the Defendants were not in a contractual or fiduciary relationship with the Plaintiff or the members of the proposed class. In the absence of such a relationship, the Defendants owed no duty of good faith to the Plaintiff or the members of the proposed class and there is no independent tort of bad faith. The Defendants' application for dismissal of the portions of the claim based upon an alleged breach of a duty of good faith is granted.

G Negligent Misrepresentation

48 In the *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at para 33, the Supreme Court of Canada identified the five elements that must be established in a claim for negligent misrepresentation:

a) a duty of care based on a "special relationship" between the parties

b) representations that were untrue, inaccurate or misleading

- c) the representor must have acted negligently in making the misrepresentations
- d) the representee must have relied, in a reasonable manner, on the misrepresentations; and
- e) the reliance must have been detrimental in the sense that damages resulted.

49 In *Hercules Management Ltd. v. Ernst & Young*, [1997] 2 S.C.R. 165 (S.C.C.) at para 20, the Supreme Court confirmed the usual test to determine whether a duty of care in tort exists:

- a) Is there sufficient proximity between the parties that the defendant would reasonably contemplate that carelessness on its part might cause damage to the plaintiff?
- b) Are there any considerations which ought to limit the scope of that duty?

50 The Plaintiffs allege that the Defendants were in a special relationship with Birch Mountain, that of wealthy professional investor and under-funded developing borrower, and owed a duty of care to the Birch Mountain common shareholders arising out of the terms and conditions of various agreements, including the Loan Agreement, the Unsecured Subordinated Convertible Debentures and the Senior Secured Convertible Debenture.

51 The agreements in question were between Birch Mountain and the Defendants and their debtor/creditor relationship was governed by the terms of those agreements. Absent some unique special relationship or exceptional circumstances, a lender owes no duty of care to a borrower: *Bossé v. Mastercraft Group Inc.* (1994), 3 C.C.L.S. 264 (Ont. Gen. Div.) at para 51 and *CareVest Capital Inc. v. Chyhrun*, 2008 BCSC 201, 55 C.C.L.T. (3d) 75 (B.C. S.C.) at para 17. The relationship between the Birch Mountain shareholders and the Defendants is even more remote. There is no evidence before me that establishes any special relationship between the Defendants and the shareholders of Birch Mountain that would give rise to a duty of care.

52 The alleged representations upon which the Plaintiff relied include the following:

- a) A statement on the Brookfield website that Tricap has a "long term perspective", that it "targets transactions in which it can invest between \$50 million and \$500 million", and that it "has a 3 to 7 year investment horizon".
- b) Various press releases stating that Tricap was "established to provide a "source of patient, long term capital and strategic assistance to mid-market companies".

53 These alleged representations were general statements about Tricap's business rather than specific representations directed at Birch Mountain or its shareholders. To the extent that these are viewed as representations of a past or existing fact, there is no evidence to suggest that they are false. To the extent they are viewed as a representation as to future conduct, they are not actionable.

54 There is no evidence that the statements were made negligently or that they were relied upon by any members of the proposed class. Moreover, it is not apparent how any such reliance could be reasonable in the face of Birch Mountain entering into detailed loan agreements that set out the rights and obligations of each party, some of which contained "entire agreement" clauses.

55 The Plaintiff's claims based upon negligent representation raise no genuine issue requiring trial and are dismissed.

H Allegations of Death Spiral Stock Trading

56 The Plaintiff alleges that the Defendants are responsible for death spiral stock trading that caused the price of Birch Mountain common shares on the TSX to collapse from \$7.99 on May 26, 2006 to \$0.01 on November 5, 2008.

57 In his affidavit, Rick Eng stated that at no time did Tricap or Hammerstone exercise any right to convert any Birch Mountain debt into Birch Mountain shares, that none of the Defendants ever owned or was a short seller of Birch Mountain

shares, that the Defendants have no knowledge of and did not participate in trading any Birch Mountain shares. No evidence has been put forward by the Plaintiff that contradicts this evidence. Therefore, the Defendants have established that there is no genuine issue requiring trial in respect of this allegation.

V Conclusion

58 The Plaintiff's action is dismissed in its entirety as I am satisfied that there is no merit to the claim, or any part of the claim.

59 If the parties are unable to agree on costs, they may file written submissions within 30 days of the date of these reasons.

Application granted; action dismissed.

2016 ABCA 375
Alberta Court of Appeal

McDonald v. Brookfield Asset Management Inc.

2016 CarswellAlta 2308, 2016 ABCA 375, [2016] A.J. No. 1263, [2017] A.W.L.D. 401,
[2017] A.W.L.D. 413, [2017] A.W.L.D. 422, [2017] A.W.L.D. 509, 274 A.C.W.S. (3d) 95

Lanny K. McDonald (Appellant / Plaintiff) and Brookfield Asset Management Inc., Brookfield Special Situation Partners Ltd. and Hammerstone Corporation (Respondents / Defendants)

Catherine Fraser C.J.B.C., Frans Slatter J.A., and Brian O'Ferrall J.A.

Heard: June 15, 2016

Judgment: December 5, 2016

Docket: Calgary Appeal 1501-0131-AC

Proceedings: affirming *McDonald v. Brookfield Asset Management Inc.* (2015), 42 B.L.R. (5th) 255, 2015 CarswellAlta 864, 2015 ABQB 281, J. Strekaf J. (Alta. Q.B.)

Counsel: J.W. McDonald, for Appellant

H. Gorman, Q.C., A. Badami, for Respondent

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Securities; Torts

APPEAL by proposed representative plaintiff, from judgment reported at *McDonald v. Brookfield Asset Management Inc.* (2015), 2015 ABQB 281, 2015 CarswellAlta 864, 42 B.L.R. (5th) 255 (Alta. Q.B.) granting summary judgment to defendant company.

Per curiam:

1 The plaintiff appeals the summary dismissal of this action: *McDonald v. Brookfield Asset Management Inc.*, 2015 ABQB 281 (Alta. Q.B.). The action was a proposed class action on behalf of shareholders arising from a failed investment known as Birch Mountain Resources. Birch Mountain was initially thought to own a quarry with a value of \$1.6 billion, but it was unable to fund its operations, and its assets were sold under receivership for less than \$50 million.

Facts

2 Birch Mountain Resources Limited was a publicly traded company focussed at the relevant time on developing a limestone quarry it had discovered in northern Alberta. At one point the quarry was valued at \$1.6 billion, but Birch Mountain had trouble funding its operations from the outset. Birch Mountain eventually lost the quarry in receivership proceedings when it was unable to meet its obligations.

3 The plaintiff McDonald was a director and shareholder of Birch Mountain. He brings this action as a potential class action on behalf of all those who held common shares of Birch Mountain between April 2005 and November 2008.

4 The defendants Brookfield Asset Management Inc., Brookfield Special Situations Partners Ltd. (sometimes known as "Brookfield Capital Partners Ltd." or "Tricap Partners"), and Hammerstone Corporation are a part of a group of venture capital companies that attempt to identify and then invest in companies with potential, but facing business challenges. The defendants' business model is to provide financial and operating experience, as well as capital, to these companies with a view to eventual profit.

5 The ultimate demise of Birch Mountain, and the source of this claim, can be traced to a number of financial transactions and events between 2006 and 2008:

- a) Birch Mountain issued \$30 million of Convertible Unsecured Subordinated Debentures in November 2006 (EKE A65). Great Pacific Capital Corp. was or became the holder of \$29.28 million of those debentures.
- b) In March 2007 Birch Mountain obtained a \$15.5 million senior secured one year term credit facility from Brookfield Bridge Lending Fund, which was designed to bridge cash requirements pending an expected increase in sales from operations by December 2007.
- c) The anticipated increase in sales did not materialize, and Birch Mountain committed events of default under the bridge loan between May and August 2007. Brookfield Bridge Lending agreed to waive those defaults in July, August and September 2007, on various conditions.
- d) In September 2007, Birch Mountain established a special committee to explore strategic alternatives for the company.
- e) In December 2007, Tricap subscribed for a \$31.5 million Convertible Secured Senior Debenture (EKE A71) under the terms of a blanket Loan Agreement. The proceeds were to be used to pay off the \$15.5 million bridge loan to Brookfield Bridge Lending Fund, and to provide additional capital. The Birch Mountain Directors recommended this transaction, and in May 2008 it was approved by a 94% vote of the shareholders.
- f) In June and July 2008, Birch Mountain defaulted on interest payments due under the Convertible Secured Senior Debenture. Tricap and Birch Mountain entered into a Waiver and Amending Agreement in August 2008 with respect to these defaults, in return for a fee of \$3 million which was funded by an increase in the principal indebtedness. This agreement waived certain existing defaults, and granted Birch Mountain a "covenant holiday" under the Loan Agreement.
- g) In August 2008 the American Stock Exchange signalled an intention to delist the Birch Mountain shares because of the company's impaired financial condition, and Birch Mountain advised in a press release that it was experiencing serious financial difficulty.
- h) On October 31, 2008 Tricap commenced enforcement of its security. Birch Mountain executed a waiver of the notice period, and consented to the enforcement of the security.
- i) On November 3, 2008, Birch Mountain issued a press release advising that it was unable to pay its indebtedness, and that Tricap had commenced enforcement of its security. The press release noted that a receiver might be appointed, but that the receiver might not continue to operate the business of the Company.
- j) An Interim Receiver and Manager was appointed by the Court on November 5, 2008. The application for a receiver was made on notice to Birch Mountain, and was not opposed by Birch Mountain or any other party.
- k) At this time Great Pacific Capital Corp. was the holder of \$29.28 million of the Convertible Unsecured Subordinated Debentures issued in November 2006. On November 20, 2008 Great Pacific entered into an agreement with Tricap to assign its interests to Tricap's subsidiary Hammerstone.
- l) The receiver attempted to find a buyer for the Birch Mountain quarry, but was unsuccessful despite contacting approximately 146 potential purchasers. On December 17, 2008 Tricap offered to purchase all of the assets of Birch Mountain through Hammerstone for \$42.4 million, through a combination of forgiveness of debt and assumption of third party claims against Birch Mountain.
- m) The receiver recommended acceptance of the Tricap offer, and the sale was approved by the Court on January 8, 2009. None of the orders granted in the receivership proceedings (including the receivership order itself and the order selling the Birch Mountain assets to Hammerstone) were appealed.

As a result of the defaults and the eventual judicial sale of the quarry to Hammerstone, the shares of Birch Mountain lost all of their value, motivating this action.

6 Another shareholder initiated the claim in Ontario, but the action was stayed because there was no real and substantial connection to that jurisdiction: *Bond v. Brookfield Asset Management Inc.*, 2011 ONSC 2529 (Ont. S.C.J.), aff'd 2011 ONCA 730, 18 C.P.C. (7th) 74 (Ont. C.A.). The claim was then continued in Alberta in this action by the new representative plaintiff. Before an application could be heard to certify it as a class proceeding, the defendants brought an application for summary dismissal.

7 The chambers judge summarily dismissed the action, concluding that there was no substantial evidence on the record showing any "merit" to the claims (reasons, para. 25). She concluded that, to a large extent, the claim amounted to a collateral attack on the unopposed and unappealed receivership order (reasons, para. 33).

8 The chambers judge concluded that the plaintiff class did not qualify as "complainants" for the purposes of the corporate oppression remedy (reasons, para. 45). The statement of claim alleges that the defendants were "affiliates" of Birch Mountain, because if the Convertible Secured Senior Debentures were in fact converted to common shares, the defendants would fall into the definition of "affiliate" in s. 2 of the *Business Corporations Act*, RSA 2000, c. B-9. Alternatively, the statement of claim alleged that the defendants were "affiliates" because of certain provisions of the loan agreements. If the defendants were affiliates, then the plaintiff alleged that they had conducted the business of Birch Mountain in a way that was oppressive or unfairly prejudicial to the proposed class. The chambers judge rejected the argument that the defendants were "affiliates" of Birch Mountain (reasons, para. 42). The chambers judge agreed with the Ontario decision in *Bond v. Brookfield Asset Management Inc.* that a creditor is not to be regarded as a shareholder for the purpose of determining if two companies are affiliates prior to actual conversion of a debt instrument into shares (reasons, para. 43).

9 The chambers judge dismissed the claim based on the "good-faith doctrine", on the basis that this claim was a part of the law of contract, the proposed class did not have any contractual relationship with the defendants, and there was no independent tort of bad faith (reasons, para. 47).

10 The chambers judge outlined the requirements for a claim of negligent misrepresentation, as set out in cases like *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at p. 110. She concluded that the "special relationship" needed to maintain this claim did not exist between a creditor and a borrower (reasons, para. 51). In any event, there was no evidence to suggest that the representations complained of were false, that they were made negligently, or that they were relied on (reasons, paras. 53-4).

11 The end result was that the chambers judge dismissed the claim in its entirety, because the plaintiff failed to provide any substantive evidence to support the oppression, the misrepresentation, or the bad faith claims. The plaintiff appeals, and seeks to introduce fresh evidence on appeal.

Standard of Review

12 Questions of law, such as the interpretation of the Rules of Court and any conclusions about the applicable law arising in the summary judgment application are reviewed for correctness. The chambers judge's assessment of the facts based on the record before the court, the application of the law to those facts, and the ultimate determination on whether summary judgment is appropriate are all reviewed for palpable and overriding error: *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) at paras. 81-4, [2014] 1 S.C.R. 87 (S.C.C.); *Amack v. Yu*, 2015 ABCA 147 (Alta. C.A.) at para. 27, (2015), 24 Alta. L.R. (6th) 44 (Alta. C.A.); *Windsor v. Canadian Pacific Railway*, 2014 ABCA 108 (Alta. C.A.) at para. 10, (2014), 94 Alta. L.R. (5th) 301, 572 A.R. 317 (Alta. C.A.).

The Test for Summary Dismissal

13 Rule 7.3 provides that an action can be summarily dismissed if there is "no merit to a claim or part of it". The onus is first on the defendant to bring forward evidence indicating an absence of merit. If that is done, the plaintiff must provide some evidence of "merit", which often involves demonstrating that there are difficult questions of fact or law that cannot fairly be

resolved summarily. The plaintiff is not required, at this stage, to demonstrate that the action will succeed, or to show that there is merit on a balance of probabilities. The application for summary dismissal can successfully be resisted without proving the case to the normal civil standard.

14 Summary judgment is an appropriate procedure where there is no genuine issue requiring a trial, which comes down to whether the chambers judge is able to reach a fair and just determination on the merits on the application for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result. The summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims: *Hryniak v. Mauldin* at paras. 4, 5, 49; *Amack v. Yu* at para. 26; *Windsor v. Canadian Pacific Railway* at para. 13.

The State of the Record

15 A plaintiff who is responding to a summary dismissal application cannot just rely on the contents of the pleadings, or speculation about what might be proved at trial. The respondent must "put its best foot forward" and meet the application for summary dismissal with evidence showing merit:

A summary judgment motion cannot be defeated by vague references to what may be adduced in the future, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future: *Canada (Attorney General) v Lameman*, 2008 SCC 14 at para. 19, [2008] 1 SCR 372.

This action was dismissed primarily because the plaintiff failed to provide any substantive evidence showing merit.

16 The defendants applied for summary dismissal based on a detailed affidavit rebutting and denying all of the allegations made. The only evidence the plaintiff brought to the summary dismissal application was an affidavit of David Johnson, a consultant working with the plaintiff's counsel; neither the named plaintiff nor any member of the proposed class provided any evidence. Johnson had no personal involvement with or personal knowledge about the events underlying the claim. His affidavit primarily identified, and attached as exhibits, a large number of publicly available documents relating to the business and financing of Birch Mountain. The defendants accurately describe it as a "secretarial affidavit" that "occasionally makes bald unsupported assertions about [their] motives and supposed wrongdoing". The chambers judge concluded that the affidavit and the attached documents, on their face, did not show any possible merit to the claim.

17 The chambers judge's assessment of the plaintiff's evidence was:

24 . . . Mr. Johnson had no involvement with Birch Mountain until he was retained in the fall of 2010 to prepare a report based upon his review of various documents. He was not presented or qualified as an expert. His affidavit consists entirely of hearsay and his non-expert interpretation of various documents. It is of little or no evidentiary value . . .

The plaintiff argues that this passage discloses reviewable error, because a respondent to a summary dismissal application can rely on hearsay. He cites R. 13.18(3), which provides that hearsay evidence can be used when the relief requested is not "final", and *Court v. Debaie*, 2012 ABQB 640 (Alta. Q.B.) at para. 34, (2012), 550 A.R. 231 (Alta. Q.B.).

18 It is, however, too narrow a reading of the reasons to conclude that the only objection to the evidence was its hearsay nature. The chambers judge's overall assessment of the evidence was that it had no probative value for many reasons, including the fact that it deserved little weight because it was all hearsay: *Murphy Oil Co. v. Predator Corp.*, 2006 ABCA 69 (Alta. C.A.) at paras. 38-40, (2006), 55 Alta. L.R. (4th) 1, 384 A.R. 251 (Alta. C.A.). For example, a contract exhibited to the affidavit would show that there was a contract, but would not show any breach. Other documents may have shown representations, but they would not show that those representations were inaccurate, were negligently made, were relied on, or that any reliance was reasonable. Merely appending these documents to the affidavit did not show any merit to the claims set out in the statement of

claim. The affidavit purports to provide opinions and draw conclusions on issues of business management, banking and finance, public investment, accounting, and law, and speculates imaginatively on the motives and intentions of the defendants. As noted, Mr. Johnson was not qualified as an expert witness, and it is unlikely that he is a mind reader. The chambers judge did not err in attributing "little or no evidentiary value" to this affidavit.

19 The plaintiff sought to overcome this evidentiary deficiency by applying to introduce fresh evidence on appeal in the form of an affidavit of the named plaintiff. The test for introducing fresh evidence originates in *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.) and has been applied in civil cases like *Xerex Exploration Ltd. v. Petro-Canada*, 2005 ABCA 224 (Alta. C.A.) at paras. 116-117, (2005), 367 A.R. 201 (Alta. C.A.):

- a) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial,
- b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial,
- c) The evidence must be credible in the sense that it is reasonably capable of belief, and
- d) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

It is immediately apparent that the tendered affidavit of the plaintiff does not meet the first part of the test, because there is no reason why he could not have sworn an affidavit before the original application.

20 The plaintiff argues that the substantive parts of the new evidence could not be produced at the application, even with due diligence, because some of it has only recently been discovered. The plaintiff deposes that the widow of Mr. Rowe, a former president of Birch Mountain, provided a computer hard drive to the plaintiff in June 2014. The plaintiff deposes that it took two months to obtain a computer that could read the hard drive, and a full 14 months to download all the documents. The summary dismissal application was argued on October 9, 2014, and the defendants' objections to the insufficiency of the record would have been well known at that time. The reserved decision was released on April 30, 2015, suggesting that there was ample time to supplement the record, or at least advise the chambers judge that further critical evidence was being uncovered during the downloading from the hard drive.

21 The absence of due diligence on the part of the plaintiff is significant in a summary dismissal application. As was pointed out in *Papaschase Indian Band No. 136 v. Canada (Attorney General)* [2008 CarswellAlta 398 (S.C.C.)], it undermines the rationale of the summary judgment rule if the plaintiff can ignore the obligation to produce evidence of merit before the trial court, and then rely on a fresh evidence application on appeal to defeat summary dismissal.

22 The plaintiff Bond in the Ontario case apparently had sufficient particulars to commence her action advancing the same claims. The present plaintiff's counsel had drafted a lengthy, detailed statement of claim in September 2010, and turned it into a 69 page (168 paragraph) amended statement of claim by May 2014. The causes of action now being advanced, and many of the particulars, were known by then, and there was no reason why the named plaintiff could not have sworn an affidavit depositing to any merit in the claim. Counsel for the plaintiff advised the chambers judge (reasons, para. 25) that the plaintiff "would provide evidence in due course"; this is directly contrary to the rule in *Lameman*. The hard drive from the Rowe estate may have provided more evidence, but the appellant only had to introduce enough evidence to show an issue requiring a trial. As previously noted the respondent to a summary dismissal application does not have to prove the case on a balance of probabilities. Given the amount of detail in the statement of claim, it is difficult to believe that the plaintiff was not able to depose to any merit prior to the summary dismissal application being argued.

23 In addition to the absence of due diligence, the tendered new evidence cannot reasonably be thought to affect the outcome, as will be seen from the balance of these reasons.

The "Merit" of the Action

24 The plaintiff proposes to advance three causes of action on behalf of the class of shareholders:

- a) negligent misrepresentation,
- b) oppressive conduct in the operation of the business of Birch Mountain, and
- c) what is described as "the good faith doctrine".

The ultimate issue on the summary dismissal application was whether the plaintiff had shown sufficient "merit" in these claims to send the matter to trial. Put another way, was the state of the record such that the chambers judge could reach a fair and just determination on the merits on the motion for summary judgment. An analysis shows that the chambers judge correctly concluded that there is no merit shown on this record to any of these claims.

Negligent Misrepresentation

25 The plaintiff acknowledges five essential components of a claim of negligent misrepresentation:

- (a) a duty of care based on a special relationship,
- (b) misrepresentations that were untrue, inaccurate or misleading,
- (c) negligence in making the misrepresentations,
- (d) detrimental reliance, and
- (e) resulting damage.

The weight of the case law suggests that creditors are not generally in a special relationship with borrowers giving rise to a duty of care: *Pierce v. Canada Trustco Mortgage Co.* (2005), 254 D.L.R. (4th) 79 (Ont. C.A.) at paras. 26-7, (2005), 197 O.A.C. 369 (Ont. C.A.); *CareVest Capital Inc. v. Chychrun*, 2008 BCSC 201 (B.C. S.C.) at para. 17, (2008), 55 C.C.L.T. (3d) 75 (B.C. S.C.). The shareholder class has an even more remote connection to the defendant lenders than Birch Mountain, the principal debtor. It is, however, not necessary to resolve whether the defendants, as financiers of Birch Mountain, owed any duty to the class of shareholders of that corporation, as the proposed negligent misrepresentation claim fails to meet several of the other requirements.

26 The amended statement of claim pleads a number of discrete misrepresentations. The chambers judge summarized at para. 52 the misrepresentations complained of:

- a) A statement on the Brookfield website that Tricap has a "long term perspective", that it "targets transactions in which it can invest between \$50 million and \$500 million", and that it "has a 3 to 7 year investment horizon".
- b) Various press releases stating that Tricap was established to provide a "source of patient, long term capital and strategic assistance to mid-market companies".

All of the alleged misrepresentations are related to the Brookfield group's stated corporate philosophy, and were said to be made on its public website. They disclosed that Brookfield's business model was to provide "strategic assistance" to companies with potential but experiencing financial or operational difficulties, and to provide the necessary operational and financial assistance to turn them around. It is clear that these alleged misrepresentations were known well before the fresh evidence was received from the Rowe estate.

27 In December 2007 Tricap and Birch Mountain both issued press releases, on the issuance of the Senior Secured Convertible Debenture, which noted that Tricap's business model was to be a "source of patient, long term capital". The Loan Agreement allowed Tricap to review (acting reasonably) any public disclosures relating to "this Agreement or the Credit Facilities". The plaintiff argues that this provides some link between the representations about Tricap's business model and the business of Birch

Mountain. There is, however, no evidence that any press release was inaccurate, or negligently prepared, or that any member of the shareholder class reasonably relied on one.

28 The plaintiff's essential complaint is that the defendants arguably did not follow their own corporate philosophy and guidelines in their investment in Birch Mountain. Firstly, the plaintiff notes that Brookfield only invested about \$35 million in Birch Mountain, below its target threshold of \$50 million. Further, when the loans went into default the defendants commenced enforcement proceedings before their own 3 to 7 year investment horizon had been reached. The plaintiff alleges that "long term patient capital" would have waited longer. The argument is therefore not that the representations were inaccurate when made, but that with hindsight the defendants' corporate objectives were not achieved.

29 It is clear that there is no "merit" to the allegations that these general statements of corporate philosophy could support a claim in negligent misrepresentation, either in their original form on the defendants' website, or as repeated in the press releases:

- There is no evidence that these statements are in any respect inaccurate. There is no evidence that Brookfield's corporate philosophy was other than as stated.
- There is likewise no evidence that the statements are in any respects "negligent". There is no evidence that someone at Brookfield negligently set out the corporate philosophy on the website.
- There is no evidence that any class member relied on the representations prior to making an investment in Birch Mountain.
- There is, in any event, no evidence that any class member relied on the particular interpretation of the representations alleged by the plaintiff. In other words, no class member has deposed that he or she thought Brookfield would unconditionally keep investing money until it reached the \$50 million threshold. There is no evidence that any class member thought that Brookfield would not enforce its lending agreements, notwithstanding any defaults, for at least three years.
- Finally, and conclusively, if any class member did purport to rely on this latter interpretation of the representations, such reliance would be patently unreasonable. It would be unreasonable for any investor to rely on a general statement of corporate philosophy as if it was a guarantee that no less than \$50 million would be invested for no shorter than a three year period, notwithstanding any defaults, and no matter what happened with the investment along the way.

When considered holistically and in context, it is clear that the claim based on negligent misrepresentation has no merit.

Oppressive Conduct

30 The plaintiff alleges oppressive conduct in the operation of Birch Mountain's business. The underlying theory is that the defendants lent money to Birch Mountain as part of a long term scheme to obtain the limestone quarry, which had been valued at \$1.6 billion, for a fraction of that value. The theory is that the defendants instigated or participated in a number of transactions that had little or no legitimate business purpose, and were designed to unjustly transfer the value of the limestone quarry to the defendants.

31 Many of the plaintiff's complaints relate to transactions that allegedly damaged Birch Mountain. Any claim for damages arising from those transactions would properly belong to the corporation, not the shareholders; the shareholders could only apply to advance a derivative claim.

32 Secondly, many of the complaints involve a collateral attack on the orders made in the receivership proceedings:

- (a) An allegation that is inconsistent with one of the fundamental or necessary findings of an order amounts to a collateral attack; it is not necessary that there be an application to set aside the order: *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.*, 2003 ABCA 34 (Alta. C.A.) at paras. 47, 52, (2003), 10 Alta. L.R. (4th) 23, 320 A.R. 351 (Alta. C.A.); *Ernst & Young Inc. v. Central Guaranty Trust Co.*, 2006 ABCA 337 (Alta. C.A.) at paras. 47-51, (2006), 66 Alta. L.R. (4th) 231, 397 A.R. 225 (Alta. C.A.).

(b) Any argument that there were in fact no genuine defaults of the loan agreements, or that the loan agreements were somehow unenforceable or breached by the defendants would be inconsistent with the orders made during the receivership.

(c) Further, the plaintiff alleges that the affidavits provided in support of the receivership order were "misleading", and that material information was withheld from the Court. It must be remembered that the application for the receivership order was not *ex parte*; it was on notice, unopposed, and unappealed. Any allegation that the receivership order was improperly obtained is a clear collateral attack on that order.

(d) Likewise, it is alleged that the affidavits in support of the eventual sale of the Birch Mountain assets to Hammerstone were incomplete, or inaccurate, or failed to disclose some information. These arguments all amount to collateral attacks on the unappealed sale order.

To the extent that the claim for an oppression remedy relies on any of these arguments, the claim is barred by the rule against collateral attacks on final orders of the Court.

33 The plaintiff relies on the anomalous decision in *Royal Bank v. W. Got & Associates Electric Ltd.*, [1999] 3 S.C.R. 408 (S.C.C.). That case is distinguishable, because the claim for damages was advanced in a counterclaim in the receivership action itself. The effect of the decision was that the *in rem* portion of the action represented by the receivership order was allowed to proceed, while the *in personam* claim for damages was preserved: *David M. Gottlieb Professional Corp. v. Nahal*, 2012 ABCA 88 (Alta. C.A.) at para. 19, (2012), 522 A.R. 25 (Alta. C.A.).

34 In any event, the record does not support the plaintiff's overall theory that the defendants were engaged in a scheme to obtain the quarry below its actual value. There were at least three occasions when the defendants made decisions which were inconsistent with any such plan:

(a) Brookfield Bridge Lending agreed to waive defaults under the bridge loan in July, August and September 2007.

(b) In December 2007, Tricap subscribed for the \$31.5 million Convertible Secured Senior Debenture to pay off the \$15.5 million bridge loan to Brookfield Bridge Lending Fund which was in default.

(c) In August 2008 Tricap agreed to waive defaults under the Convertible Secured Senior Debenture.

If the defendants were engaged in a long term plan to obtain the quarry, they let it slip through their fingers on at least these three occasions. Rather than waiving defaults, or providing additional funds to cure defaults, the defendants could have commenced enforcement of their security. Their conduct in attempting to keep Birch Mountain going is inconsistent with the plaintiff's thesis.

35 Most, if not all, of the oppression claim depends on the plaintiff class demonstrating that the defendants and Birch Mountain were "affiliates". That involves showing that the defendants were deemed by statute to have a controlling interest in Birch Mountain by reason of the convertible debt they held, even though the debt had not been converted into shares. The argument then picks up the definition of oppressive conduct in s. 242(2) of the *Act*, that the "corporation or *any of its affiliates*" conducted the business of the corporation (i.e., Birch Mountain) in an oppressive way. The shareholder class argues that the financial decisions that the defendants (as "affiliates") made respecting their dealings with Birch Mountain actually amounted to "conducting the business of Birch Mountain", not conducting the defendants' own business.

36 The *Act* defines "affiliate" as follows:

2(1) For the purposes of this Act,

(a) one body corporate is affiliated with another body corporate if one of them is the subsidiary of the other or both are subsidiaries of the same body corporate or each of them is controlled by the same person, and

(b) if 2 bodies corporate are affiliated with the same body corporate at the same time, they are deemed to be affiliated with each other.

(2) For the purposes of this Act, a body corporate is controlled by a person if

(a) securities of the body corporate to which are attached more than 50% of the votes that may be cast to elect directors of the body corporate are held, other than by way of security only, by or for the benefit of that person, and

(b) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the body corporate.

When affiliation is said to arise as a result of "control" there is a two part test: holding 50% of the votes plus the ability to elect a majority of the directors.

37 A person holding unexercised rights to convert securities into voting shares has no votes, much less 50% of the votes. Such a person does not have the ability to elect a majority of the directors. Absent "control" as defined in the statute, there is no affiliation. The *Act* does not contemplate any sort of *de facto* "control" apart from that specifically defined in s. 2.

38 For the reasons given by the chambers judge (*supra*, para. 8) and by the Ontario courts in *Bond v. Brookfield Asset Management Inc.*, the members of the proposed class do not qualify as "complainants" for the purposes of advancing the pleaded oppression claim. A lender holding a convertible debt instrument does not obtain voting rights until the conversion option is actually exercised. Accordingly, Birch Mountain and the defendants were not "affiliates" under the *Act*. Whether companies are affiliates for the purposes of the oppression remedy depends on the definitions in the statute, not the terms of the loan agreements between them.

39 On behalf of the class, the plaintiff alleges oppressive conduct arising from a number of discrete transactions: the "contrived interest default", "death spiral stock trading", the terms of the Tricap Amending Agreement, and the Great Pacific transaction. Even if the members of the proposed class qualified as complainants, the record does not disclose any merit to these claims.

The "Contrived Interest Default"

40 The factual context relates to the South Haul Road that was built to access the Birch Mountain quarry. The South Haul Road was built by Birch Mountain, but it was entitled to receive proceeds (approximately \$4.8 million) from some of the major oil companies that had acquired an interest in the road.

41 Birch Mountain wanted to use the South Haul Road proceeds as part of its general cash flow. The original Loan Agreement did not deal with these funds other than as part of "all present and after acquired personal property" of Birch Mountain. The August 2008 Waiver and Amending Agreement (EKE R287), however, specifically dealt with the issue. It provided that the South Haul Road proceeds would be held in escrow, but they could be released to pay pre-approved expenditures, on certain conditions, one being that Birch Mountain was not in default under the Loan Agreement.

42 Interest was payable by Birch Mountain on the Convertible Unsecured Subordinated Debentures. The failure to pay that interest would adversely affect Birch Mountain's financial reputation in the public markets, and likely be deemed a further default under the Tricap financing as well. Birch Mountain did not have funds available to pay that interest, but Tricap consented to the interest being paid out of a new issue of equity. Birch Mountain wanted to pay the interest out of the South Haul Road funds, but Tricap would not agree. Tricap took the position that it would not agree to payments to junior creditors while there were any defaults under the senior debt. In the end, Tricap's position prevailed, which was one of the events that led to Birch Mountain's eventual receivership.

43 The plaintiff alleges that Birch Mountain's default in paying the interest was "contrived". He alleges that under a proper interpretation of the Loan Agreement, the South Haul Road cost recovery was not within the category of funds that had to be paid to Tricap. Thus, the plaintiff alleges that any default was "contrived" because of conduct of the defendants in refusing to

acknowledge that the South Haul Road proceeds were freely available to Birch Mountain to pay the interest on the Debentures. The obvious barrier to this argument is that it is inconsistent with the uncontested and unappealed receivership order. That order found that the Tricap Loan Agreement was valid and enforceable, and implicitly held that there were no defaults by Tricap precluding enforcement. Any inconsistent argument is a collateral attack on the receivership order.

44 Secondly, this argument ignores the detailed covenants in the Waiver and Amending Agreement that specifically dealt with the use of the proceeds of the South Haul Road. Whatever the status of the South Haul Road proceeds under the general wording of the Loan Agreement, the specific terms of the later Waiver and Amending Agreement would prevail.

45 In addition, the position taken by the plaintiff is inconsistent with that taken by Birch Mountain at the time. The officers of Birch Mountain essentially conceded that Tricap was entitled to control the South Haul Road proceeds; the efforts of the officers were to obtain Tricap's consent to the use of these funds to pay the interest, not to convince it that it was not entitled to control the funds in the first place. Tricap was entitled to assert its claim to the proceeds of the South Haul Road. When Birch Mountain acquiesced in or conceded that claim it effectively conceded any argument it might have had about entitlement. Tricap's ultimate success in advancing its position does not generate any actionable claim against it, and it certainly does not fall under the definition of "oppressive" conduct.

46 There is no merit to the claim that there was an artificial default, nor that it was generated by any actionable misconduct of the defendants. Any lingering doubt terminated when the receivership order confirmed the enforceability of the Tricap Loan Agreement. The chambers judge correctly determined that there is no merit to this claim.

"Death Spiral Stock Trading"

47 The price of the Birch Mountain common shares collapsed between 2006 and 2008. Given Birch Mountain's financial circumstances, and the eventual delisting of its shares, this is hardly surprising. There was evidence that short selling contributed to the collapse. The statement of claim alleged that the defendants were responsible for this decline, as part of the scheme to obtain the Birch Mountain quarry at below its real value. The defendants deposed that they had never owned any Birch Mountain shares, they never engaged in trading in the shares, and they therefore had nothing to do with the collapse of the share price. The chambers judge correctly noted that this evidence was uncontradicted, and there was no merit shown to this portion of the claim (reasons, para. 57).

The Tricap Amending Agreement

48 In June and July 2008, Birch Mountain defaulted on interest payments due under the \$31.5 million Convertible Secured Senior Debenture granted to Tricap to pay out the bridge loan to Brookfield Bridge Lending Fund (which at the time was in default), and to provide further capital for Birch Mountain. Rather than commencing enforcement proceedings, in August 2008 Tricap entered into a Waiver and Amending Agreement with Birch Mountain with respect to these defaults.

49 The consideration paid by Birch Mountain for the waiver of the default was significant: a fee of \$3 million, an increase in the interest rate, more favourable terms and price on the conversion option, and other amendments to the terms of the loan. The plaintiff argues that these terms were so onerous as to be "oppressive".

50 This argument is one premised on Tricap and Birch Mountain being "affiliates". The argument is that by imposing such strict terms the "corporation or *any of its affiliates*" conducted the affairs of Birch Mountain in a manner that was unfairly prejudicial to or unfairly disregarded the interest of the shareholders (to paraphrase s. 242(2) of the *Act*). As previously noted (*supra*, para. 38) the two companies are not affiliates, which is fatal to this argument.

51 As to the substance of the allegation, Birch Mountain agreed to the terms of the Acknowledgment, Waiver and Amending Agreement. There was no evidence that its agreement was anything other than voluntary. At this point Birch Mountain and Tricap were doing business on an arms-length basis. The officers of Birch Mountain obviously faced a difficult choice: they could default on the Debenture or accept the terms offered by Tricap. A creditor negotiating with a debtor in default might well

impose strict terms, but such a transaction does not amount to "conducting the affairs of the borrower corporation"; the lender is conducting its own affairs, not the affairs of the borrower.

52 It cannot be argued that the terms of the loan were so unreasonable as to be unconscionable; that argument would be a further collateral attack on the receivership order. There is no expert evidence tendered to show what type of terms a lender might ordinarily extend to a borrower in default. All things considered, the chambers judge correctly determined that there was no merit to this argument.

The Great Pacific Capital Transaction

53 Great Pacific Capital Corp. was controlled by James Pattison, who was at the relevant time a director of Brookfield. Great Pacific was the holder of \$29.28 million of the Convertible Unsecured Subordinated Debentures issued by Birch Mountain in November 2006. This appears to be close to 100% of the debentures actually issued. In September 2008 Birch Mountain arranged a private and confidential tour of the quarry by a number of potential investors, including Pattison. The plaintiff vaguely hints that Pattison's participation in this tour was somehow nefarious or ominous, but there is nothing on this record to indicate that it was anything more than an earnest attempt by the officers of Birch Mountain to access more capital.

54 The granting of the receivership order would obviously cause all the creditors of Birch Mountain to consider the status of their debts, and the options open to them. On November 20, 2008, two weeks after the receivership order was granted, Great Pacific entered into an agreement with Tricap to assign its interests to Hammerstone, a wholly owned subsidiary of Tricap. In exchange for the assignment, Great Pacific acquired the option to obtain either:

- (a) 30% of the Senior Secured Convertible Debenture owned by Tricap (see *supra*, para. 4(e)), or
- (b) 30% of the shares in Hammerstone, if Hammerstone ended up acquiring Birch Mountain's assets through the receivership process.

The option was open for three years. The option price, payable on exercise of the option, was \$11.8 million in the first year, increasing through a formula by 25% for each subsequent year. In substance, on payment of the formula option price Great Pacific:

- (a) under the first option, would effectively trade Unsecured Subordinated debt for Senior Secured Convertible debt, or
- (b) under the second option, would have a right to purchase 30% of the equity in the Birch Mountain assets, but only if Hammerstone was successful in acquiring those assets through the receivership.

The advantage for Tricap, in addition to receiving the option price, was that it gave Tricap greater control and flexibility in the enforcement of its own debts. Tricap's acquisition of the Convertible Unsecured Subordinated Debentures was publicly reported, but the details of the consideration obtained by Great Pacific were not.

55 The plaintiff raises a number of issues with respect to the Great Pacific transaction:

- (a) The parties "dealt without restriction with a Birch Mountain asset". This categorization is inaccurate, because the parties dealt only with their own assets, namely the various debentures and loans and the shares of Hammerstone. To the extent that Birch Mountain assets were indirectly involved, they were not dealt with "without restriction" because the receivership was under the supervision of the Court.
- (b) The transaction is said to have breached insider trading rules, or material change rules, or was not properly disclosed to the public as required. A "cover-up" of the transaction is alleged, but that depends on demonstrating that further disclosure was required by law. Securities regulation is a highly technical area, and no particulars are given of these alleged breaches. At the time of this transaction the common shares had been delisted, and the receivership order granted, which further complicates the situation. In any event, the remedies lie with the regulatory agencies that oversee the securities industry.

(c) The transaction is said to allow Great Pacific to either convert the nature of its debt, or obtain an equity interest in the underlying assets. This merely describes the effect of the transaction, and does not disclose any actionable wrong.

(d) The transaction granted Great Pacific and Pattison preferences and advantages not available to other debenture holders and common shareholders. Great Pacific appears to have owned nearly 100% of the issued Unsecured Subordinated Debentures; there were no other debenture holders left behind. Even if there were, the shareholder class has no standing to pursue any claim they may have. Since none of the shareholders owned any of the debentures, there was no reason why they would be extended any of the rights obtained by Great Pacific in the transaction.

(e) Great Pacific was granted a "preference" over other unsecured creditors. Great Pacific did not receive any preference through this transaction. It merely exchanged its debt interests for other contractual rights. The obligations of Birch Mountain under the Subordinated Debentures were unchanged, and the rights obtained by the transferee Hammerstone were in no way enhanced.

Efforts of Tricap and Great Pacific to reorganize and coordinate their interests in Birch Mountain after the receivership order was granted were to be expected. Once insolvency proceedings commence, the priority of obligations becomes critical: the secured debt would rank ahead of the unsecured debt, and both would rank ahead of the equity position of the shareholders. In the face of the receivership there was nothing "oppressive" about the efforts of the various creditors to consolidate or improve their position.

Summary

56 In summary, the chambers judge correctly concluded that there was no merit to the proposed claim of corporate oppression. With respect to the bulk of the allegations, the claim fails because the defendants were not "affiliates" of Birch Mountain, an assumption which underlies much of the argument. Many of the allegations represent a collateral attack on the receivership orders. On this record, the various identified transactions were shown to be legitimate business transactions that did not amount to "oppression". This portion of the claim was properly summarily dismissed. Whether a lender might in some circumstances be liable to a borrower in tort, contract or on another basis can be left for another day.

"The Good Faith Doctrine"

57 The plaintiff proposes to rely on what is described as "the good faith doctrine". The simple answer to this proposed claim is that there is no such freestanding cause of action, and the good faith doctrine is only a "general organizing principle of the common law of contract". The applicable cause of action is "breach of contract". In *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 (S.C.C.) the Supreme Court of Canada concluded that contracting parties have a general obligation to perform their obligations under a contract honestly. The circumstances in which this doctrine will come into play are rare, but it will never come into play absent a contract. If there is no contract, there are no contractual obligations to perform. If there is nothing to perform, it cannot be performed in bad faith.

58 The defendants depose that they have never entered into contracts with any of the members of the proposed class. This evidence is uncontradicted, even if the proposed fresh evidence is considered. If there are no contracts, there can be no breach of contract, nor any application of the related "honest performance doctrine" relating to the performance of contracts. This portion of the claim was properly summarily dismissed.

59 It is possible that the plaintiff class intended to assert that the defendants did not perform in good faith contracts the defendants had with Birch Mountain. That would be a claim in the hands of the corporation Birch Mountain, not the shareholders. The assertion of that claim would also amount to a collateral attack on the receivership orders. It is potentially inconsistent with the "whole agreement" clauses in the lending agreements. Many of the specific allegations overlap, in any event, with the asserted examples of oppressive conduct. If this was the claim being asserted by the class of shareholders, it too has no merit.

Conclusion

60 In conclusion, the chambers judge correctly concluded that there was no merit to the proposed claim, and the Court could reach a fair and just determination on the merits on the motion for summary judgment. The claim fails because the appellant failed to adduce sufficient evidence of oppressive conduct, misrepresentations or bad faith on the part of the defendants. The application to admit fresh evidence and the appeal are both dismissed.

Appeal dismissed.

TAB 18

2015 ONCA 6
Ontario Court of Appeal

Meady v. Greyhound Canada Transportation Corp.

2015 CarswellOnt 46, 2015 ONCA 6, [2015] O.J. No. 55, 16 C.C.L.T.
(4th) 55, 248 A.C.W.S. (3d) 361, 329 O.A.C. 173, 72 M.V.R. (6th) 213

Pam Meady, Evelyn Shepherd, Carrie Anne Tapak, Dennis Cromarty, Thayne Gilliat, Faye Evans, Sheldon Christensen, a Minor by his Litigation Guardian, Cathy Ducharme, Anthony Clowes, Tanya Clowes, and Briannah Elizabeth Clowes, Shauna Pauline Clowes, Minors by their Litigation Guardian, Tanya Clowes, Brian Gordon Adams, Michael David Finn, Jennifer Esterreicher, Johnathan Theriault, an infant under the age of eighteen years by his Litigation Guardian, Lyne Theriault, and Lyne Theriault, Plaintiffs (Appellants) and Greyhound Canada Transportation Corp., Constable Corey Parrish, Constable Martin Singleton, Her Majesty the Queen in Right of Ontario, Albert Arnold Dolph and Shaun Davis, Defendants (Respondents)

G.R. Strathy C.J.O., K. Feldman, G. Pardu J.J.A.

Heard: October 27, 2014

Judgment: January 8, 2015

Docket: CA C55125

Proceedings: affirming *Meady v. Greyhound Canada Transportation Corp.* (2012), 27 M.V.R. (6th) 15, 2012 CarswellOnt 749, 2012 ONSC 657, T.A. Platana J. (Ont. S.C.J.)

Counsel: Paul J. Pape, David S. Steinberg, Christopher Hacio, for Appellants
Owen Smith, Amanda McBride, for Respondents, Greyhound Canada Transportation Corp. and Albert Arnold Dolph
Roger Horst, Rafal Szymanski, for Respondents, Constables Corey Parrish and Martin Singleton

Subject: Civil Practice and Procedure; Contracts; Evidence; Family; Public; Torts

APPEAL by plaintiffs from judgment reported at *Meady v. Greyhound Canada Transportation Corp.* (2012), 2012 ONSC 657, 2012 CarswellOnt 749, 27 M.V.R. (6th) 15 (Ont. S.C.J.), dismissing action for damages for wrongful death and personal injury sustained in motor vehicle accident as against respondent defendants.

G.R. Strathy C.J.O.:

Overview

1 On December 23, 2000, 21-year-old Shaun Davis boarded a Greyhound bus in the small northern Ontario town of Ignace and continued his journey east from Calgary to spend Christmas with his family in Pictou, Nova Scotia.

2 About an hour later, Davis got out of his seat at the front of the bus and moved to the stairwell by the door. He ignored the driver's requests that he return to his seat. Suddenly, he lunged at the driver and grabbed the steering wheel. The bus veered off the road and toppled on its side. One person was killed and many of the 32 passengers were injured.

3 In this action, a number of passengers sued Greyhound and the bus driver, Albert Dolph (the "Greyhound respondents") and two OPP officers who had contact with Davis before he boarded the bus, and their employer, Her Majesty the Queen in Right of Ontario (the "OPP respondents"). They also sued Davis, who did not defend and was noted in default.

4 After a trial lasting more than 60 days, the trial judge dismissed the action against all defendants, other than Davis.

5 The plaintiffs appeal.¹ They say the trial judge erred by excluding the evidence of two experts — one a specialist in police training and the other an expert in bus safety. They claim the police training expert would have established that competent police officers, having observed that Davis was delusional, would have used crisis management techniques to deter him from boarding the bus. The bus safety expert, they say, would have established that a prudent bus driver, knowing Davis' agitated condition and observing him leave his seat, would have reduced his speed. In turn, this may have averted the accident or at least mitigated the damage it caused. In addition, they argue the trial judge failed to adequately articulate the standard of care applicable to the respondents.

6 For the reasons that follow, I would dismiss the appeal. In my view, the trial judge properly exercised his gatekeeper function by excluding unnecessary expert evidence. On the admissible evidence, he made no error in concluding the respondents had not breached the applicable standards of care.

Background

7 Davis' eastbound bus trip began in Calgary. At Dryden, Ontario, he transferred to a bus to Thunder Bay. When that bus stopped at the Tempo Rest Stop in Ignace, about 240 km northwest of Thunder Bay, Davis told the driver that some passengers had been going through his baggage and were trying to harm him. The driver asked an attendant to call police and Cst. Corey Parrish arrived to investigate.

8 Parrish concluded that no crime had occurred. He believed Davis was displaying signs of anxiety and mild paranoia. Otherwise, he seemed calm, well-spoken, well-mannered and quite rational. Davis told Parrish that he wanted to continue his journey on the next bus and the driver endorsed his ticket to allow him to do so.

9 Davis then told Parrish he did not want to stay at the Tempo to wait for the next bus. Parrish agreed to take him to another local coffee shop, the Voyageur.

10 Parrish asked Davis whether he had consumed any alcohol or drugs. Davis replied he had not, but said he was taking prescription medicine for attention deficit disorder.²

11 Parrish requested a CPIC search, which disclosed nothing of concern.

12 Later that afternoon, Davis called a cab to come to the Voyageur to take him back to the Tempo. He complained that people were after him. The cab driver spotted a parked police car and pulled over so Davis could report his concerns. Parrish was in the police car and asked Davis whether he wanted to see a doctor. Davis declined, saying he simply wanted to go home.

13 Davis later called police from the Tempo and spoke to the respondent Cst. Martin Singleton. He said he wanted police to come to the Tempo because people were going to beat him up. Singleton was aware of Parrish's prior involvement with Davis. Parrish and Singleton headed to the Tempo together. Their arrival coincided with the arrival of the next bus. Davis told them the people who were going to beat him up had left. He asked Parrish if he would wait around until he boarded the bus.

14 Parrish spoke to the bus driver, the respondent Dolph, and told him that Davis was suffering from mild paranoia, but had displayed no signs of violence and was not a threat to anyone. Meanwhile, Singleton spoke to Davis in the Tempo parking lot. Davis showed Singleton his ADD medication, but Singleton did not make inquiries about it. Singleton observed that Davis was calm and happy to be going home.

15 Dolph allowed Davis to board and he was seated in the front seat, where Dolph could keep an eye on him and could speak to him if he became anxious. Parrish had advised passengers sitting nearby to avoid contact with Davis.

16 About 50 minutes after the bus left Ignace, Davis got out of his seat and told Dolph that some people on the bus wanted to hurt him. Dolph assured him that everything would be all right and Davis returned to his seat. A few minutes later, Davis

again left his seat and stood in the stairwell at the front of the bus. Dolph again asked Davis to return to his seat, but Davis did not comply. This did not particularly concern Dolph, as he had previously allowed passengers to stand in the stairwell and he did not think Davis posed any threat.

17 At one point, Dolph reduced the speed of the bus, prompting Davis to tell him not to stop. In any case, there was no safe place to stop on the highway as the shoulder was too narrow. Dolph resumed the speed at which he had been driving.

18 Moments later, Davis jumped up and grabbed the steering wheel, forcing the bus across the highway and into the ditch.

Proceedings Below

The Trial and Exclusion of Expert Evidence

19 The trial began in 2010, ten years after the accident. The respondents acknowledged they owed the appellants a duty of care. The issues were the standard of care, whether the respondents had met that standard and, if not, whether the breach was causative of the appellants' damages.

20 The trial judge heard 65 days of evidence from 83 witnesses. During the trial, he refused to admit the expert evidence of two witnesses tendered by the appellants. These rulings are at issue in this appeal.

21 The first proposed expert was Steven Summerville, a retired Toronto police officer with extensive experience in use-of-force principles. The appellants wanted to rely on his opinion that Parrish and Singleton failed to meet the standard of care of a reasonable and prudent police officer by failing to follow standard police practices — specifically in relation to detention under s. 17 of the *Mental Health Act*, R.S.O. 1990, c. M.7, and the common law doctrine of investigative detention.

22 The trial judge held that Summerville had no expertise in training police officers on these subjects and was therefore not qualified to give expert evidence about them.

23 He acknowledged that expert evidence concerning the standard of care of a professional, such as a police officer, may be required in some cases. However, he concluded that he did not require expert evidence in this case to determine the standard of care of a competent police officer or to determine whether the OPP respondents properly exercised their use-of-force or investigative detention powers. He referred to the observations of the British Columbia Court of Appeal in *Burbank v. B. (R.T.)*, 2007 BCCA 215, 279 D.L.R. (4th) 573 (B.C. C.A.), at para. 79, leave to appeal to S.C.C. refused, (S.C.C.), to the effect that expert evidence concerning police training and practices is not required where the issue falls within the understanding or experience of the trier of fact. He observed that police policies and procedures could be adduced in evidence and that the officers could be cross-examined on their compliance.

24 The second proposed expert was Arthur Atkinson, a transportation safety consultant, who had experience as an accident investigator and in drafting policies and standards for training bus operators. The trial judge found that although his opinion was relevant, it was not necessary. He did not need expert evidence to determine what the driver knew or ought to have known regarding his duties as an operator. Nor did he need expert evidence to determine the appropriate speed of the bus in relation to the road conditions, the steps that Dolph should have taken when Davis came to the front of the bus, how he ought to have reacted to Davis grabbing the wheel, or what other steps he ought to have taken to avoid the accident.

25 In addition, the trial judge found, Atkinson's opinion should be excluded because he expressed an opinion on the ultimate issue — specifically stating, "It is my opinion that Mr. Dolph was negligent in the operation of his passenger carrying bus."

The Trial Judgment

26 The trial judge released extensive reasons, nearly 600 paragraphs in length, dealing with both liability and damages. He dismissed the action against both groups of respondents.

27 He found the appellants failed to establish that a police officer in the position of Singleton and Parrish, exercising reasonable care and diligence, would have prevented Davis from boarding the bus. He rejected the argument that the officers should have detained Davis either under s. 17 of the *Mental Health Act* or using their powers of investigative detention. He also rejected the allegation that the OPP did not adequately train the officers to respond to people with mental illness.

28 The trial judge also found the appellants had not established that Dolph failed to exercise reasonable care and skill in the operation of the bus or that Greyhound had failed to properly train him. Dolph had no reason to anticipate that Davis would act as he did. He could not have prevented Davis from approaching the front of the bus, could not have pulled over to the side of the highway, and his decision to continue driving to Upsala (which was only a few minutes away) was reasonable in the circumstances.

Issues

29 The appellants raise three issues on appeal:

- 1) Did the trial judge err in excluding Summerville's expert evidence?
- 2) Did the trial judge err in excluding Atkinson's expert evidence?
- 3) Did the trial judge err in failing to articulate the standard of care for each respondent?

Discussion

30 The appellants' first two grounds of appeal raise common issues concerning the trial judge's approach to the admissibility of expert evidence and, in particular, the necessity criterion. I will address the principles governing these grounds together and then apply those principles to the arguments respecting each proposed expert witness. I will then address the appellant's third ground of appeal concerning the trial judge's articulation of the applicable standard of care for each respondent.

Principles Governing the Admissibility of Expert Evidence

31 In considering the admissibility of the expert evidence, the trial judge correctly identified the test in *R. v. Mohan*, [1994] 2 S.C.R. 9 (S.C.C.), as explained by this court in *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.), leave to appeal to S.C.C. refused, (S.C.C.). The test has four requirements: (a) the evidence must be relevant; (b) it must be necessary to assist the trier of fact; (c) it must not be subject to an exclusionary rule; and (d) the expert must be properly qualified.

32 The issue on this appeal is the second requirement — the necessity of the evidence to assist the trier of fact. In *Mohan*, at p. 23, the Supreme Court explained that necessary evidence must be outside the knowledge and experience of the trier of fact:

This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey*, [1982] 2 S.C.R. 24]. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. *In Kelliher (Village of) v. Smith*, [1931] S.C.R. 672,, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".

33 The application of the necessity criterion asks whether the trier is able to form a correct judgment about the issue without the assistance of persons with special knowledge.

34 The general standard of care of a professional, such as a police officer, is a question of law, but the content of the standard of care in a particular case is a question of fact. As such, the content of the standard will generally require expert evidence:

Krawchuk v. Scherbak, 2011 ONCA 352, 106 O.R. (3d) 598 (Ont. C.A.), at para. 125, 133, leave to appeal to S.C.C. refused, (S.C.C.).

35 This is, however, subject to the exception for "nontechnical matters or those of which an ordinary person may be expected to have knowledge": *Krawchuk*, at para. 133, referring to *Zink v. Adrian* (2005), 2005 BCCA 93, 37 B.C.L.R. (4th) 389 (B.C. C.A.), at para. 44.

36 The trial judge invoked this exception in refusing to admit the expert evidence. He quoted the British Columbia Court of Appeal in *Burbank*, above, at para. 79:

Expert evidence would only be necessary (and therefore admissible) to establish the standard of care in a negligence case of this kind if the conduct in question gave rise to considerations beyond common understanding. Evidence that need not invariably be expert evidence might be adduced to prove the training police officers are given, or to explain police practice, or where needed to interpret and explain the application of requirements contained in legislation or policy with which the trier of fact is unlikely to be familiar. These are just examples of the kind of evidence that where needed might go toward assisting the court in establishing the standard of care. But unless the nature of the inquiry into the conduct of a police officer is actually beyond the common understanding or experience of judge or jury, evidence of the standard of care, particularly expert opinion, is not required and should not be admitted. It is not otherwise necessary to adduce evidence that a police officer failed to meet the standard of care of a competent police officer.

37 There has been growing recognition of the responsibility of the trial judge to exercise a more robust gatekeeper role in the admission of expert evidence — see: Lisa Dufraimont, "New Challenges for the Gatekeeper: The Evolving Law on Expert Evidence in Criminal Cases" (2012) 58 C.L.Q. 531; and *Report of the Inquiry into Pediatric Forensic Pathology in Ontario* (Toronto: Queen's Printer for Ontario, 2008), vol. 3, c. 18: "Role of the Court". This observation holds true for both civil and criminal contexts. Although much of the discussion has focused on increasing scrutiny of threshold reliability at the gatekeeper stage, it is equally important to ensure the evidence is genuinely necessary.

38 There are compelling rationales underlying this approach. Unnecessary expert evidence distracts the trier of fact from the issues at hand, complicates the proceeding, prolongs the trial and increases the cost of litigation. In *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 (S.C.C.), Rothstein J. stated at para. 77:

If a trial judge concludes that proposed expert evidence is unnecessary or irrelevant or will distract from the issues to be decided, he or she should disallow such evidence from being introduced.

39 In a similar vein, Moldaver J.A. (as he was then) stated in *Johnson v. Milton (Town)*, 2008 ONCA 440, 91 O.R. (3d) 190 (Ont. C.A.), at para. 48:

Trial judges should do their best to perform the gatekeeper function they have been assigned, if for no other reason than trial economy. Permitting experts to give evidence on matters that are commonplace or for which they have no special skill, knowledge or training wastes both time and resources and adds stress to an already overburdened justice system. It is also legally incorrect.

40 As Doherty J.A. observed in 2009 in *Abbey*, at paras. 93-95, in assessing whether the evidence is necessary to the proper adjudication of the facts, the trial judge conducts a cost-benefit analysis — whether the benefits of admission are sufficiently strong to outweigh the associated costs. This is part of the judge's gatekeeper function and involves an exercise of discretion. It is an analysis that does not necessarily admit of a "yes" or "no" answer: *Abbey*, at para. 79.

41 In one of his rulings, the trial judge referred to Bryant, Lederman and Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009) at pp. 799-800, where the authors observe that there is "no bright line" to determine whether the subject matter of expert evidence falls within the normal experience of a particular trier of fact. The authors quote the judgment of this court in *R. v. F. (D.S.)* (1999), 43 O.R. (3d) 609 (Ont. C.A.), in which O'Connor J.A. observed, at p. 625:

There is no exact way to draw the line between what is within the normal experience of a judge or a jury and what is not. The normal experiences of different triers of fact may differ. Over time the subject matters that come within the normal experiences of judges and juries may change. The normal experiences of those in one community may differ from those in other communities. In the end, the court in each case will be required to exercise its best judgment in deciding whether a particular subject matter is or is not within the normal experience of the trier of fact.

42 For these reasons, deference is owed to the exercise of the trial judge's gatekeeper function in excluding unnecessary evidence. The trial judge is best equipped to appreciate the issues in the context of the evidence as it unfolds and to determine the extent to which, if at all, expert evidence is required to assist the trier of fact in the disposition of the issues: *R. v. D. (D.)*, 2000 SCC 43, [2000] 2 S.C.R. 275 (S.C.C.), at paras. 12-13.

43 The tragic events in this case unfolded in a small northern community situated on the highway between Kenora and Thunder Bay and on a bus serving that and similar communities. The key issues involved the standard of care to be observed by police officers and by a bus driver operating in those communities. In my view, the trial judge was uniquely positioned to decide whether he needed expert evidence to determine those standards of care and his rulings attract deference.

Ground #1: Admissibility of Summerville's Expert Evidence

44 The appellants acknowledge that the trial judge was entitled to reject many of their allegations against the OPP respondents.

45 They appellants do not dispute his conclusion that the police officers did not have grounds to detain Davis, either under the *Mental Health Act* or on the basis of investigative detention. Nor do they challenge his ruling that Summerville was not qualified to give expert evidence on these issues. Instead, they say that Summerville should have been permitted to give evidence on police crisis management techniques. They say that, had the officers made an appropriate investigation, they would have realized that Davis posed a risk if permitted to board the bus. Knowing that, they ought to have used crisis management techniques to persuade him not to board the bus. The appellants say the exclusion of Summerville's evidence deprived them of the opportunity to establish the standard of care of a reasonably prudent police officer using crisis management techniques and to show that the OPP respondents did not meet that standard.

46 In my view, the trial judge made no error in excluding Summerville's evidence. On the contrary, he properly exercised his gatekeeper role by excluding unnecessary evidence.

47 The exercise of police powers of investigation, arrest and detention and police interactions with the public falling short of coercion, are part of the daily diet of judges of the Superior Court. Technical knowledge or expertise was not required to determine whether the OPP officers properly investigated Davis, and whether they should have restrained him, diverted him or otherwise persuaded him not to board the bus. The police training materials were in evidence and were used to cross-examine the OPP respondents. The trial judge did not require expert evidence to understand them.

48 In considering this ground of appeal in relation to the OPP respondents, context is all-important. The thrust of the complaint at trial, and of the proposed expert evidence, was the allegation that the officers should have apprehended Davis pursuant to s. 17 of the *Mental Health Act*, or that they should have detained him using their powers of investigative detention. These allegations have not been pursued on appeal. The only live issue on appeal is whether crisis management, or "verbal judo" as described by the putative expert, should have been employed.

49 However, Summerville's report had only this to say on the subject of crisis management:

Police training documentation indicates that the involved officers had received training in 'crisis management' and 'effective communications' strategies respecting persons displaying signs of mental illness or impairment. I saw nothing in any of the provided material to suggest that the involved officers attempted to apply this training.

50 The training documentation to which Summerville referred was before the trial judge. It has not been established that he required expert advice to understand or apply the standards set out in those materials or to assess whether the officers had properly applied their training.

51 In examining the allegations against the OPP respondents, it is also important to keep in mind, as the trial judge clearly did, that Parrish had the opportunity to observe Davis, at close hand, on three separate occasions over the course of the afternoon, lasting in total about 45 minutes. While he considered that Davis was displaying mild paranoia, he observed him to be calm, well-mannered and well-spoken, and he did not regard him as a threat to anyone. He was clearly solicitous of Davis' well-being and was at pains to ensure that he would be comfortable on the next stage of his journey.

52 Parrish's observations were consistent with the evidence of witnesses at the Tempo, who described Davis as "calm", "articulate", "mild", "relaxed" and a "sweet lost scared boy." While he showed signs of agitation, anxiety and delusions, no one expressed concern that he might harm himself or others. The trial judge accepted this evidence.

53 The trial judge was plainly aware that the onus was on the appellants to establish the applicable standard of care, the breach of that standard and that the breach was causative of the appellants' damages. He considered and rejected each one of the appellants' complaints that the OPP respondents failed to meet the standard of care. He found, among other things:

- there were no grounds to detain Davis under s. 17 of the *Mental Health Act*;
- the doctrine of investigative detention was not applicable;
- in view of Davis's demeanour, it was not necessary that the officers make inquiries of his family and friends or of his doctor concerning his mental state or his medication;
- there was no evidence the officers failed to provide Dolph with appropriate information, misled him about Davis' condition or pressured him to allow Davis on the bus; and
- there was nothing the officers knew or ought to have known that triggered an obligation to stop Davis from exercising his lawful right to board the bus.

54 It was open to the trial judge to conclude that expert evidence was unnecessary for him to decide these issues and his findings were well-supported by the record. As a result, I would reject this ground of appeal.

Ground #2: Admissibility of Atkinson's Expert Evidence

55 As with their first ground, the appellants have also abandoned many of the allegations advanced at trial against the Greyhound respondents.

56 The appellants assert, however, that the trial judge failed to come to grips with their complaint that the bus was travelling too fast, and that Dolph should have slowed down significantly after Davis left his seat. They say the trial judge improperly excluded Atkinson's expert evidence, which would have enabled such findings to be made.

57 In my view, the trial judge reasonably concluded that expert evidence was unnecessary to resolve the allegations of negligence against the Greyhound respondents.

58 These allegations related to Dolph's response to Davis leaving his seat and coming to the front of the bus and Dolph's operation of the bus thereafter. These and similar issues are frequently decided in motor vehicle negligence cases without the assistance of expert evidence. As the record developed at trial, there was ample evidence of Greyhound's practices and procedures and Dolph was cross-examined at length concerning his compliance with them. The trial judge considered all of the breaches of the standard of care alleged by the appellants against the Greyhound respondents.

59 The trial judge found:

- Dolph was not negligent in permitting Davis to board the bus in light of his own observations of Davis and the information he received from police;
- Dolph's decision to allow Davis to remain standing in the stairwell was reasonable in the circumstances; and
- it would not have been reasonable to pull the bus over to the side of the road, as suggested by one of the appellants' experts, because the condition of the shoulders were unknown, it could have escalated Davis' anxiety and Upsala was only a few minutes away.

60 The trial judge noted there was conflicting evidence on the speed of the bus. The appellants had submitted that Dolph was traveling at least 100 km per hour. Dolph insisted he was driving at the 90 km per hour speed limit. There was evidence that his speed was the same as other commercial drivers on the highway at the time.

61 The appellants are critical of the trial judge's observation that there was no evidence the crash could have been avoided or the appellants' injuries would have been less serious had the speed been lower. They say the exclusion of Atkinson's evidence deprived them of the opportunity to prove that excessive speed aggravated their injuries.

62 The trial judge was clearly not persuaded that the speed of the bus was unreasonable in the circumstances. It was therefore unnecessary to consider whether the accident could have been avoided or the injuries reduced at a lower speed.

63 The trial judge found there was nothing Dolph knew or ought to have known that should have caused him to change the way he was driving the bus. This conclusion was available to him on the extensive evidence he heard. It was also open to him to conclude he could decide this issue without expert evidence. Therefore, I would reject this ground of appeal.

Ground #3: Articulation of the Standard of Care

64 I do not accept the appellants' submission that the trial judge failed to articulate the content of the applicable standards of care.

65 Having found the standard of care applicable to Dolph was that of a reasonable bus driver in like circumstances, he said he was required to ask "whether the bus driver used all due, proper and reasonable care and skill in the circumstances" — referring to *Day v. Toronto Transportation Commission*, [1940] S.C.R. 433 (S.C.C.), at p. 441 and *Rances v. Scaplen*, 2008 ABQB 708, 462 A.R. 1 (Alta. Q.B.), at para. 349.

66 He then proceeded to examine each element of the standard of care put forward by the appellants, including those based on Greyhound's training materials and on other expert evidence adduced by the appellants. He concluded that Dolph's conduct met the standard of care in each respect.

67 Similarly, the trial judge concluded that the standard of care applicable to the OPP respondents was that of "the reasonable officer in like circumstances" and the officer "must live up to the accepted standards of professional conduct to the extent that it is reasonable to do so in the circumstances" — referring to *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at para 70. He noted that an error in judgment would amount to negligence only "if the error would not have been made by a reasonably competent professional with the same skill as the officer in question who acted with ordinary care."

68 Again, the trial judge considered every aspect of the content of the standard of care put forward by the appellants, based on the evidence adduced by the parties. He concluded there had been no breach of the standard of care by the OPP respondents.

69 The onus was on the appellants to adduce evidence of the content of the standard of care. They did so. The trial judge correctly identified the standard of care applicable to each defendant and applied it to the circumstances of the case. He was not required to make broad pronouncements on the content of the duty of care of police officers or bus drivers. He was entitled to find, as he did, that the respondents' conduct did not fall below the standards identified by the appellants.

Disposition

70 For these reasons, I would dismiss the appeal, with costs. If not agreed upon, costs should be addressed by written submissions, not exceeding three pages, excluding the costs outline.

K. Feldman J.A.:

I agree

G. Pardu J.A.:

I agree

Appeal dismissed.

Footnotes

- 1 The appeal was bifurcated by order of this court and the issue of damages is not before us.
- 2 The trial judge found there was no proven link between Davis's ADD medicine and his violent behaviour on the bus. The appellants acknowledge the evidence does not support a contrary finding.

TAB 19

1996 CarswellOnt 4068
Ontario Court of Justice (General Division)

Nash v. CIBC Trust Corp.

1996 CarswellOnt 4068, [1996] O.J. No. 3940, 18 O.T.C. 161, 66 A.C.W.S. (3d) 930, 7 C.P.C. (4th) 263

**Dr. Lawrence Nash, Ashak Rustom, Dennis Proudlove, Dr. John Kwak,
Robert Bond, Joe Pacsuta, Dr. Donald R. Johnson and Margaret
Johnson (Plaintiffs) and CIBC Trust Corporation (Defendant)**

Ground J.

Heard: September 5 and 6, 1996
Judgment: November 7, 1996
Docket: 94-CQ-58919-CP

Counsel: *Alan J. Lenczner* and *Ronald G. Chapman*, for plaintiffs.

Bonnie Tough and *Paul Schabas*, for defendant.

Subject: Civil Practice and Procedure; Corporate and Commercial; Torts

MOTIONS by plaintiff and defendant for summary judgment.

Ground J.:

1 The motions before this court are brought in the within action which was certified as a class proceeding by orders dated February 15, 1996 and April 24, 1996. The plaintiffs' motion is for summary judgment with a reference directed to the master with respect to the quantum of damages suffered by the plaintiffs. The defendant's motion is for summary judgment in favour of the defendant dismissing the plaintiffs' claim. Submissions on both motions were heard together.

Factual Background

2 The representative plaintiffs Ashak Rustom and Dennis Proudlove represent a class of plaintiffs who were investors in mortgages with Mater's Management Limited and related companies (collectively "Mater's") as of January 29, 1990. Each member of the class invested in one or more mortgages on various residential and commercial properties owned by Mater's. Mater's was owned and/or controlled by one Alberto DoCouto ("DoCouto").

3 Many of Mater's mortgages were arranged through Falloncrest Financial Corporation ("Falloncrest"), a mortgage broker registered under the *Mortgage Brokers Act*, R.S.O. 1990, c. M.39, in the Province of Ontario.

4 The defendant CIBCTrust Corporation was previously named Morgan Trust Company of Canada ("Morgan Trust").

5 Morgan Trust was the mortgagee in trust for investors in Mater's projects. There were essentially two types of investors: (a) self-directed RRSP clients ("RRSP investors") who carried their investment in their RRSP accounts; and (b) individuals who invested other than through their RRSP accounts ("Non-RRSP investors"). Some investors were both RRSP investors and Non-RRSP investors.

6 In the case of RRSP investors, Morgan Trust was the trustee of the RRSPs and acted on the instructions of the investors to advance funds from their plans to the solicitors for Mater's. In respect of Non-RRSP investors, Morgan Trust was not involved in the disbursement of funds.

7 Following delivery of the funds to Mater's solicitors by Morgan Trust, the funds would be released to Mater's as contemplated in a mortgage commitment executed between Mater's and the investor and as set out in a letter of instruction which each investor would provide to Mater's solicitors.

8 Every investor received from Morgan Trust a participation certificate signed by Morgan Trust with respect to each investment. The participation certificate described the obligations of Morgan Trust as including the following:

- (a) to act honestly, in good faith, and in the best interest of the investors in the course of administration and, if applicable, enforcement of the first mortgage; and,
- (b) otherwise, to act in accordance with instructions received from a majority of investors.

9 Commencing in late 1988, RRSP investors signed, in addition to the application, a standard form Mortgage Direction and Undertaking (the "MDU"). An MDU was not signed by any of the Non-RRSP investors: an MDU was signed by some, but not all, of the RRSP investors.

10 On or about January 15, 1990, following an investigation conducted by the Ministry of Consumer and Commercial Relations (the "Ministry"), representatives of the Ministry applied to the Director of the Consumer Protection Division (the "Director") and received orders under the *Mortgage Brokers Act*:

- (i) freezing the assets of Falloncrest and Mater's (the "Freeze Order");
- (ii) requiring Falloncrest and Mater's to cease activities relating to the raising of funds from investors (the "Cease and Desist Order"); and
- (iii) appointing investigators to investigate further the affairs of Falloncrest and Mater's (the "Investigation Order").

11 On or about January 16, 1990, Morgan Trust was advised of the Freeze Order, the Investigation Order and the Cease and Desist Order.

12 On January 19, 1990, Morgan Trust commenced action no. 44941/90 in the Supreme Court of Ontario against Falloncrest, Mater's, DoCouto, et al. In this action, Morgan Trust sought the appointment of a receiver and manager, a tracing and accounting of trust funds, damages for breach of trust and breach of fiduciary duty and costs. This action will be referred to as the "Receivership Proceedings".

13 On January 19, 1990, Morgan Trust applied in the Receivership Proceedings for an order appointing a receiver and manager of the assets and property of Mater's.

14 By order of Mr. Justice Montgomery dated January 19, 1990, Peat Marwick Thorne Inc. ("PMT") was appointed and receiver and manager of the assets of Mater's. Mr. Justice Montgomery made his order returnable in ten days and the order was continued on January 29, 1990. The receivership is continuing to this day.

Submissions

15 It is the submission of the plaintiffs that Morgan Trust did not act prudently or responsibly in bringing the application before Mr. Justice Montgomery for the appointment of a receiver, that it was not authorized to bring such an application and that it acted in breach of its contract with the investors in bringing such an application. It is their further submission that Morgan Trust brought the application at the request of Mr. Brian Cass ("Cass"). Superintendent of Deposit Institutions for the Ontario Ministry of Finance, and that Morgan Trust was reluctant not to accede to the request of Cass as he was a senior regulator of financial institutions in Ontario.

16 The plaintiffs also allege that Morgan Trust was negligent in bringing the application for the appointment of a receiver in that the appointment of receiver was the most extreme measure that could be taken and there were other less extreme measures

available such as the appointment of a monitor, there was no default under any of the mortgages and Morgan Trust had no information that Mater's had breached any covenant under any of the mortgage documents, there was no immediate risk to any of the assets of Mater's by reason of the Freeze Order issued by the Ministry, there was no evidence that Mater's was insolvent or could not meet its obligations under the mortgages, there was no attempt made by Morgan Trust to contact Mater's or any independent party to verify the information it received from the Ministry and there was no emergency requiring urgent action on the part of Morgan Trust.

17 The plaintiffs submit that Morgan Trust was not authorized and acted in breach of its contract with the investors and in breach of trust in bringing the application for the appointment of a receiver. They refer to the terms of the MDU which state, in part, "I (the investor) acknowledge that, in the event of a non-payment by the mortgagor or breach of any other covenants in a mortgage, any action taken or decision to waive action is my responsibility. ... It is understood that action will not be taken by Morgan Trust to enforce any mortgage covenant or to realize on any mortgage security.". They also submit that, under the terms of the participation certificate, the trustee was not acting in the enforcement of the mortgages in applying for the appointment of a receiver as there had been no default under any of the mortgages and that accordingly the trustee was required to act in accordance with instructions received from a majority of the investors and the trustee did not do so.

18 The plaintiffs submit that, in acting on the instructions of Cass, Morgan Trust was not acting in good faith. A number of the properties on which mortgages were held were raw land or were properties on which no activities were being carried on and did not require the appointment of a receiver and manager. With reference to the provisions of the participation agreement setting out the obligations of the trustee, it is the position of the plaintiffs that the provisions of the MDU narrow the responsibilities and obligations of the trustee under the participation certificate. The question of whether the appointment of a trustee was in the best interests of the investors and whether there were other options available was not considered by Justice Montgomery; he considered only whether the appointment of a receiver was an appropriate remedy vis-à-vis Mater's based on the material before him at the time.

19 It is the position of the plaintiffs that the "collateral attack" rule preventing an action being brought based upon the defendant having commenced an action and obtained a favourable judgment, does not apply where the action is brought by a plaintiff who is not a party to the original proceedings. They point out that the investors were not represented on the hearing before Justice Montgomery and did not have independent counsel until May, 1990.

20 It is the position of the defendant that there is no genuine issue for trial, that the issues on these motions are legal issues only and that there are no material facts in dispute. They submit that the material before this court discloses no genuine issue for trial with respect to breach of trust, negligence or breach of contract. They submit that, as a general rule, the courts have not allowed an action founded on the commencement or ultimate success of a legal proceeding except in certain narrow circumstances, none of which applies to the action before this court. They submit that the only exception where the courts have permitted an action based on the institution of legal proceedings is where the case had ultimately been resolved in favour of the plaintiff, the action was commenced without reasonable and probable cause by the defendant and was motivated by fraud, malice or bad faith and the plaintiff has suffered damages recognizable in law as a result of the initiation of the action or as a result of a judgment subsequently set aside due to fraud or irregularity. They submit that the rationale for the principle that the courts will not permit an action based upon the initiation of, or success in, another legal proceeding is that the public must have access to the courts without fear of retaliatory action, that inconsistent orders and judgments bring the administration of justice into disrepute and that there must be a finality to litigation. They submit that none of the criteria for the exception to this principle is applicable to this action and that the judgments and orders of the court must be free from collateral attack whether such attack is at the instance of the defendant in the earlier proceeding or a third party affected by the proceeding. They submit that this is not a case where the original proceeding has been resolved in favour of Mater's or of the investors, that the evidence before this court establishes that there is ample reasonable cause for commencing the receivership application, that there is no evidence that Morgan Trust was motivated by bad faith, fraud or malice in bringing the application and that, if the plaintiffs have suffered damages, this is not as a result of the initiation of the receivership application but rather as a result of the order of Justice Montgomery which was an intervening act of Justice Montgomery in the exercise of his judicial discretion. It is their submission that the order of Justice Montgomery establishes that receivership was the appropriate remedy in the circumstances

and that to permit this action to continue would amount, in effect, to an appeal of the decision of Justice Montgomery. They note that the submissions made by counsel for the plaintiffs on these motions were not made before Justice Montgomery and have not been made to any judge on any of the motions brought during the course of the receivership and that the investors have had independent counsel as a party to the receivership proceedings since May of 1990. They submit that, even though this court has found that the statement of claim on its face discloses a cause of action, on consideration of the legal issues involved and an analysis of the various allegations contained in the statement of claim, there is clearly no genuine issue for trial and summary judgment ought to be granted in favour of the defendant. They point out that in considering a certification application the court need only be satisfied that the pleadings or the notice of application on their face disclose a course of action but that subsection 5(5) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 states that an order certifying a class proceeding is not a determination of the merits of the proceeding. They further submit that, even if the plaintiffs could show implied damage to Mater's as a result of the damage to its reputation from the initiation of the receivership application, Mater's is not the plaintiff in this action and, in any event, the plaintiffs must show that, in addition to damages, there was bad faith, fraud or malice in the initiation of the application and that it was initiated without reasonable and probable cause.

21 The defendant submits that, at common law, the principal duty of the trustee is to preserve and protect the assets of the trust regardless of the terms of the trust agreement or the fact that the trustee is a mere bare or custodial trustee. It is their submission that the participation certificate and not the MDU is the governing document as between Morgan Trust and the investors in that the participation certificate is signed by Morgan Trust, is delivered to every investor and refers to the specific investment or mortgage in respect of which the certificate is given. In contrast, the MDU was only delivered to certain of the RRSP investors amounting to about 1,217 out of the total 4,209 investors and is generic in its terms and does not refer to a particular asset held in trust. They submit that an application for the appointment of a receiver is an act which can be taken in the administration of mortgage investments and that it was not therefore necessary to obtain instructions from a majority of the investors. They submit that there is no evidence that Morgan Trust was not acting honestly and in good faith and in what it believed at the time to be in the best interests of the investors and accordingly there is no evidence of breach of trust, negligence, lack of authority or breach of contract. They submit that even if, with the wisdom of hindsight and further reflection, it would appear that there may have been other remedies short of receivership which could have been pursued by Morgan Trust, this does not amount to negligence or, if the court should find negligence, the damage suffered by the investors was not as a result of such negligence but as a result of the order made by Justice Montgomery which is an intervening act of judicial discretion and not actionable.

22 The defendant points out that the receivership order has never been appealed or overturned at any time during the currency of the receivership and that this motion amounts to an appeal from, or a challenge to the validity of, such order and as such is a collateral attack on Justice Montgomery's order and constitutes an abuse of process. In addition, where a party has knowledge of judicial proceedings in which it is entitled to participate, it is an abuse of process to allow that party to commence a new action raising issues that could have been raised in the initial action. The investors have received separate legal advice and have been separately represented since May 1990 in the receivership proceedings and have participated in such proceedings. The defendant submits that the investors have therefore acquiesced in the receivership and are now estopped from bringing this action.

23 With respect to good faith, they submit that the overwhelming evidence before this court is that the decision by Morgan Trust to apply for the appointment of receiver was made by senior management at Morgan Trust and at CIBC and, after due consideration and the receipt of legal advice, and that the decision was not made as a result of a request from Cass or any pressure put upon Morgan Trust by Cass. The evidence before this court by way of affidavits on these motions and on the application before Justice Montgomery also establishes that there were ample, reasonable and probable grounds for Morgan Trust bringing the application. To establish bad faith, the plaintiffs would have to satisfy the court that the application for the receivership was brought solely to accommodate Cass and to ingratiate Morgan Trust with the regulatory authorities and that Morgan Trust had no other reasonable and probable grounds for initiating the application.

24 Counsel for the defendant also submits that, if the court should find a breach of trust, the court ought to exercise its discretion pursuant to section 35 of the *Trustees Act, R.S.O. 1990, c. T.23* and relieve Morgan Trust from personal liability.

25 Section 35 provides as follows:

If in any proceeding affecting a trustee or trust property it appears to the court that a trustee, or that any person who may be held to be fiduciarily responsible as a trustee, is or may be personally liable for any breach of trust whenever the breach of trust occurred, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust, and for omitting to obtain the directions of the court in the matter in which the trustee committed the breach, the court may relieve the trustee either wholly or partly from personal liability for the same.

26 Finally they submit that, if the motions for summary judgment are not granted and the trial proceeds, the issue re damages is not just the quantum of damages but also the causation of damage and that that question can not be left to a reference to the master.

Reasons

27 It is trite law that, on a motion for summary judgment, the court must be satisfied that there is a genuine issue for trial. Legal issues may be determined by the judge hearing the motion for summary judgment but, if there are genuine issues of credibility as to material facts, the matter must go on to trial. On the motion for summary judgment, the responding party must put its best foot forward and provide to the court at that time a coherent set of evidence establishing a genuine issue for trial.

28 The issues before this court on these motions are legal issues except that there appears to be a dispute as to whether Morgan Trust brought the application for appointment of a receiver simply to accede to a request from Cass and accordingly was not acting in good faith in bringing such application. Even though this is a factual matter, I find no evidence before this court to establish that Morgan Trust brought the application merely to accede to a request from Cass; this appears to me to be pure supposition on the part of the plaintiffs. On the other hand, there is ample evidence before this court to establish that the application was brought after receipt of legal advice and consideration by senior management of Morgan Trust and CIBC that it was an appropriate step to take in accordance with the provisions of the Participation Certificate and a trustee's common law duty to protect and preserve the assets of the trust in the best interests of the beneficiaries. Accordingly, I find that the plaintiffs have not satisfied the onus of putting forth coherent evidence establishing a genuine issue for trial with respect to a material fact.

29 With respect to the legal issues raised by the plaintiffs on these motions as to breach of contract, breach of trust, breach of fiduciary duty and negligence on the part of Morgan Trust. I find that the determining document as between Morgan Trust and the investors is the Participation Certificate which was provided to each investor with respect to each investment and was signed by Morgan Trust. As noted above, the Participation Certificate describes the obligations of Morgan Trust as including "to act honestly, in good faith, and in the best interests of the investors in the course of administration and, if applicable, enforcement of the mortgage". There is, in my view, no evidence that Morgan Trust did not act honestly or in good faith and substantial evidence that in bringing the application for the appointment of the receiver, Morgan Trust was acting in what it believed to be in the best interests of the investors to protect the trust property. Accordingly, I find that Morgan Trust was not in breach of contract, in breach of trust, or in breach of fiduciary duty in bringing the application for the appointment of the receiver. As I have found no breach of trust or breach of fiduciary duty, it is unnecessary to resort to section 35 of the *Trustee Act* to relieve Morgan Trust from personal liability.

30 With respect to negligence, in my view, even if there were less serious remedies available to Morgan Trust, I can not conclude that Morgan Trust, in all the circumstances of this case, was negligent in determining to apply to the court for the appointment of a receiver. The decision of Justice Montgomery to appoint the receiver, of itself, establishes that there were reasonable and probable grounds for bringing the application for the appointment of a receiver. The affidavit evidence before Justice Montgomery and before this court sets out ample grounds for Morgan Trust determining that an application ought to be brought before the court for the appointment of a receiver to protect and preserve the assets which it held in trust for the investors.

31 Counsel for the defendant have submitted that its motion for summary judgment should be granted on the principle of collateral attack. I accept the submission of counsel for the defendant that the general principle applied by the courts of not permitting collateral attack is that an action founded on the commencement of, or success in, a legal proceeding will not be allowed and that the only exception to such principle is where the original proceeding has been resolved in favour of the

plaintiff, the original proceeding was commenced without reasonable and probable cause and was motivated by fraud, malice or bad faith and the plaintiff has suffered damage which the law will recognize from the initiation of the earlier proceeding or a judgment obtained in the earlier proceeding which has subsequently been set aside as fraudulently obtained. See *Johnson v. Emerson & Sparrow* (1871), L.R. 6 Exch. 329; *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674 (C.A.); and *Nelles v. Ontario* (1989), 37 C.P.C. (2d) 1 at 21 (Ont.C.A.), varied [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609

32 Even if a trial court should conclude that the application was brought by Morgan Trust in bad faith or was motivated by fraud or malice, which seems to me to be highly improbable, that is not of itself sufficient to permit the action to proceed as an exception to the general principle that no action may be brought based upon the defendant having initiated or succeeded in a legal proceeding. The court must also be satisfied that there was no reasonable or probable cause for bringing the proceeding and that the plaintiffs have suffered damage as a result of the initiation of the proceeding or as a result of a judgment subsequently set aside as fraudulently obtained.

33 The plaintiffs have submitted that the principle of collateral attack is not applicable where the subsequent proceeding is brought by a party which was not a party to the original proceeding and that accordingly this action does not amount to a collateral attack on the order of Justice Montgomery as the investors were not a party to, and did not appear on, the hearings before Justice Montgomery.

34 In *Manufacturers Life Insurance Co. v. Gordon* (1992), 126 A.R. 354 (Master), the plaintiff landlord leased business premises to the defendant, C. Company, but it was not clear whether it or the defendant, B company was the actual tenant. Both companies were owned by the defendant, C.G.. Subsequent to the rent falling into arrears, C.G. obtained an *ex parte* order appointing a receiver for B. The receiver removed some chattels from the leased premises contrary to the terms of the lease. The landlord brought an action against all the parties, including the receiver and its officer for wrongful removal of the goods. The receiver and officer applied to have the action struck.

35 The plaintiff alleged that the receiver took possession of and removed all goods "contrary to the lease" and "without the prior written consent of the plaintiff". In response to the allegation, Master Funduk stated that (at p.360):

[The plaintiff's claim] is in substance a collateral attack on the receivership order. That is not permissible: *Skegs v. Jamieson* (1986), 72 A.R. 231 (Master); *Abacus Cities v. Bank of Montreal* (1988), 80 A.R. 254 (C.A.). The order authorized the Receiver to take possession of all C. Bailey's property. The Receiver did not need the plaintiff's consent to anything. If the plaintiff is unhappy with the legal consequences to it of the order, the remedy, if there is one, is not to sue the Receiver.

36 In *Royal Bank v. W. Got & Associates Electric Ltd.*, [1994] 5 W.W.R. 337 (Alta Q.B.), the court considered the principle of collateral attack in the context of a receivership order. The plaintiff bank had advanced funds to a company and held various forms of security. The bank became concerned about the debt and advised the principal of the company that it required further specified security, failing which it would notify parties with whom the company had significant contracts. The bank then decided to appoint a receiver and sent notices to these parties to perfect an assignment of book debts. The bank did not advise the principal or the company's solicitor of its intention to appoint a receiver, although the bank officer involved was aware that both were attempting to contact him. A receivership order was applied for *ex parte*. The order was granted. The bank sued the company for debt and the principal as guarantor. The company counterclaimed against the bank for damages for loss of the company's assets and against the receiver for mismanagement and negligent operation of the business.

37 The court allowed the counterclaim. It held that the validity of the receivership order had been challenged directly in the statement of defence and counterclaim, rather than collaterally, and therefore, was not barred. McDonald J. held the following at pp. 348-349:

As the application was essentially *ex parte*, the plaintiff had to act in the utmost good faith and make full, fair and candid disclosure of the facts... Such disclosure must include facts which would militate against the application: *Caisse populaire de Morinville Savings & Credit Union v. Pasay* (1982), 47 A.R. 311 at 316 (Q.B.). If the order was obtained by fraud, or non-disclosure or misleading disclosure, the order might be challenged directly, as by an application to set it aside, or by

appeal, but not collaterally - i.e., not in a proceeding in which an attack is made on the order incidentally to the cause: *R. v. Wilson*, [1983] 2 S.C.R. 594 at 603 [[1984] 1 W.W.R. 481]. In my view, where, as in the present case, the validity of the order is challenged directly in the very action in which it was made, the challenge being made in the statement of defence and counterclaim, such a challenge may be the equivalent of a direct attack by an application to set the order aside or on appeal. I do not say that the challenge is bound to succeed if made in that manner, only that it is not barred if made in that manner. Whether, at trial, the challenge should succeed will depend upon a variety of circumstances.

In the case at bar, the attack is clearly a collateral attack. The receivership order was not challenged in the receivership proceedings even though the plaintiffs had notice of the receivership proceedings and failed to do anything about it when the proceedings arose over 5 years ago or since. It is interesting to note that the time to appeal the receivership order expired well before the institution of the present action.

38 The principle that an order or judgment cannot be attacked by a proceeding which is incidental to the cause was set out by the Supreme Court of Canada in *Wilson v. R.*, *supra* [[1983] 2 S.C.R. 594]. At trial, the provincial court judge ruled that wiretap evidence was inadmissible as having been illegally obtained. The accused was acquitted and the Crown appealed. The issue on appeal was whether the provincial court judge exceeded his jurisdiction in refusing to admit the tapes since the wiretaps had been authorized by four Queen's Bench judges. The appeal was granted and a new trial was ordered on the basis that an authorization could not be challenged collaterally in a provincial court. The accused's appeal to the Supreme Court of Canada was dismissed on the basis that a trial judge has no authority to collaterally attack a wiretap authorization. McIntyre J. held at pp.502-503:

In the Manitoba Court of Appeal, Monnin J.A. said [at p.95]:

The record of a superior court is to be treated as absolute verity so long as it stands unreversed.

I agree with that statement. It has long been a fundamental rule that a court order made by a court having jurisdiction to make it stand and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well-settled in the authorities that such an order may not be attacked collaterally — *and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.* (Emphasis added)

Essentially, the principle of collateral attack states that an order made by a court having jurisdiction is binding and conclusive, and cannot be attacked in a proceeding where the object of that proceeding is other than the reversal, variation or nullification of the order or judgment.

39 Further, it is clear, that a judicial act such as the appointment of a receiver, is not actionable. In *Johnson v. Emerson & Sparrow* (1871), L.R. 6 Exch. 329, the plaintiff brought an action for maliciously, and without reasonable and probable cause, procuring the plaintiff to be adjudicated bankrupt. The court held that no act of bankruptcy was committed by the plaintiff in not paying, securing or compounding the alleged debt. The allegation of the act of bankruptcy was untrue and was either known by the defendant as untrue or not *bona fide* believed by the defendant to be true. Cleasby B. found the defendant liable and the court's error in making the adjudication did not discharge him. The judge found that no action is maintainable where the want of reasonable and probable cause is only error on a point of law and he held at p.339:

But what I am now considering is a suggestion which was made in the course of the argument, that the matter having been brought regularly before the judge who heard both the parties, the adjudication was the act of the judge, and the person who instituted the proceedings could not be made responsible.

And at p.364:

But the appointment of a receiver is not a consequence of the presentation of the petition. It could not be unless there had been such presentation, but it is a consequence of an independent application.

Further, at p.380:

The reason may be that the judgment of the Court is not caused or procured by anyone. It is the independent exercise of the mind of the Court upon the facts before it, and cannot be said to be caused or procured in the sense in which these words are used in such actions as the present.

In other words, the act of appointing a receiver is an independent act. Although the court, in making its decision, considers the evidence and arguments presented by the parties, ultimately, the judicial decision-making process is one that is wholly independent of the parties.

40 A further obstacle to the plaintiff's being permitted to continue with this action is establishing that they have suffered damage as a result of the initiation of the receivership application by Morgan Trust. The law seems to me to clearly establish that, where an order has been made or judgment given as a result of a decision made by a judge or other judicial officer in the exercise of his or her judicial discretion, no action lies for damages resulting from that decision.

41 The basic principle that a plaintiff must establish damages as a result of the initiation of legal proceedings was set out in *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674 (C.A.). In that decision, the plaintiff company brought an action against the defendant who was a former shareholder. The plaintiff alleged that the defendant falsely and maliciously presented a petition under the *Companies Act*, 1862, 1867 to the court for the winding-up of the plaintiff company. At trial, no proof of damage to the company was given beyond the liability to pay its own costs of defending against the petition and upon this ground the company was nonsuited at the end of its case. The Court of Appeal held that where the plaintiff brings a claim against the defendant for instituting a legal proceeding, the plaintiff must show some damages it has suffered in order to establish a cause of action. Brett M.R. stated at p.682:

I entirely agree that even although civil proceedings are taken falsely and maliciously and without reasonable or probable cause, nevertheless no action will lie in respect of them, unless they produce some damage of which the law will take notice. The present action is in tort, and in order to support it the plaintiff company must have sustained some damage such as the law takes notice of.

The court then went on to discuss the type of damages a party may sustain in a bankruptcy proceeding. Brett M.R. stated at pp.684-685

By proceedings in bankruptcy a man's fair fame is injured just as much since the Bankruptcy Act, 1869, as it was before, because he is openly charged with insolvency before he can defend himself. It is not like an action charging a merchant with fraud, where the evil done by bringing the action is remedied at the same time that the mischief is published, namely, at the trial.

The court held that a petition to wind-up is like a bankruptcy petition in that the petition is made public before the plaintiff can defend himself. Accordingly, the initiation of the wind-up proceedings caused an injury to the plaintiff's fame. Brett M.R. stated at pp.688-689:

To speak broadly, and without travelling into every corner of the law, whenever a man complains before a court of justice of the false and malicious legal proceedings of another, his complaint, in order to give a good and substantial cause of action, must show that the false and malicious proceedings have been accompanied by damage express or implied.

The distinction between *Quartz Hill* and the present case is that the investors did not personally suffer any damage to their fame. Any damage to fame that may have occurred would have been to Mater's and not the investors.

42 In the case at bar it appears to me that, if damage has been suffered by the plaintiffs as investors in the mortgages in the Mater's mortgages, such damage resulted from the manner in which the mortgage funds were administered by Mater's, the issuance of the various orders by the Ministry and the order of Justice Montgomery and not as a result of the initiation of the receivership application by the defendant. The defendant had no control over the administration of the mortgage funds by Mater's or over the issuance of the various orders by the Ministry and the law is clear that damage resulting from an order made,

or judgment issued, by a judicial authority cannot form the basis for an action against the person initiating the legal proceedings except in the limited circumstances discussed above which I have determined are not applicable to the case at bar.

43 With respect to the submissions of the defendant that the plaintiffs are estopped by their conduct from challenging the propriety of the receivership application, the investors were notified of the receiver appointment through press releases and other notices. The original order of Montgomery J. was reviewed 10 days later, at which time no dissent was made by the investors. No appeal was taken by the investors from that order. Accordingly, their conduct of sitting back and watching the proceedings estops them from challenging the receivership order. Even if the investors were not a party to the receivership proceedings in January 1990, they had independent legal counsel appointed in May of 1990 and they could have immediately or shortly thereafter raised issue with the order. On the contrary, they continued to participate in a number of motions brought in the receivership proceedings. For them to come to court some five and a half years after the original proceedings amounts to an abuse of process. Estoppel by conduct does not require a positive act. A person can be estopped by failing to take action.

44 The defendant has also submitted that the plaintiffs should be found to have acquiesced in the appointment of a receiver. Acquiescence does require some positive act or words that demonstrate approval or consent.

45 In *Royal Bank of Canada v. Fogler, Rubinoff* (1991), 5 O.R. (3d) 734 at 746 (Ont. C.A.) Dubin C.J.O. stated:

What is stated in *Waters, supra*, at p.1010, is applicable here: However, knowledge itself is not sufficient to constitute consent or acquiescence. *There must be some positive act or words which demonstrate that the beneficiary not only knew, but also approved of what was proposed or had been done. A man cannot be said to consent or acquiesce because, though he knows, he does not interfere.* (Emphasis added)

46 It may be that the participation by the investors in subsequent motions in the receivership proceedings could be held to be a positive act implying consent to or approval of the appointment of the receiver. I do not think I am required to determine this question as I am satisfied, as outlined above, that the plaintiffs are estopped by their conduct from ever challenging the appointment.

47 Accordingly, I find no genuine issue for trial in this action and that, in any event, the action commenced by the plaintiffs constitutes a collateral attack on the order of Justice Montgomery and can not be permitted to proceed.. The plaintiffs' motion for summary judgment is dismissed. An order will issue granting summary judgment in favour of the defendant and dismissing the plaintiffs' claim. If counsel wish me to fix costs of these motions, I would ask them to make written submissions as to scale and quantum of costs to me before November 30, 1996.

Plaintiff's motion for summary judgment granted and action dismissed.

TAB 20

2009 NBQB 60
New Brunswick Court of Queen's Bench

New Brunswick v. Rothmans Inc.

2009 CarswellNB 89, 2009 NBQB 60, [2009] N.B.J. No. 60, 175
A.C.W.S. (3d) 970, 342 N.B.R. (2d) 171, 75 C.P.C. (6th) 86, 878 A.P.R. 171

**HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF NEW
BRUNSWICK (Plaintiff) and ROTHMANS INC., ROTHMANS, BENSON &
HEDGES INC., CARRERAS ROTHMANS LIMITED, ALTRIA GROUP, INC.,
PHILIP MORRIS U.S.A. INC., PHILIP MORRIS INTERNATIONAL, INC.,
JTI- MACDONALD CORP., R.J. REYNOLDS TOBACCO COMPANY, R.J.
REYNOLDS TOBACCO INTERNATIONAL INC., IMPERIAL TOBACCO CANADA
LIMITED, BRITISH AMERICAN TOBACCO P.L.C., B.A.T. INDUSTRIES
P.L.C., BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED,
and CANADIAN TOBACCO MANUFACTURERS' COUNCIL (Defendants)**

T.E. Cyr J.

Heard: March 10, 2009

Judgment: March 20, 2009

Docket: F/C/88/08

Counsel: Philippe J. Eddie, Q.C., Christopher Correia, Q.C., Robin Ryan-Bell for Plaintiff
Charles D. Whelly, Q.C. for Defendants, Rothmans Inc., Rothmans Benson & Hedges Inc.
Rodney J. Gillis, Q.C. for Defendants, Altria Group Inc., Philip Morris U.S.A. Inc.
Robert G. Basque, Q.C. for Defendant, Philip Morris International Inc.
Thomas G. O'Neil, Q.C., Deborah A. Glendinning, Mahmud Jamal for Defendant, Imperial Tobacco Canada Limited

Subject: Evidence; Constitutional; Public; Civil Practice and Procedure; Torts

MOTION by Crown to strike expert reports from law professors G and H.

T.E. Cyr J.:

I. Introduction

1 The court is hereby seized of a motion, whereby the moving party is requesting that the court strike or otherwise rule inadmissible two affidavits purported to contain expert opinion evidence filed on behalf of the responding parties who, in turn, intend to rely on these affidavits in support of their own motions to be heard in the foreseeable future. I must determine according to the variable application of the four criteria found in the decision of the Supreme Court of Canada in *R. v. Mohan*, [1994] S.C.J. No. 36 (S.C.C.), whether the aforementioned affidavits should be admitted into evidence or otherwise excluded.

II. Facts

2 The defendant, Imperial Tobacco Canada Limited, (Imperial) has filed a motion whereby it claims that the Attorney General of New Brunswick contracted the conduct of this action to a consortium of U.S., Ontario, and New Brunswick lawyers (Crown Counsel Consortium). According to Imperial, the Province has agreed to pay the lawyers a very large contingent fee in the event it is successful in this litigation. In this motion, (C.F.A. motion), Imperial is challenging the constitutionality, legality, and ethical integrity of the contingent fee agreement.

3 The following defendants, Philip Morris International, Inc., Rothmans Inc., Rothmans, Benson & Hedges Inc., Altria Group, Inc., and Philip Morris U.S.A. Inc. have joined Imperial by filing similar motions. A procedural timetable has been set for the C.F.A. motions. The hearing is scheduled to take place on June 16-18, 2009. (See *New Brunswick v. Rothmans Inc.*, [2009] N.B.J. No. 8 (N.B. Q.B.).)

4 These defendants take the position that the Attorney General hired external counsel by way of a contingent fee agreement thereby violating the *Constitution Act, 1867*. Further, that these lawyers are in conflict of interest in prosecuting this action and that the U.S. lawyers retained are and would continue to be engaged in the unauthorized practice of law in the Province of New Brunswick.

5 They also say that the Attorney General of New Brunswick retained the legal services of the Crown Counsel Consortium authorizing it to act in the public's interest. They believe that it should be removed and that the contingent fee agreement should be declared void for it has a disqualifying conflict of interest between its public duties as counsel for the Attorney General and its private financial interests under the agreement.

6 In addition, they argue that the Attorney General of New Brunswick had no constitutional authority to enter into the contingent fee agreement and to commit such vast sums of public money to anyone without proper legislative approval. They are of the view that this agreement breaches s. 53 of the *Constitution Act, 1867*, and s. 30 of the *Financial Administration Act*, R.S.N.B., 1973, c.F-11, and that it contravenes accepted public law principles of fiscal management.

7 Therefore, they allege that they are being sued for potentially billions of dollars by lawyers acting in circumstances which offer them the prospect of enormous wealth in the event of success. Included in this group are foreign lawyers who, according to them, are unauthorized to practice law in this jurisdiction. Consequently, they believe that the contingent fee agreement breaches the *Law Society Act, 1996*, S.N.B.1996, c.89, due to the fact that foreign lawyers have been engaged in the unauthorized practice of law and further by failing to comply with the Contingent Fee Rules put in place under s. 83 of the Act.

8 In support of the C.F.A. motion, Imperial filed *inter alia* the affidavit of Professor H. Patrick Glenn, attaching his expert report (the "Glenn Report"), and the affidavit of Professor Geoffrey C. Hazard Jr., attaching his expert report (the "Hazard Report").

9 The other defendants, who have filed C.F.A. motions, are also relying on the "Glenn and Hazard Reports" in support of their respective motions.

III. The Present Motion

10 The plaintiff moves to strike or to have the court rule inadmissible, the "Glenn and Hazard Reports". The moving party relies on Rules: 27.09 and 39 of the *New Brunswick Rules of Court* and on the inherent jurisdiction of the court as provided by the *Judicature Act 1973*, A.S.N.B., c.J-2.

11 The defendants maintain that the expert reports are properly admissible as expert evidence and that if the court has any doubt about their admissibility, it should address this issue only with the benefit of the full context and argument of the C.F.A. motions. Consequently, the court should defer the plaintiff's motion regarding the affidavits, without prejudice, to the hearing of the C.F.A. motions.

12 The plaintiff argues that it would be prejudiced by having its motion adjourned. Crucial decisions must be made in light of the procedural timetable set by the court and it should rule on its motion as soon as possible so that the plaintiff may adjust its position accordingly and proceed expeditiously to the hearing of the C.F.A. motions.

13 I agree with the plaintiff that it is important for the court to address this motion at this time, in light of the procedural timetable previously set by the court, and to provide the plaintiff the opportunity to respond to the C.F.A. motions once this motion is dealt with, if it so wishes to do so, and in order to give the parties the opportunity to prepare adequately for the hearing of the C.F.A. motions.

14 The plaintiff's position, in support of its motion, is well summarized in para. 4 of the pre-hearing brief as follows:

- a) Both affidavits fail to meet the requirement of "necessity" laid down by the Supreme Court of Canada for the admissibility of expert evidence;
- b) The Glenn Affidavit contains opinion evidence on questions of domestic law which is inadmissible. The Glenn Affidavit seeks to usurp the role of this Honourable Court in determining domestic law and other issues before the Court. Matters of domestic law are exclusively within the expertise of this Honourable Court and are to be determined by it;
- c) The Glenn Affidavit contains opinion evidence on the ultimate issue the court must determine on the motion, and is therefore inadmissible;
- d) To the extent that the Glenn Affidavit seeks to give evidence on foreign law, it is irrelevant and inadmissible;
- e) The Hazard Affidavit contains opinion evidence on questions of foreign law. Foreign law must be specifically pleaded in order for evidence of foreign law to be admissible. No such plea exists in this case;
- f) The opinion of evidence on a question of foreign law that is contained in the Hazard Affidavit is irrelevant. Further, the opinion evidence in the Hazard affidavit seeks to usurp the role of this Court by providing "expert evidence" on the issues to be decided by the Court.

15 Moreover, counsel for the Province of New Brunswick submit that the "Glenn and Hazard Reports", in their entirety, present the views of two legal academics as to what the law is and should be and that they are advocacy documents dressed up as expert opinions. Further, they contend that this is the type of opinion evidence that has been rejected by Canadian courts in the past and that they are, at best, matters for argument. For these reasons, they are not properly the subject matter of evidence to be admitted before the Court.

16 All defendants who have filed a C.F.A. motion rally behind the position expressed by Imperial in that the expert reports are properly admissible as expert evidence. They argue that many trial and appeal courts, including the Supreme Court of Canada, have admitted expert evidence of this nature on the issue of whether a lawyer has complied with his standard of care and ethical duties, including the duty to avoid conflicts of interest. They contend, as well, that these authorities are completely dispositive of the plaintiff's objections pertaining to these reports.

17 In addition, they insist that the reports meet the requirements of relevance and necessity for the admission of expert evidence and that their admission is not precluded by any exclusionary rule. Their position is summarized at paragraph 9 of Imperial's brief as follows:

- a) The Reports are *relevant* to the issues on the CFA Motion. Both Reports address the ethical, professional standards, and public policy issues raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. These are key factual issues that will be disputed at the CFA Motion. Moreover, the Reports are in no way prejudicial. Since the CFA Motion will be heard by a judge without a jury, there is no danger that the Court will be unduly influenced by the experts' opinions. If the Court does not find their opinions persuasive, it can give them little or no weight (below paras. 44-47).
- b) The Reports are also *necessary* to the trier of fact. The Supreme Court has cautioned that necessity is not to be judged by too strict a standard (below para. 48). In accordance with this approach, courts have routinely admitted expert evidence of lawyers on the issue of whether a lawyer has complied with ethical duties, such as the duty to avoid conflicts of interest (below paras. 49-51). As the issues of legal ethics are outside the knowledge and understanding of ordinary people, a judge, as trier of fact, should not rely on his own judgment on such matters, which cannot be cross-examined, when competent expert advice is preferred (below para. 52).

c) The admission of the expert reports is *not precluded by any exclusionary rule*:

(i) The Reports do not contain opinion evidence on questions of law. Rather, they address ethical, professional standards, and public policy issues, which, as various courts have recognized, are not rules of law, but rather reflect what members of the legal profession have decided is proper or improper. It is well established that the application of professional standards to a particular case is an issue of fact, for which expert evidence is proper, even though the Court is not bound to accept such evidence (below paras. 59-64)

(ii) The Reports are not inadmissible under the "ultimate issue rule". The Supreme Court of Canada has held that expert evidence is admissible even if it relates directly to the ultimate issue (below para. 72). In any event, the Reports do not address the ultimate issue before the Court, which is whether, in all the circumstances, the Court should exercise its discretion under New Brunswick law to disqualify the Crown Counsel Consortium. The Glenn and Hazard Reports do not address this ultimate issue, but rather address only the factual issues of the applicable ethical, professional standards, and public policies at stake (below paras. 74-76). In short, Professors Glenn and Hazard provide expert testimony bearing on the conflict issue; this Court must then decide, based on New Brunswick law, what to do about any conflict.

(iii) If the Hazard Report contains opinion evidence on foreign law (which is denied), it is nevertheless admissible since foreign law must be proven by expert evidence (below paras. 77-82). No pleading of foreign law is required, since this case is governed by domestic rather than foreign law.

18 Furthermore, Imperial submits that if the Court has any doubts about the admissibility of the expert reports, it should address this issue only with the benefit of the full context and argument of the C.F.A. motion. They maintain that the plaintiff's motion to strike should be dismissed or alternatively be deferred, without prejudice, to the hearing of the C.F.A. motions.

IV. Discussion

(a) Expert opinion evidence

19 "Admission of expert evidence depends on the application of the following criteria:

- a) relevance;
- b) necessity in assisting the trier of fact;
- c) the absence of any exclusionary rule; and
- d) a properly qualified expert."

See *R. v. Mohan*, *supra*, at para. 17.

20 Relevance is a threshold requirement for the admission of expert evidence and is a matter to be decided by a judge as a question of law. Expert evidence is *prima facie* admissible if it is so related to a fact in issue that it tends to establish it. However, evidence that is otherwise logically relevant may be excluded if:

- its probative value is overborne by its prejudicial effect;
- it involves an inordinate amount of time which is not commensurate with its value;
- or it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.

See *R. v. Mohan*, *supra*, at para. 18.

21 With respect to the requirement of necessity, it is not enough that the expert evidence might be relevant or "helpful". The opinion evidence must be necessary for the trier of fact to reach a decision and this requirement will be strictly applied. However, necessity must not be judged by too strict a standard. The expert opinion evidence must be necessary to allow the trier of fact:

- to appreciate the facts due to their technical nature; or
- to form a correct judgment on a matter where ordinary persons are unlikely to do so without the help of those with special knowledge.

See *R. v. Mohan, supra*, at para. 22 and *R. v. D. (D.)*, [2000] S.C.J. No. 44 (S.C.C.) at para. 47.

22 The Supreme Court of Canada stated in *Mohan* that there is concern inherent in the application of the necessity criterion that experts not be permitted to usurp the functions of the trier of fact. See *R. v. Mohan, supra*, at para. 24.

23 Although the rule excluding expert evidence in respect of the ultimate issue is no longer of general application, the concerns underlying it remain.

24 The question of the admissibility of expert evidence requires a case by case analysis of the four *Mohan* criteria. See *R. v. D. (D.)*, *supra*, at para. 13.

(b) The Glenn Report

25 The plaintiff alleges that I should completely disregard Professor Glenn's Report because it is not the proper subject matter for expert opinion in that it is an attempt to provide the court evidence of domestic law and, on occasion, to refer to the jurisprudence of other countries. The lawyers for the Province insist that the report is nothing more than "advocacy dressed up as expert opinion" and that its use to make such submissions is entirely superfluous.

26 The plaintiff maintains that the "Glenn Report" is not relevant and moreover that it is not necessary in assisting the trier of fact. In putting forward its objections to the "Glenn Report", it argues that it is inadmissible under three exclusionary rules:

- Firstly, that the report contains opinion evidence on questions of domestic law, which is inadmissible;
- Secondly, that the report contains opinion evidence on foreign law, which is irrelevant and inadmissible;
- And thirdly, the plaintiff asserts that the expert report is inadmissible under the "ultimate issue rule".

27 The plaintiff has forcefully advanced the general proposition that a court will not receive evidence from an expert providing opinion evidence about domestic law due to the fact that it is not necessary to assist the trier of fact. The plaintiff has cited cases rejecting expert evidence on legal questions, thereby providing examples where affidavits of law professors and lawyers seeking to tender an expert opinion and purporting to elucidate a supposedly complex area of the law have been rejected by the courts. See *CCH Canadian Ltd. v. Law Society of Upper Canada*, [1999] F.C.J. No. 1647 (Fed. T.D.); *Canadian Pacific Ltd. Re*, [1990] O.J. No. 606 (Ont. H.C.); *Pente Investment Management Ltd. v. Schneider Corp.*, [1998] O.J. No. 6387 (Ont. Gen. Div. [Commercial List]); affd (Ont. C.A.); and *Canada Post Corp. v. Smith*, [1994] O.J. No. 2232 (Ont. Div. Ct.).

28 The general proposition that an expert cannot give evidence on domestic law is not disputed by the defendants. They argue that the true issue is whether Professional Standards and Ethical Rules are rules of law; they submit that they are not. They claim that the application of professional standards of conduct, as they apply to the particular circumstances, are issues of fact to be resolved by the trier of fact.

(i) Expert evidence is ordinarily required in cases dealing with legal ethics and professional standards

29 Courts, on occasion, have stated that in cases involving professional standards of conduct and their application to particular circumstances; it is generally preferable that expert evidence be submitted to assist the court thereby avoiding a situation where

the judge, in the absence of such evidence, becomes "his own expert". See *Zink v. Adrian* (2005), 37 B.C.L.R. (4th) 389 (B.C. C.A.), paras. 42-44; *Payne v. Pearson*, [2005] A.J. No. 1178 (Alta. Q.B.), para. 25; *Precision Remodeling Ltd. v. Soskin, Soskin & Potasky LLP*, [2008] O.J. No. 2560 (Ont. S.C.J.), para. 57.

30 Moreover, courts have admitted expert evidence of lawyers on the issue of whether a lawyer has complied with his standard of care and/or ethical duties. See *Noble v. Lourensse*, [2001] N.B.J. No. 466 (N.B. Q.B.), paras. 42, 75-76, affd (N.B. C.A.); *Stewart v. Canadian Broadcasting Corp.* (1997), 150 D.L.R. (4th) 24 (Ont. Gen. Div.), pp. 108-109, 115-116, 120; *Transamerica Life Insurance Co. of Canada v. Seward* (1997), 33 O.R. (3d) 604 (Ont. Gen. Div.), pp. 610-611.

(ii) *Ethical and professional standards for lawyers are not rules of law*

31 The Ontario Court of Appeal in the case of *Teskey v. Canadian Newspapers Co.*, [1989] O.J. No. 828 (Ont. C.A.), held that the trial judge erred in refusing to admit expert evidence of a lawyer concerning whether the solicitors had a conflict of interest. The following passages found at paragraphs 48 and 49 of the decision are particularly relevant:

48 The proposed evidence of the expert forms part of the record and is contained in a letter from the expert to Ogilvie's counsel. It refers to the Municipal Conflict of Interest Act and cases decided thereunder and also to the Rules of Professional Conduct published by the Law Society of Upper Canada. The letter makes clear that the Act does not apply to the respondents because they are not employees of the township and refers to cases decided under the statute only as examples of the application of conflict of interest principles. It also refers to three of the Rules of Professional Conduct of the Law Society of Upper Canada and comments on each rule and concludes that the respondents breached them both in letter and spirit.

49 The trial judge refused to permit the expert to give evidence on the ground that he would be expressing conclusions of law. It is indisputable that witnesses cannot usurp the prerogatives of the trial judge by giving evidence as to the applicable law. With respect, nevertheless, I am of the opinion that the trial judge erred in holding that the expert's views on the Rules of Professional Conduct should be treated as conclusions of law. Professional standards of conduct are not rules of law but rather reflect what members of a professional have decided is proper or improper.

32 Accordingly, the application of legal profession standards by a professional law society is distinct from the application of law by the courts. See also *MacMillan Bloedel Ltd. v. Freeman & Co.* (1992), 78 B.C.L.R. (2d) 325 (B.C. S.C.), paras. 42-43; *Transamerica Life Insurance Co. of Canada v. Seward*, *supra*, p. 613.

33 In the case of *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.), pp. 1243-1246) the Supreme Court of Canada confirmed that a court has inherent jurisdiction to remove solicitors who have a conflict of interest and is not bound to apply a code of professional conduct or code of ethics of a legal profession in order to do so. This case strongly supports the approach of the Ontario Court of Appeal in the case of *Teskey v. Canadian Newspapers Co.*, *supra*, that legal professional standards and ethical norms contained in codes of professional conduct or codes of ethics are not rules of law. Although they should be considered an important statement of public policy, the court is not bound to follow them.

34 In my view, the decision in *Teskey v. Canadian Newspapers Co.*, *supra*, remains good law and has not been overruled, expressly or implicitly. Further, the decision of the Court of Appeal of Ontario in that case is entirely consistent with the Supreme Court's decision in *MacDonald Estate v. Martin*, *supra*.

35 The Supreme Court of Canada's decision in *Mohan* addressed only the general test for the admission of expert evidence. That case dealt with the context of a pediatrician accused of sexually assaulting patients but did not address the issue whether or not legal professional and ethical standards are rules of law as did the court in *Teskey v. Canadian Newspapers Co.* Nor was the case cited in the *Mohan* decision.

36 The B.C. Supreme Court in the decision of *MacMillan Bloedel Ltd. v. Freeman & Co.*, *supra*, and the Ontario General Division decision in *Transamerica Life Insurance Co. of Canada v. Seward*, *supra*, concluded similarly as in the decision in *Teskey v. Canadian Newspapers Co.*, *supra*, that the application of legal professional standards by provincial law societies is

distinct from the application of the law by the courts. I believe that these decisions are entirely consistent with the decision of the Supreme Court of Canada in *MacDonald Estate v. Martin, supra*.

37 The decision in *Teskey v. Canadian Newspapers Co., supra*, is cited approvingly in John Sopinka, Sidney N. Lederman, Alan W. Bryant, *The Law of Evidence in Canada* (1999), p. 640, Footnote 225 where the authors mention that the case stands for authority that Rules of Professional Conduct are admissible for they are not rules of law.

38 In seeking to avoid the impact of the decision in *Teskey v. Canadian Newspapers Co., supra*, the plaintiff relies heavily on the decision of the Ontario Superior Court of Justice in *Carlingwood Motors Ltd. v. Nissan Canada Inc.*, [2000] O.J. No. 2508 (Ont. Master). In that case the defendants brought a motion seeking to have a law firm removed as solicitors for the plaintiff due to an alleged conflict of interest. The defendants sought to introduce the expert opinion of a lawyer and bencher of the Law Society of Upper Canada with respect to whether a conflict of interest existed pursuant to their Rules of Professional Conduct. The learned master struck the affidavit of the expert on the basis that the opinion offered served the function of the court to determine the very issues that would be argued on the return of the motion.

39 This decision distinguishes the one in *Teskey v. Canadian Newspapers Co., supra*, on two grounds: firstly, on the basis that the affidavit purported to be used went to the ultimate issue before the court, and, secondly, on the basis that ethical rules are not information of a technical nature that is outside the knowledge of the court. With respect, I disagree with the approach taken on both grounds, for this decision does not appear to consider the Supreme Court of Canada's pronouncements in the following cases: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 (S.C.C.) at para. 39; *R. v. B. (R.H.)*, [1994] 1 S.C.R. 656 (S.C.C.), p. 666, where it explicitly held that expert evidence is admissible even if it relates directly to the ultimate issue before the court. The finding that the expert report was inadmissible because ethical rules are within the knowledge of the court is flatly inconsistent with the decision in *Teskey v. Canadian Newspapers Co., supra*, and other cases cited above, where this type of expert evidence was found to be admissible. For these reasons, with respect, the Ontario Court of Appeal's decision in *Teskey v. Canadian Newspapers Co., supra*, should be preferred to the decision in *Carlingwood Motors Ltd. v. Nissan Canada Inc., supra*.

(iii) The Glenn affidavit does not contain option evidence on domestic and foreign law

40 Professor Glenn indicates that he was asked to present his opinion on the following question: "What ethical, professional standards, and public policy issues are raised when an Attorney General retains outside counsel pursuant to a contingent fee arrangement?" Professor Glenn notes that he is not aware of any Canadian writings or authorities that have considered the specific question he addresses. He bases his report on the ethical principles and professional standards that apply to government lawyers in Canada. He also considers how foreign jurisdictions have dealt with the question. Professor Glenn opines that there is an "ethical duty of government lawyers to act impartially and in the public interest", which is "reflected in obligations imposed on government lawyers in common law by the government and under the *Charter*". He focuses on ethical duties and professional standards of government lawyers which are "reflected in" and "illuminated by" various branches of the law. He refers to legal sources to illustrate ethical and professional standard principles and, in doing so, also refers to various non-legal sources and historical materials to shed light on these principles that apply to government lawyers. (Quotations taken from paragraphs 5 and 14 of the "Glenn Report".)

41 He concludes that "there are major ethical, professional standards, and public policy issues raised when an Attorney General retains outside counsel pursuant to a contingent fee arrangement". (Quotation taken from paragraph 43 of the "Glenn Report".)

42 The plaintiff is adamant that the "Glenn Report" adds nothing to the analysis of issues to be determined in the C.F.A. motions that could not have been said in a written submission or in an argument. Therefore, it is in no way necessary for the court to arrive at a decision on the C.F.A. motions. According to the plaintiff, the "Glenn Report" is nothing more than a memorandum of legal argument with a '*jurat*' attached to it.

43 The defendants contend that the "Glenn Report" addresses ethical, professional standards, and public policy issues that are raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. They allege that these are issues of fact for which it is proper to receive expert evidence.

44 They recognize that Professor Glenn refers to legal authorities while elucidating the basis of his opinion concerning the ethical, professional standards, and public policy issues addressed in his report. They claim that expert evidence concerning the ethical standard of legal professionals is admissible as relating to an issue of fact, even if it is based on jurisprudence and other legal authorities.

45 Furthermore, they argue that the "Glenn Report" refers to codes of conduct, jurisprudence, and other authorities that reflect or state the ethical standards of government lawyers. According to them, some of these authorities apply the ethical duty to act impartially and in the public interest in particular circumstances. These authorities serve to clarify issues of fact which are relevant to the C.F.A. motions according to them, such as whether government lawyers are subject to an ethical duty of impartiality and, if so, whether public contingent fee agreements are consistent with that duty.

46 The defendants concede that the "Glenn Report" refers to authorities that could be put before the court other than by way of evidence. They maintain, however, that the report places the authorities in the context of the evolution, nature, and application of the professional ethical standards of lawyers acting for a government or public body. According to them, these are matters within the special expertise of Professor Glenn and outside the knowledge and understanding of the ordinary person. The report is therefore necessary, even if some of the authorities to which it refers could be put before the court in its absence. Hence, they argue that they are not presented as binding legal authorities and thus, the report is not inadmissible because it refers to these authorities.

47 In the case of *Stewart v. Canadian Broadcasting Corp.*, *supra*, the court admitted and considered expert evidence from a lawyer concerning whether the defendant solicitor had acted in compliance with his ethical duties to a former client. The following excerpt from paragraph 205 of the decision is particularly relevant:

205 (...) In order to give his opinion, it was frequently necessary for Mr. MacKenzie to address matters of law. This was permitted so that he could develop his opinion respecting factual issues as he saw fit, and so that his evidence would disclose the assumptions or influences which shaped his conclusions. Clearly, Mr. MacKenzie is highly qualified respecting matters of professional conduct, ethics and discipline. It should be noted however that, while his views respecting the law were informative and insightful, domestic law is not the province of the expert witness. It is for the court to determine and apply.

48 Similarly, it is possible for the court to consider the expert opinion as it relates to the relevant facts before it even though reference to domestic law is contained in his or her opinion. In this case, Professor Glenn's opinion is relevant and necessary as it relates to the factual determination: i.e. the ethical principles and professional standards that apply to government lawyers in Canada as it relates to the particular facts in this case. His use of domestic law for the purpose of elucidating his opinion on the facts in no way usurps the function of the court. Any other use of domestic law will be ignored due to the fact that it is not in the domain of the expert opinion. Domestic law is for the court to determine and apply.

49 Reference to domestic and/or foreign law, other than for the purpose of illustrating his opinion on the facts, is not necessary in the case of domestic law and irrelevant in the case of the laws of another jurisdiction.

50 Moreover, the court is not bound by such expert evidence and is entitled to give it whatever weight it deems appropriate. See *Stewart v. Broadcasting Corp.*, *supra*, at para. 220; *Transamerica Life Insurance Co. of Canada v. Seward*, *supra*, at pp. 610-611.

(iv) Ultimate issue rule

51 The defendants, in their C.F.A. motions, seek a declaratory order from the court that the Crown Counsel Consortium has a disqualifying conflict of interest between its duties as counsel for the Attorney General of New Brunswick and its private

financial interests under the terms of its contingent fee agreement (C.F.A.) with the Province of New Brunswick represented by the Attorney General through the lawyers he has retained. Additionally, due to the alleged creation of a conflict of interest that, according to them, arises from the use of a contingent fee agreement, they contend that the plaintiff may not retain counsel under such an agreement to pursue its claim under the *Tobacco Damages and Health Care Costs Recovery Act*, S.N.B. 2006, c. T-7.5.

52 The plaintiff insists that the "Glenn Report", in whole or in part, is inadmissible because it transgresses the "ultimate issue rule". In support of its argument, it has brought to the court's attention conclusions drawn by Professor Glenn in paragraph 44 of his report which reads as follows:

44 (...)

The duty of lawyers representing the government to act impartially and according to a 'rigorous conflict of interest standard' is as applicable in civil matters as it is in criminal matters (*Assh*, above, para. 22). This duty is impossible to reconcile with the major incentives for substantial and personal financial gain which arise under a contingent fee arrangement. Nor is it possible for the Attorney General to exercise absolute control over outside counsel in cases which require outside counsel to employ professional judgment and discretion. The conflict of interest that arises when an Attorney General retains outside counsel under a contingent fee arrangement therefore cannot be avoided by the Attorney General exercising absolute control over outside counsel.

53 The lawyers for the Province maintain that this is an example where Professor Glenn has specifically concluded that there is a conflict in this case and that he thereby seeks to usurp the role of this court by providing expert evidence on the issues the court is asked to decide. Other examples of alleged transgressions of the "ultimate issue rule" found in paragraphs 33-35 of his report have been brought to the court's attention.

54 According to the defendants, the "Glenn Report" does not address the ultimate issue before the court. In their opinion, the ultimate issue is not the ethical issue itself but rather the legal consequences of a breach of the ethical standard. They argue that the ultimate issue is whether the breach, if found, is serious enough to require judicial intervention in that the court should disqualify the Crown Counsel Consortium in the circumstances.

55 Alternatively, the defendants maintain that even if the "Glenn Report" addresses the ultimate issue before the court, it is not inadmissible on this basis.

56 The Supreme Court of Canada has concluded that expert testimony is admissible even if it relates directly to the ultimate issue which must be answered by the trier of fact. In *R. v. B. (R.H.)*, *supra*, at p. 666, McLachlin J., (as she then was), writing for the court, said:

(...)

His objection is that "the opinion of Dr. Maddess went to the very root of the issue before the learned trial judge" and that "allowing that opinion usurped the function of the trial judge": the so-called "ultimate issue rule". However, the jurisprudence does not support such a strict application of this rule. While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at p. 666 (per Doherty J.A.).

57 Consequently, expert evidence on matters of fact should not be excluded simply because it addresses the very subject that the judge must determine. See also *R. v. R. (D.)*, [1996] 2 S.C.R. 291 (S.C.C.), para. 39; *New Brunswick (Department of Health & Community Services) v. H. (B.)* (1994), 153 N.B.R. (2d) 45 (N.B. C.A.), para. 18.

(v) *The Mohan Criteria*

58 As previously mentioned, relevance is a threshold requirement for the admission of expert evidence. The "Glenn Report" is pertinent to issues on the C.F.A. motions for it is relevant to facts that will be in issue for the court. This will not be enough to meet the relevance criteria. Relevance requires a finding of logical relevance and a determination that the benefits of the evidence outweigh its costs.

59 The expert opinion must be related to a fact in issue and have some tendency to help resolve that issue. The "Glenn Report" addresses the ethical, professional standards, and public policy issues that are raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. In this respect, the report refers to key factual issues that are in dispute between the parties and as such are admissible. In this sense, the evidence addresses live and material issues and, at first glance, the inferences are compelling. The evidence appears to be reliable, subject to a final determination by the judge at the hearing of the C.F.A. motions.

60 I must consider the negative impact the evidence may have on the trial process, which may include the following:

- the risk of uncritical acceptance by the trier of fact of the opinion;
- the risk of the trier of fact in giving the opinion more weight than it deserves;
- the danger that the opinion will be misused;
- the danger that the trier of fact will be overwhelmed or confused.

Due to the fact that the C.F.A. motions will be heard by a judge without a jury, my concerns regarding these possible negative impacts are greatly alleviated.

61 Further, its use does not involve an inordinate amount of time which is not commensurate with its value. The procedural timetable set for the hearing of the C.F.A. motions addresses the concern of the undue consumption of time regarding the motions and provides for a procedure insuring that these motions are dealt with expeditiously.

62 Furthermore, procedural safeguards, such as the opportunity to respond to the plaintiff's affidavits and the right to ask to cross-examine the expert also reduce the risk of a prejudice being caused to the plaintiff.

63 Consequently, nothing in the report is unfairly prejudicial to the plaintiff or to the Crown Counsel Consortium. For this reason, the *prima facie* admissible report should not be excluded because of any overbearing prejudicial effect.

64 The opinion of Professor Glenn is necessary in the sense that it provides information on factual issues which is likely to be outside the experience and knowledge of the trier of fact. Courts have found that expert evidence is ordinarily required in proceedings concerning lawyers' professional standards of conduct and their application to particular circumstances. The report is therefore necessary to assist the trier of fact in the C.F.A. motions.

65 The admission of the "Glenn Report" is not precluded by any exclusionary rule for the following reasons:

- Firstly, ethical and professional standards for lawyers are not rules of law and the application of such standards in particular circumstances is an issue of fact to be resolved by the trier of fact to the extent that the "Glenn Report" addresses ethical, professional standards, and public policy issues that are raised when an Attorney General retains outside counsel pursuant to a contingent fee agreement. These are issues of fact, for which it is proper to receive expert evidence.
- Secondly, reference to cases and legal authorities, domestic and foreign, for the sole purpose of elucidating expert evidence as it relates to factual issues, which are relevant to the C.F.A. motions, do not render the "Glenn Report" inadmissible. Any other use of these legal authorities is, in my view, in the case of domestic law, not necessary and in the case of foreign law, irrelevant.

- Thirdly, to the extent that the "Glenn Report" may relate directly to the ultimate issue, it is not inadmissible on this basis due to the fact that the judge, and not the expert, makes the final decision on all issues in the case. All transgressions of the ultimate issue rule, "if any", can be ignored by the trier of fact because the judge, and the judge alone in this instance, makes the final decision on all issues in the case.

66 The report meets the requirements of relevance and necessity expressed in *Mohan* and the admission of the "Glenn Report" is not precluded by any exclusionary rule. The plaintiff, for the purposes of this motion, has not questioned the qualifications of Professor Glenn. This is subject, however, on a without prejudice basis to present arguments as to what weight should be given to his evidence on the hearing of the C.F.A. motions. Consequently, the four criteria in *Mohan* have been satisfied and the motion to strike and/or otherwise declare inadmissible the evidence of Professor H. Patrick Glenn, sworn on November 24th, 2008 ("Glenn Report"), is hereby denied.

(c) The Hazard Report

67 Professor Hazard Jr. indicates that he was asked to present his opinions from the perspective of U.S. law concerning the following question: "What ethical, professional standards, and public policy issues are raised when an Attorney General retains outside counsel pursuant to a contingent fee arrangement?" (Quotation taken from paragraph 3 of the "Hazard Report".)

68 In paragraph 5 of his report, Professor Hazard Jr. expresses his opinion that, "from a U.S. perspective, significant questions of professional ethics of public policy are presented where an Attorney General retains outside counsel under a contingent fee arrangement to litigate claims of a sort not available to private citizens". The "Hazard Report" contains an overview of the use of such arrangements in the United States and a discussion of how the law in the United States has treated them between public agencies and outside counsel in the context of civil litigation. His report includes an overview of U.S. case law regarding contingent fee arrangements in public body litigation.

(i) The Hazard Report contains opinion evidence on foreign law and is irrelevant

69 The plaintiff moves to strike, or otherwise rule inadmissible, the "Hazard Report" on the ground that it contains opinion evidence on a question of foreign law and is therefore irrelevant.

70 The plaintiff contends that foreign law, including the law of the United States, is irrelevant to this action and to the C.F.A. motions. The Statement of Claim in this action does not raise any issue of foreign law and does not plead that foreign law shall apply. Also there are no further pleadings in the action at present and the C.F.A. motions filed by the defendants similarly do not claim that foreign law pertains to the action or to the motions.

71 According to the plaintiff, the "Hazard Report" purports to do nothing more than assist the court in the interpretation of the applicable domestic law by setting up the law and policy considerations relevant to the United States and argues forcibly that, where a witness gives evidence as to foreign law, such evidence, where intended as a fact, is irrelevant where it is merely being adduced to assist the court in its interpretation of domestic law.

72 The plaintiff further contends that the court is clearly capable, without the evidence of an expert, of considering foreign law and related matters while determining whether, according to domestic law, lawyers are in a conflict of interest. Accordingly, the "Hazard Report" adds nothing to the analysis of the issues to be determined on the C.F.A. motions that could not have been said in a written submission or argument. The plaintiff insists that counsel can assist the court in this regards, if they wish, by making legal submissions highlighting foreign case law that it may choose to consider. In short, it is a matter for argument, not evidence.

73 The defendants maintain that the "Hazard Report" addresses the ethical, professional standards, and public policy issues at stake from a U.S. perspective. According to them, he does not purport to provide an opinion on U.S. law, although he does consider jurisprudential and other sources to illustrate his opinions. Further, they contend that to the extent that the "Hazard Report" contains opinion evidence on foreign law, it is properly tendered through expert evidence.

74 They argue that the "Hazard Report" is also unquestionably relevant to the issues in the C.F.A. motions due to the fact that a contingent fee arrangement in public body litigation of this scale and magnitude is simply unprecedented in Canadian law. They add that in the United States, by contrast, public contingent fee arrangements are not unfamiliar. The defendants suggest that the "Hazard Report" considers the development of contingent fees as a feature of the U.S. juridical landscape. Therefore, it traces the manner in which contingent fees have been employed in public body litigation in the U.S., and considers if and when these arrangements are consistent with the ethical duty of government lawyers to act neutrally in that country. According to them, Professor Hazard's views on this issue are informed by both the relevant U.S. jurisprudence and the opinions of U.S. legal scholars. For these reasons, they claim that Professor Hazard's Report is thus relevant and necessary to the trier of fact on the C.F.A. motions.

75 The defendants acknowledge that the requirement to plead foreign law applies where the case or an issue in the case is governed by foreign law. They concede that this matter is governed by domestic law.

76 Reference to foreign law, according to them, is made due to the fact that the United States appears to be the only common law jurisdiction in the world that has specifically considered the propriety of contingent fee arrangements in litigation brought on behalf of an Attorney General. For this reason, they contend the "Hazard Report" has been filed to assist the court by outlining the U.S. perspective on the issue and not on the basis that U.S. law governs this proceeding.

77 The defendants have brought to my attention the decision in *United States v. Kinsella* (2007), 322 N.B.R. (2d) 131 (N.B. C.A.) in support of the principle that foreign law is a question of fact that must be proven by admissible evidence. Further, they have cited the decision of *RiouxB v. Berthelot* (1996), 177 N.B.R. (2d) 144 (N.B. Q.B.), para. 20 in support of their contention that foreign law must be proved with the help of experts. These cases are easily distinguished for they both deal with matters where foreign law was an issue in the proceedings.

78 No issue of foreign law has been raised in this case and for that reason expert evidence with respect to U.S. law is not relevant to these proceedings.

79 Further, as previously mentioned, the defendants concede that the matter is governed by domestic law. No witness, expert, or otherwise can provide an opinion on pure questions of domestic law.

80 In the case of the "Hazard Report", the plaintiff has not challenged the qualifications of Professor Hazard Jr.. It does, however, argue forcefully that the evidence is not relevant nor is it necessary for the reasons stated above. I agree with the plaintiff's position in this regards.

81 Expert evidence with respect to the ethical, professional standards, and public policy issues from a U.S. perspective are not relevant, nor are they necessary in order for this court to arrive at the factual determination of the appropriate standards applicable in Canada. Nor is the information relevant and/or necessary for this court to arrive at a legal conclusion with respect to whether there exists a disqualifying conflict of interest and whether the Province's lawyers can continue to act in this case.

82 As previously stated, no issue of foreign law has been raised in this case and for that reason expert evidence with respect to U.S. laws is not relevant to these proceedings nor is the "Hazard Report" necessary to determine domestic law, which must be left to the court to apply.

83 The court is clearly capable, without the evidence of an expert, of considering foreign case law and related matters while determining whether, according to domestic law, lawyers are in a conflict of interest. In *MacDonald Estate v. Martin*, *supra*, at pp. 1243-1246, the Supreme Court of Canada, in considering the appropriate standard to be applied in determining whether a law firm was disqualified from acting in litigation by reason of a conflict of interest, made its decision having regard to policy considerations, rules of professional conduct, and varying approaches to the issue found in the case law of several jurisdictions including England, the United States, Australia, and New Zealand. There is no indication that the court required opinion evidence of an expert in order to consider jurisprudence emanating from other jurisdictions, including the United States

and other publications, as in the case of a review of U.S. law and an article in the Harvard Law Review. (See *MacDonald Estate v. Martin, supra* at pp. 1247-1248.)

84 Similarly, nothing prevents the defendants, if they wish, to refer to jurisprudence and other publications emanating from other jurisdictions, including the United States, by making legal submissions highlighting the relevant foreign case law and other publications that the court may wish to consider. It is a matter of argument, not evidence!

85 For these reasons, the "Hazard Report" does not meet the criteria set out in *Mohan* and, consequently, should not be received by the court as expert evidence for the purposes of the C.F.A. motions.

86 Consequently, I have come to the determination that the affidavit of Geoffrey C. Hazard Jr., sworn on November 24th, 2008 ("Hazard Report"), as it relates to the C.F.A. motions, is inadmissible. My ruling on evidence applies to all defendants who have filed C.F.A. motions as per their agreement that my decision would, by consent, bind all defendants who relied on the "Hazard Report" for the purposes of their respective C.F.A. motion.

V. Summary

87 The plaintiff's motion for an order to strike, or otherwise rule inadmissible the affidavit of H. Patrick Glenn, sworn on November 24th, 2008, as it relates to the C.F.A. motions, is hereby denied.

88 I have determined that the affidavit of Geoffrey C. Hazard Jr., sworn on November 24th, 2008, ("Hazard Report"), as it relates to the C.F.A. motions, is inadmissible for the purposes of those motions. My ruling on evidence, as it relates to the C.F.A. motions, binds all defendants who have filed similar motions.

89 The court will hear motion(s) for an order regarding examinations under Rule 39.02 according to the procedural timetable previously set by the court or at another time and date agreed by the parties involved in the C.F.A. motions.

Motion dismissed as regards G; motion granted as regards H.

TAB 21

2002 CarswellOnt 2066
Ontario Superior Court of Justice

Obonsawin v. Canada

2002 CarswellOnt 2066, [2002] O.J. No. 2502, 26 C.P.C. (5th) 293

Obonsawin, Carrying on Business as Native Leasing Services and Joe Hester, Plaintiffs and Her Majesty the Queen in Right of Canada, Minister of National Revenue, Minister of Indian Affairs, Commissioner of Customs and Revenue, Bill McCloskey, Robert Frapier, Michael Cox, Winford Smith, Denis Lefebvre, K.M. Burpee, Ken Fox, John Fennelly, Jeanne Flemming, Luisa Guyan, Ruby Howard, Ken McCuaig, Aileen Conway and Brian Dawe, Defendants

Epstein J.

Heard: May 31, 2001
Judgment: June 24, 2002
Docket: OO-CV-192586CP

Counsel: *B. Shiller*, for Plaintiffs
William Burden, John Birch, for Defendants

Subject: Civil Practice and Procedure; Public

MOTION by defendants for order severing claim brought by individual plaintiff from class claims brought by representative plaintiff.

Epstein J.:

- 1 This motion raises the issue of the legitimacy of joining an individual claim with class claims under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6, (the "CPA").
- 2 This action includes two types of claims, an individual one and a proposed class claim. The action has been brought under the CPA and has been assigned a class proceeding file number.
- 3 The defendants seek an order under s. 12 of the CPA and rule 5.05 of the *Rules of Civil Procedure* severing the individual claim brought by the plaintiff, Roger Obonsawin ("Obonsawin") on his own behalf, from the class claims brought by the representative plaintiff, Joe Hester ("Hester").
- 4 The defendants argue that it is improper to join a class proceeding with an individual action. The plaintiffs, on the other hand, submit that there is nothing in the CPA that prohibits such joinder and that the tests set out in rule 5.02 of the *Rules of Civil Procedure*, properly applied, support the conclusion that joinder is in the interests of justice.

The Facts

- 5 In this action, the plaintiffs have sued Her Majesty the Queen in Right of Canada, the Minister of National Revenue, the Minister of Indian Affairs, and the Commissioner of Customs & Revenue (collectively, the "Crown") and 15 individuals who at relevant times were employed by the Crown. The action is based on alleged abuse of power in the defendants' treatment of the plaintiffs during a dispute that arose between Obonsawin and the Crown over changes in the way the Crown administered tax exemptions to native peoples. The plaintiffs contend that in the course of resolving this dispute, the defendants developed such

animosity towards Obonsawin's position on the rights of native people in Canada that they acted maliciously and conspired to damage Obonsawin, his business and his employees.

6 The plaintiff Joe Hester is a status Indian and is an employee of Native Leasing Services ("NLS"). He brings this action on behalf of all employees of NLS. Obonsawin, also a status Indian, operates NLS as a sole proprietorship. There is no dispute that Obonsawin is not a member of the proposed class. He advances a claim solely on his own behalf.

7 NLS contracts with native organizations to provide a broad range of human resource assistance to the employee plaintiffs to create a pool of aboriginal personnel equipped with skills required by native communities and organizations. The employees' support services, administration, salaries and benefits are administered through NLS's offices located on the reserve of the Six Nations of Grand River, near Brantford, Ontario.

8 Obonsawin encourages native people to exercise their tax exemption rights in order to increase their ability to be self-sufficient. In keeping with this mixed political and economic agenda, Obonsawin has taken a public stand that the Crown cannot lawfully reduce these tax exemption rights except with the consent of native peoples expressed through treaty or self-government agreements. Accordingly, Obonsawin commenced this action when the Crown unilaterally developed guidelines for the administration of the tax exemption provided for in section 87 of the *Indian Act*, R.S.C., 1985, c. I-5.

9 One of the claims advanced is breach of fiduciary duty. It is alleged that the fiduciary duties the Crown owes to native people extend to the protection of native property situated on an Indian reserve, and that such property includes employment income from taxation. The plaintiffs say that the administration of section 87 of the *Indian Act* has been assigned to the defendant Revenue Canada, and that Revenue Canada has a fiduciary duty to ensure that, in its exercise of discretion while interpreting and applying section 87, tax exemption rights are reasonably protected.

10 The statement of claim contains details of obligations that the plaintiffs say flow from the Crown's fiduciary duties. The chronology of facts concerning the historical treatment of natives with respect to tax exemption rights, ends with allegations of an agreement to proceed with test cases to determine whether NLS's employees were exempt from taxation and therefore whether the Crown was lawfully administering its obligations. It is alleged that a term of the agreement was that the Crown would not pursue the collection of taxes from employees of NLS until a settlement or ultimate determination of the issues before the courts in the test cases.

11 The claim also raises an issue with respect to GST. The Crown administers the GST exemption in the same manner as it does the income tax exemption: only an employer who fits within one of certain specified categories relating to certain types of employment relationships is protected from taxation. NLS takes the position that it is not required at law to collect GST from the placement organizations with which it contracts.

12 Obonsawin alleges that some or all of the individual defendants acted with malice by undertaking three actions with regard to GST collection including a GST prosecution against Obonsawin under the *Criminal Code*. At the end of 1998, the Crown instructed the prosecution to apply for a stay of proceedings in this prosecution. The plaintiffs contend that the stay was sought to prevent evidence of wrongdoing by the defendants from being revealed through the disclosure of documents in the criminal proceedings. This, in addition to other alleged acts of intimidation, have caused damage to the plaintiffs, such as loss of tax exemption rights, loss of business opportunities and injury to Obonsawin's reputation.

13 These allegations provide the backdrop to the conspiracy claim. The plaintiffs allege that beginning in 1994, the individual defendants agreed to take steps to harm the plaintiffs by pursuing the course of conduct set out in the statement of claim. The specific purposes of the conspiracy alleged include using Obonsawin as an example in order to suppress native opposition to government policies concerning taxation, injuring Obonsawin's commercial interests by discouraging the placement organizations from contracting with NLS and harming Obonsawin's ability to mount an effective political campaign to require the government to fulfil its obligations under s. 87 of the *Indian Act*.

14 In addition to seeking a declaration concerning the defendants' violation of certain of the plaintiffs' constitutional rights and damages for breach of such rights, the plaintiffs allege and claim damages for breach of fiduciary obligations, abuse of power in the exercise of statutory powers and duties, and conspiracy to injure Obonsawin.

15 A detailed review of the pleadings discloses that while Mr. Hester advances claims on behalf of the proposed class, and Obonsawin advances claims on his own behalf, there are some overlapping claims and therefore overlapping issues.

The Issues

16 The defendants advance their argument in support of severance on the following grounds:

1. The *CPA* does not permit the joinder of individual claims and class claims.
2. Relying on the provisions of rules 5.02 and 5.05, it is clear that joinder is otherwise not appropriate and will unduly complicate this matter and will prejudice the defendants.
3. There are policy reasons to grant the relief sought and sever the individual claim from the proposed class action.

The Analysis

17 The *CPA* is a comprehensive statute that governs the commencement, certification, trial and other procedural aspects of class actions. Section 2(1) of the *Act* provides as follows:

One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

18 Mr. Burden, counsel for the defendants argues that the wording of the *Act*, not only in this section but also in others in which the detailed class action procedure is set out, makes it clear that no one other than a class member may commence a class proceeding. The defendants also contend that permitting joinder would be contrary to the well-recognized objectives of the *CPA*.

19 Mr. Shiller, representing the plaintiffs, also relies on the wording of s. 2 of the *CPA* in support of his argument. He points out that the section is silent as to whether a class proceeding may be joined with an individual claim. Further, he submits that permitting the individual claim and the class action to be joined in one proceeding does, in fact, promote the objectives of the *CPA*.

20 In my view, both a plain and a purposive reading of the *CPA* lead inexorably to the conclusion that a class proceeding, including a proposed class proceeding, cannot be joined with an individual claim. The motion for severance must therefore be allowed.

21 Section 2 identifies those who may commence a proceeding under the *CPA* as being "one or more members of a class of persons". The section makes no mention of individuals with distinct claims for the simple reason that they are not entitled to be parties to class actions.

22 It is impossible to interpret the detailed procedural scheme established in the *CPA* for class actions in any other way. Examples of sections that make this point clear are; s. 4 dealing with certification, s. 11 dealing with specific stages of the proceeding, s. 15 with discovery, the notice provisions in sections 17 and 18 and s. 29 dealing with court approval of settlements.

23 Moreover, joinder of a class action with an individual claim is not compatible with the advancement of the objectives of class proceedings. Certainly joinder of an individual action with a class action is not consistent with the objectives of behaviour modification or access to justice. Depending on the facts of the particular case, joinder may also interfere with the type of judicial economy contemplated by class proceedings. In fact, joinder may unnecessarily complicate the class proceeding. There are therefore policy reasons why such joinder should not be permitted.

24 Further, joinder of this nature is incompatible with other elements of the class action regime. For example, the *Law Society Act*, R.S.O. 1990, c. L.8, s. 59.1 establishes a fund to provide financial support to plaintiffs in proceedings commenced under the *CPA* in respect of disbursements related to the proceeding. The *Law Society Act* stipulates that the committee administering the fund may have regard to any matter it considers relevant in determining whether or not to provide financial assistance. It is possible that the class in this action may be adversely affected in terms of its access to the fund because its action is combined with a complex individual claim. This potentially puts the two plaintiffs in this action in conflict with each other. Alternatively, Obonsawin may unfairly obtain access to disbursement assistance from the fund.

25 In a similar fashion, joinder may give Obonsawin the advantage of being able to participate in a contingency fee arrangement that, under current law, is only available to members of a certified class. Such would give Obonsawin improper personal advantage in the financing of his individual claim.

26 For these reasons I conclude that it is improper, having regard to the wording of the *CPA* and for policy reasons, to have, as a single action, a class action and an individual action. They have to be separate and discrete actions.

27 Having said that, if in the event of certification, a party is of the view that the common issues in the class proceeding, as certified, overlap with issues in the individual action, one or both parties can apply, pursuant to the provisions of rule 6 for appropriate relief.

28 While the *CPA* provides that the *Rules of Civil Procedure* apply to class proceedings, given my conclusion that the *Act* does not allow for joinder, it is unnecessary for me to consider the tests under the joinder provisions of the rules. However, if I were in a position to exercise my discretion under s. 12 of the *CPA*, I would allow the motion and order severance as, based on the facts of the various claims and the circumstances of this case, I am of the view that joinder may unduly complicate or delay the hearing.

Conclusion

29 On the basis of this analysis, I order that Obonsawin's individual claim be severed from the proposed class proceeding.

30 If the parties are unable to resolve costs, they may make written submissions within 15 days.

Motion granted.

TAB 22

2018 ONSC 5377
Ontario Superior Court of Justice

Persaud v. Talon International Inc.

2018 CarswellOnt 15154, 2018 ONSC 5377, 300 A.C.W.S. (3d) 27

**Ashleka Persaud and Ten Eight Vacations Ltd.
(Plaintiff) and Talon International Inc. (Defendant)**

Perell J.

Heard: August 16, 2018

Judgment: September 13, 2018

Docket: CV-17-569023CP

Counsel: Mitchell Wine, for Plaintiff

Michael Tamblyn, Symon Zucker, Nancy Tourgis, for Defendant

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Property; Securities; Torts

Perell J.:

A. Introduction

1 This a proposed class action under the *Class Proceedings Act, 1992*.¹ The Plaintiff Ashleka Persaud signed an agreement to purchase a hotel condominium unit from the Defendant Talon International Inc in the Trump International Hotel and Tower Toronto. She seeks to have the agreement rescinded and the deposit refunded with interest. Ms. Persaud brings her action on behalf of purchasers of hotel condominium units who paid a deposit and who seek rescission of their agreements with Talon.

2 Ms. Persaud now moves to have the action certified as a class proceeding. She also requests that the class action be consolidated with action CV-14-498306, which is an action in which Talon is the plaintiff and Ms. Persaud is the defendant. In that action, Talon seeks to forfeit the deposit and to claim damages for breach of contract.

3 Talon resists certification and submits that none of the certification criteria are satisfied.

4 For the reasons that follow: (a) I conditionally approve the certification of Ms. Persaud's action as a class action; and (b) in any event, I consolidate the action in which Ms. Persaud is a defendant with the class action in which she is plaintiff.

5 I conclude that all of the certification criteria with the exception of the representative plaintiff criterion are satisfied.

6 I conclude that the representative plaintiff criterion can be satisfied provided that Ms. Persaud's delivers a notice of change of lawyer from current proposed Class Counsel Levine, Sherkin, Boussidan within sixty days. Her choice of Class Counsel must be approved by the Court. If Ms. Persaud fails to appoint a new Class Counsel, her motion for certification shall be dismissed and only the consolidation order shall be granted.

B. Facts

1. The Marketing of the Hotel Units

7 Talon is the parent corporation of Talon International Development Inc. Both corporations were incorporated under the laws of the Province of Ontario with registered head offices in Markham, Ontario.

8 In 2004, Talon owned a property municipally known as 311-325 Bay Street, in the City of Toronto on which it was constructing a mixed-use condominium project known as the Trump Tower, named after Donald John Trump, Sr., the current president of the United States, who was then a real estate developer.

9 Trump Tower was comprised of a hotel, hotel condominium units, and condominium residential units. Talon was licenced to use the Trump name pursuant to a licence agreement. There were two condominium declarations. There were 261 hotel condominium units and 118 residential condominium units. The residential units are not the subject of the proposed class action.

10 The hotel, which bore the name Trump International Hotel in Toronto, was to be managed by Trump Toronto Hotel Management Corp., a Delaware corporation owned by Mr. Trump. Also involved was Trump Marks Toronto LP ("Trump Marks"), a Delaware limited partnership. Trump Marks is the licensor of the Trump name and trademarks in Canada, and it had entered into licence agreements for the use of the Trump name and trademarks for the Trump Tower.

11 Talon's development and sale of the hotel condominium appeared to be the sale of "security," which is a very broadly defined term under the *Securities Act*,² and so by letter dated April 28th, 2004, pursuant to s. 74 of the *Securities Act*, Talon's lawyers applied on Talon's behalf for an exemption from the requirement to file a prospectus when selling a security.

12 Talon's lawyers sought this exemption because, under s. 1(1) of the *Securities Act*, the definition of "security" includes "any investment contract". Without conceding the point, Talon's lawyers explained in Talon's application for the exemption that there was a risk that a Hotel Unit could be considered an investment contract for purposes of the Act. If so, without an exemption, the Hotel Units could not be sold or resold by real estate brokers, and any sale or resale would have to comply with the dealer registration and prospectus requirements of the Act. In other words, Talon wanted the Hotel Units to be treated as real estate, not as securities.

13 The law firm's letter set out the reasons for seeking the exemption, and the law firm made certain representations on behalf of Talon as to how it planned to market the Hotel Units, which required purchasers to enter into a Reservation Agreement governing the renting of Hotel Units. The letter stated:

[A] Hotel Unit will generally appeal only to persons who wish to defray related ownership expenses through participation in the Reservation Program [. . .];

(a) Hotel Units will be marketed primarily as first-class luxury condominium units to be used for short-term transient hotel occupancy or for longer-term occupancy. The Reservation Program is merely a secondary feature which offers participating purchasers a means to defray related ownership expenses as opposed to an investment vehicle for making a gain or profit of the type contemplated by *Howey* and *Hawaii*;

(b) In keeping with this marketing approach of emphasizing the predominance of the luxury transient hotel occupancy features of Hotel Units, prospective purchasers of Hotel Units will not be provided with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment on the part of [Talon];

(c) An initial purchaser of a Hotel Unit before an Agreement of Purchase and Sale is entered into would receive an offering memorandum called a Disclosure Document. This would be in the form of the disclosure statement required under the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Condominium Act") but would also "include additional information in the body of the disclosure statement relating to the real estate securities aspects of the offering prepared substantially in accordance with the form and content requirements of 45-906F of the *Securities Act* (British Columbia), S.B.C. 1985, c. 83 ("Form 45-906F");

(d) As stated in paragraph 9.04, no purchaser of a Hotel Unit who elects to participate in the Reservation Program will be provided with rental or cash flow guarantees or any other form of financial projection or commitment on the part of [Talon], except for the budget that must be delivered to an initial purchaser of a Hotel Unit pursuant to the *Condominium Act*;

(e) A Disclosure Document Summary of the Disclosure Document shall be prepared that includes certain items in Form 45-906F; and

(f) [I]f Hotel Units are marketed and structured in the manner described above, it is our submission that trades therein they [sic] should be entitled to an exemption from the registration and prospectus requirements of the Act. It is our submission that Hotel Units will not be marketed or structured as investments for profit or gain within the meaning of *Howey* and *Hawaii*. Hotel Units will instead be marketed as luxury hotel condominium units entailing exclusive occupancy rights, coupled with an opportunity to defray related ownership expenses in connection with periods of non-occupancy through voluntary participation in the Reservation Program.

14 On May 25, 2004, the Ontario Securities Commission ("OSC") issued a ruling exempting Talon from the requirements of sections 25 and 53 of the *Securities Act*. The OSC ruled that it was not necessary for Talon to obtain approval of a prospectus to sell the Hotel Units, and it authorized a different means for the Hotel Units to be sold. The OSC allowed the Hotel Units to be sold as real estate.

15 The OSC's ruling set out many of the representations made by Talon's lawyers in the application for an exemption, including representations numbered 23, 24, 28 and 29 which dealt with financial information. These representations stated:

23. Hotel Units will be marketed primarily as first-class luxury hotel condominium units to be used for short-term transient hotel occupancy or for longer term occupancy. The Reservation Program is merely a secondary feature which offers participating purchasers a means to defray related ownership expenses, as opposed to an investment vehicle for making a gain or profit.

24. Prospective purchasers of Hotel Units will not be provided with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment on the part of the Applicant.

28. No purchaser of a Hotel Unit who elects to participate in the Reservation Program will be provided with rental or cash flow guarantees or any other form of financial projection or commitment on the part of the Applicant, except for the budget that must be delivered to an initial purchaser of a Hotel Unit pursuant to the *Condominium Act*.

29. The economic value of a luxury hotel condominium of this type will be attributable primarily to its real estate component because Hotel Units will be marketed as luxury transient occupancy hotel condominium properties and will not be offered or sold with an emphasis on the expected economic benefits of the Reservation Program and the Reservation Program Agreement.

16 The OSC Ruling required that before entering into an agreement of purchase and sale with a prospective purchaser, Talon should deliver an offering memorandum in the form of a disclosure statement required under the *Condominium Act, 1998*.³

17 This Disclosure Document would include information about "the risk factors that make the offering of Hotel Units a risk or speculation." The Disclosure Document would explain that prospective purchasers have a statutory right of action for misrepresentation under s. 130.1 of the *Securities Act*. Prospective purchasers would also be informed of their right under the *Condominium Act, 1998* to rescind an agreement of purchase and sale within ten days of receiving the Disclosure Document or a material amendment to the Disclosure Document.

18 In 2004, Talon began marking the hotel and the residential units to the public. Talon opened a sales centre at the construction site. Almost all of the Hotel Units offered for sale were studio, one-bedroom, or two-bedroom units.

19 Talon prepared marketing documents including a document entitled *Frequently Asked Questions about Hotel Condominiums* and these documents were used by Adina Zak, Talon's sales representative, to market the units. A PowerPoint presentation was posted on the Trump Tower website. Advertisements were placed in newspapers, magazines, and other media. All purchasers

received a promotional DVD and were shown a 41-slide PowerPoint presentation, which described various aspects of purchasing a Hotel Unit in the Trump Tower. The presentation depicted four different studio units in the hotel.

20 The presentation included a document for the four studio units being sold entitled: "Estimated Return on Investment" (the "Estimate").

21 More precisely, there were four versions of Estimates for four different suite types. Visitors to the sales centre were provided with customized versions of the Estimates for the type of Hotel Unit that they were interested in possibly purchasing.

22 The Estimates provided the following information: (a) purchase price of the Hotel Unit (ranging from \$784,000 to \$843,000); (b) monthly common expense fees (ranging from \$1,827 to \$2,081); (c) estimated daily room rental rate (ranging from \$550 to \$600); (d) daily occupancy fee (housekeeping) of \$60; (e) percentage amount of purchase price to be financed [mortgaged]; (f) mortgage interest (estimated at a 6% interest rate); (g) property taxes (estimated at 2% of purchase price); (h) average occupancy (ranging from 55% to 75%); (i) yearly return earned by an investor in the Hotel Unit (ranging from \$18,144.41 to \$63,627.70); and (j) annual return on cash invested in the Hotel Unit (ranging from 6.46% to 21.57%).

23 As required by the OSC's ruling and by the *Condominium Act, 1998*, Talon prepared a Disclosure Statement to be given to purchasers of a Hotel Unit. The initial Disclosure Document or Statement was dated June 17, 2004 and in the following years, it was amended from time to time.

24 To participate in the Reservation Program with the Hotel Operator, Purchasers of Hotel Units were required to sign the "Reservation Program Agreement".

2. Ms. Persaud's Purchase of a Unit

25 In 2007, Ms. Persaud and her husband Jason Boccinfuso, who is a police officer, learned about the Trump Tower project from a computer search. Ms. Persaud had no direct contact with any Talon representative. Mr. Boccinfuso contacted Ms. Zak. Ms. Zak told him that an investment in a Hotel Unit would be very profitable. She gave him written Profit Estimates that she said would be met or exceeded. Mr. Boccinfuso saw the PowerPoint presentation and reviewed the Estimates with Ms. Zak.

26 In November 2007, Ms. Persaud signed an agreement of purchase and sale, but she and Mr. Boccinfuso decided not to proceed with the transaction without partners. The agreement was cancelled during the ten-day cooling off period.

27 About three months passed, and on March 7, 2008, Ms. Persaud signed an agreement of purchase and sale to acquire a Hotel Unit. By this time, five of Mr. Boccinfuso's police officer colleagues had agreed to participate in the purchase.

28 Ms. Persaud's agreement was for Unit 1615 at a purchase price of \$910,000. There was a \$227,500 deposit to be paid in installments. The agreement provided that the deposit would be forfeit if the purchaser defaulted in closing the transaction.

29 Ms. Persaud and Mr. Boccinfuso deposed that in making the purchase, they relied on the Estimate and the other information that had been provided to them by Talon.

30 Ms. Persaud and Mr. Boccinfuso incorporated Ten Eight Vacations Ltd., (Ms. Persaud's co-Plaintiff) to take title to Unit 1615. The \$227,500 deposit for the purchase of Unit 1615 was paid.

31 In November, 2008, Talon wrote to the purchasers of the Hotel Units to advise them that the closing for their purchases had been extended pursuant to paragraph 2(a) of the Agreement of Purchase and Sale from March 20, 2009 to November 1, 2010.

32 Almost two years went by. The purchasers waited, until by letter dated August 11, 2010, Talon wrote to ask them to agree to a further amendment of the Agreement of Purchase and Sale to allow the Closing Date for the Hotel Units to be extended from November 1, 2010 to as late as December 1, 2011.

33 On October 14, 2010, Talon wrote the purchasers and advised that the closing date had been delayed to September 20, 2011.

34 On May 30, 2011, Talon wrote to purchasers to advise that the closing date would be delayed a further two months until December 20, 2011.

35 By letter dated September 22, 2011, Talon wrote to purchasers asking them to agree to an amendment extending their closing date from December 1, 2011 to as late as March 31, 2012.

36 In December of 2011, the interim occupancy closing date was set for January 31, 2012, but it was later extended to February 14th, 2012, and then to February 24th, 2012.

37 On January 23, 2012, purchasers were advised the Trump Hotel would be open for business on January 31st, 2012. And, it did open on that day.

38 On February 20, 2012, four days before interim occupancy closing, Talon emailed the purchasers the following documents: (a) Reservation Program Agreement; (b) Reservation Program Highlights; (c) Reservation Program Frequently Asked Questions; (d) Hotel Unit Maintenance Program Highlights; and (e) Hotel Unit Maintenance Program Frequently Asked Questions.

39 Question five on the Reservation Program Frequently Asked Questions discussed what fees could be anticipated under the Reservation Program. The answer was that a fee of \$48.00 is charged to Hotel Units in the Reservation Program "for each night of occupancy". This was the first time this fee had been disclosed to purchasers, and it does not appear in the Estimates.

40 On February 24, 2012, Ms. Persaud through Ten Eight Vacations Ltd. took interim occupancy of Unit 1615, and Ms. Persaud, Mr. Boccinfuso, and his five police officer colleagues began making interim occupancy payments, which covered; (a) estimated common area expenses; (b) estimated realty taxes; (c) interest on deferred purchase monies; and (d) HST. The Reservation Program Agreement was executed for participation in the reservation program to earn revenue from the Hotel Unit.

41 Other purchasers took interim occupancy also on February 24, 2012. They also signed Reservation Program Agreements and began paying occupancy fees.

42 The occupancy of the units by hotel patrons was poor, and in the fall of 2012, in response to media reports about losses being suffered by purchasers of Hotel Units, Talon advised the purchasers that the Hotel Units might not be immediately profitable. Talon advised patience.

43 On November 24, 2014, Levine, Sherkin, Boussidan, the lawyers who are now acting for Ms. Persaud in this proposed class action, wrote the OSC and requested the Commission to investigate alleged breaches of the *Securities Act* by Talon, including, the distribution of the document entitled "Estimated Return on Investment" as contrary to the OSC's ruling by providing forecasts, projections, guarantees, cash flow statements, etc.

44 As a result of the complaint, Talon received an inquiry letter from the OSC dated November 21, 2012. Talon responded to the OSC's letter by letters dated November 23, and November 28, 2012.

45 On December 4, 2012, the OSC issued a public statement. The statement indicated that after a thorough review, the OSC would not be pursuing regulatory action.

46 The interim occupancy period lasted until December 12, 2012, which was the date scheduled for final closing. By this time, because of poor occupancy rates, the purchasers of the Hotel Units were losing between \$4,000 to \$5,000 per month. The Estimates were wrong, overstating revenue, understating expenses, and failing to disclose expenses.

47 On December 12, 2012, Ms. Persaud did not complete the purchase of Unit 1615. Only 50 transactions closed.

3. Litigation Following the Abortive Closings

48 Following the abortive closings, some of the purchasers retained Levine, Sherkin, Boussidan to commence individual actions for misrepresentation. There were 22 plaintiffs in twenty actions with respect to 27 Hotel Units. Of the 20 actions, 17 involved transactions that did not close and 3 actions involve purchases that did close. Of the 22 plaintiffs, only 7 reside in Ontario.

49 In 2013, Justice Janet Wilson was assigned to case manage the twenty individual actions. There are currently sixteen actions involving eighteen plaintiffs (or groups of plaintiffs) who are suing Talon for rescission and the return of their deposits. Unlike the putative Class Members in the proposed class action, the plaintiffs in the sixteen actions are seeking damages in excess of the deposits they paid and seeking recovery from s Donald Trump, Alex Shnaider and Val Levitan in addition to damages from Talon. If the plaintiffs in these sixteen actions do not opt out of the class action, they will waive their right to seek the damages and their claims against the additional Defendants.

50 On February 11, 2014, in action CV-14-498306, Talon sued Ms. Persaud for breaching the contract to purchase Unit 1615. Talon sought forfeiture of the deposit and damages of \$750,000. Ms. Persaud defended the action, but, she made no counterclaim. In the motion now before the court, Ms. Persaud seeks the consolidation of CV-14-498306 with her proposed class action.

51 In late 2014, Justice Wilson directed summary judgment motions in two of the individual actions as test cases. One motion concerned the situation where a purchaser closed the Hotel Unit transaction (CV-15-522065-Lee), and the other test case concerned the situation where a purchaser did not close (CV-12-469042- Sarbjit Singh) and sought rescission and a return of his deposit. *Singh v. Trump* as the test case for rescission.

52 I was assigned the task of deciding the summary judgment motions.

4. Singh v. Trump

53 In 2015, I decided the summary judgment motions in the two test cases.⁴ I dismissed Sarbjit Singh's action. There was an appeal, and in late 2015, my decision was reversed by the Court of Appeal.⁵

54 The theory of Mr. Singh's case was complicated. There were four branches, of which all but the fourth branch is repeated for the purposes of the proposed class action now before the court. The Plaintiffs submit that three branches of their case are supported by the Court of Appeal's decision.

55 For the purposes of the certification motion now before the court, the Plaintiffs repeat the arguments that were made for Mr. Singh in *Singh v. Trump* both before me and also repeated on the appeal to the Court of Appeal. Implicitly, but not expressly, the Plaintiffs rely on the Court of Appeal's decision as estopping Talon from disputing the factual and legal findings of the Court of Appeal.

56 The Plaintiffs place a great deal of reliance on what the Court of Appeal decided as establishing that the certification criteria are satisfied. This issue estoppel reliance is challenged by Talon. It is, therefore, necessary, to explicate my decision and the Court of Appeal's decision with some care.

57 However, that exegesis is not a simple matter of simply relying on the circumstance that the appeal was granted, because only some aspects of my decision were reversed and other aspects of my decision were adopted by the Court of Appeal. Further, some aspects of my decision were not addressed by the Court of Appeal.

58 The theory behind the first branch of Mr. Singh's case was that because Talon breached the OSC ruling, its sales without a prospectus were illegal and as such Mr. Singh was entitled to rescission.

59 The detailed theory of the first branch of Mr. Singh's case was: (a) the sale of the Hotel Units was the sale of a security under the *Securities Act*; (b) the sale, therefore, required a prospectus or an exemption from the prospectus requirement; (c) Talon was

granted an exemption and thus was permitted to use an Offering Memorandum instead of a prospectus; (d) pursuant to the OSC's exemption ruling, the Offering Memorandum (called a Disclosure Statement or Disclosure Document) was to be constituted by the Disclosure Statement required under Ontario's *Condominium Act, 1998* augmented by some of the requirements of Form 45-906F of the *Securities Act* (British Columbia); (e) in its exemption ruling, the OSC stipulated that Hotel Units were to be marketed primarily as first-class luxury hotel condominium units and prospective purchasers were not to be provided with rental or cash flow forecasts or any other form of financial projection; (f) in purported compliance with the OSC's ruling, Talon did provide a Disclosure Document or Statement; (g) however, Talon breached the OSC's ruling by providing prospective purchasers with the Estimate, which was a rental or cash flow forecast or other form of financial projection; therefore, (h) in accordance with the authority of *Jones v. F.H. Deacon Hodgson Inc.*,⁶ the breach of the OSC's ruling had the effect of vitiating the prospectus exemption, which meant, in turn, that (i) the sales agreements procured without a prospectus were illegal and void, entitling Mr. Singh to rescission.

60 The theory of the second branch of Mr. Singh's case was that the Estimate contained numerous misrepresentations with the result that he had a statutory misrepresentation claim under the s. 130.1 of the *Securities Act*.

61 The theory of the third branch of Mr. Singh's case was that the misrepresentations in the Estimate constituted common law and equitable claims for rescission and negligent misrepresentation.

62 The theory of the fourth branch of Mr. Singh's case theory was that Messrs. Trump, Levitan, and Shnaider were personally liable.

63 In my summary judgment decision, I addressed all four branches of Mr. Singh's case.

64 With respect to the first branch, I found that notwithstanding the OSC's exemption ruling, the Hotel Units were sold as an investment. However, I found that the investment was not an investment contract; i.e., the agreements were an investment but not a security instrument. Further, I found that Talon did not breach the OSC's ruling by selling an investment contract or by providing prospective purchasers with rental or cash flow forecasts or guarantees or any other form of financial projection or commitment. In this regard, the parties were in agreement that the Estimates, whatever they were, they were not rental guarantees, cash flow guarantees, or a type of financial commitment.

65 Because I anticipated an appeal, I considered whether, contrary to my finding, Mr. Singh had a claim based on a breach of the OSC's ruling. I analyzed whether the breach would support a claim for rescission or damages. My analysis, which is necessary to repeat for the purposes of the proposed class action now before the court was set out in paragraphs 119-133 of my Reasons for Decision as follows:

119. Before undertaking that analysis, because my decision may be appealed, in this section I will assume that the Plaintiffs did establish a breach of the OSC's ruling, and I will analyze whether the breach would support a claim for rescission or damages based on the Plaintiffs' theory. Here it may be recalled that the Plaintiffs' theory relies on Justice Henry's decision in *Jones v. F. H. Deacon Hodgson Inc.*, *supra* that a breach of the OSC's ruling would entail a revocation of the prospectus exemption and make illegal the sales to Mr. Singh and Mrs. Lee, which were made without a prospectus.

120. I foreshadow the conclusion of this analysis to say that in my opinion, the available remedy for a breach of the OSC's ruling would only be statutory and common law misrepresentation claims. In other words, I disagree with the Plaintiffs' theory that a breach of the OSC's ruling supports a mutually exclusive claim for rescission based on an illegal contract analysis.

121. I begin my analysis of the remedial consequences of a breach of the OSC's ruling with the observation that the ultimate purpose of the OSC's ruling was to protect prospective purchasers of Hotel Units. It was a consumer protection ruling. Although the OSC decided that the purchasers did not need the protection of receiving a prospectus, the OSC decided instead that Talon should provide purchasers with an Offering Memorandum; i.e., a Disclosure Document or Statement in

the form required by Ontario's *Condominium Act, 1998* augmented by the content of Form 45-906F of the *Securities Act* (British Columbia) and subject to the remedies available under both statutes.

122. The OSC's ruling answers the questions of what remedies the prospective purchasers would have for failed or non-compliance by Talon of its disclosure obligations. Here it may be recalled that paragraph 27 of the ruling states:

27. Each initial purchaser of a Hotel Unit will have a statutory right of action referred to in section 130.1 of the Act. The Disclosure Document will describe the statutory right of action, including any defences available to the Applicant, the limitation periods applicable to the exercise of the statutory right of action, and will indicate that the rights are in addition to any other right or remedy available to the purchaser.

123. Section 130.1 of the *Securities Act* and its limitation period, found in s. 138 state:

[. . .]

124. Here, it also may be noted that the prospective purchasers of a Hotel Unit had their common law remedies and the remedies provided by sections 72-74 and 133 of the *Condominium Act, 1998*, which state:

[. . .]

125. In my opinion, it is transparent that the OSC did not intend to revoke Talon's exemption from the prospectus requirements of the *Securities Act* if Talon breached the OSC's exemption ruling. Rather, the OSC intended that the purchasers would be protected by s. 130.1 of the *Securities Act*, sections 72-74 and 133 of the *Condominium Act* and all that protection without derogation of the purchasers' rights at common law and in equity for rescission or damages.

126. The Plaintiffs rely on *Jones v. F.H. Deacon Hodgson Inc.*, *supra* for the proposition that if the OSC's exemption ruling is breached then the exemption is revoked and the vendor who has sold pursuant to an Offering Memorandum has breached the *Securities Act* by selling securities without a required prospectus making the sales illegal and void and, in turn, entitling the purchaser to claim rescission and damages.

127. *Jones v. F.H. Deacon Hodgson Inc.*, however, does not support the Plaintiffs' complicated theory in pursuit of rescission and damages.

128. The facts of *Jones v. F.H. Deacon Hodgson Inc.* were that in January 1982, the defendant F.H. Deacon Hodgson Inc., an investment dealer, offered for sale shares in Bacova Investments Limited, a company that had been incorporated for the purpose of investing in an oil exploration company whose shares are traded over the counter. In January, 1982, Deacon offered for sale shares in Bacova and solicited subscribers. This subscription program constituted a distribution of shares to the public within the meaning of s. 52(1) of the *Securities Act* but Bacova did not file a prospectus with the Ontario Securities Commission as required by s. 52(1)(a) of the *Act*.

129. One of the subscribers, Mr. Jones, sought to have his purchase of shares rescinded because there had been a sale without a prospectus, but F.H. Deacon Hodgson Inc. moved to have the action dismissed. It argued that Mr. Jones' remedy was under s. 130 of the *Securities Act*, which provides a purchaser a right of rescission within a three-year period if he or she is a purchaser to whom a prospectus was required to be sent or delivered but to whom the prospectus was not sent or delivered. F.H. Deacon Hodgson Inc. argued that Mr. Jones had waited too long to seek rescission.

130. Mr. Jones' counter to F.H. Deacon Hodgson Inc.'s argument was that he was not relying on s.130 of the *Securities Act* but on the common law that makes an illegal contract void; i.e. a contract contrary to statute void. His argument was that F.H. Deacon Hodgson Inc. had sold shares without any prospectus contrary to the *Securities Act* making the sales contracts illegal and void. He argued that this common law action was not precluded by the *Securities Act* and it was a timely action.

131. Justice Henry agreed with Mr. Jones' argument. Justice Henry noted that s. 52 of the *Securities Act* dealt with the circumstance where there was a prospectus but a failure to deliver it to the purchaser but that Mr. Jones was alleging a

different contravention of the *Act*, that of selling shares without a prospectus. The *Act* itself did not expressly provide a remedy for this situation. Justice Henry noted, however, that in *Re Northwestern Trust Co., McAskill's Case*, [1926] S.C.R. 412, the Supreme Court had held that the sale of shares contrary to statute made the sale void. The issue then for Justice Henry was whether, as a matter of statutory interpretation, s. 52(1) of the Ontario *Securities Act* left unimpaired the common law principle that a breach of a statutory prohibition results in a sale of shares that is void. Justice Henry concluded there was no reason to think that the Legislature had intended to alter this principle. Justice Henry summarized his reasoning in paragraphs 31 and 32 of his judgment, where he stated:

31. By way of recapitulation:

- (a) No prospectus was filed with the Ontario Securities Commission and the sale by Deacon was in breach of s. 52(1) which is a fundamental element of the statutory scheme of full disclosure and regulation by the commission for protection of the investing public in cases not exempt by the Act from the prospectus requirements.
- (b) Section 70 does not here create a remedy for the plaintiff because that section applies only where a prospectus has been filed and a receipt obtained from the director.
- (c) Breach of s. 52(1) does not "trigger" an offence under s. 70(1) where no prospectus is filed; the limitation in s. 135 does not apply because no cause of action is here created by Part XXII.
- (d) Breach of s. 52(1) stands on its own; it is subject to a quasi-criminal penalty and regulatory action under Part XXI. The general rule, however, is that the sale is void in common law. That principle requires a clear expression by the Legislature if it was intended to abrogate it -- there is none here.
- (e) I am aware that while my decision precludes the dealer from enforcing an illegal contract against the purchaser, the purchaser cannot enforce it against the vendor should he prefer to do so; he, of course, may prefer not to exercise his remedy and continue to hold the shares. It seems to me, however, that the purchaser otherwise may maintain an action for a declaration that the contract is void and that he is entitled to recover the price paid for the shares as a form of unjust enrichment in the hands of the vendor. The court ought to provide him with that remedy at least as an innocent party (so far as this motion is concerned). On the other hand, I should deem it sound judicial policy for the court to refuse to entertain an action by the vendor (or allow it a defence), in reliance on the void transaction on the ground that to do so would enable the vendor to profit by his illegal conduct. This latter point I am frank to say is obiter as I am not obliged to decide it.

32. While the court should be reluctant to interfere with contracts freely made, in this case the overriding consideration is the need to support the fundamental purpose of the statute as a matter of public policy to protect the integrity of the regulatory scheme of the *Act*; contractual integrity must give way; the penalty alone and the remedies available to the commission, in my opinion, ought not to be the only deterrent or remedy. Moreover, the scheme would be seriously impaired were the court to preserve the legal transaction and deprive the purchaser of a remedy where no prospectus has been filed at all and to recognize his only civil remedy is that created by s. 70 and other provisions of Part XXII all of which are limited to cases where s. 52 has been complied with; that would ignore the fundamental breach and support only the remedies provided in cases in which the prospectus has been filed and accepted as required.

132. *Jones v. F.H. Deacon Hodgson Inc.* does not assist the Plaintiffs in the case at bar because it deals with the circumstance of a sale of securities without a prospectus when there were no disclosure documents at all. The case at bar is about the sale of securities with an Offering Memorandum because the OSC exempted the vendor from delivering a prospectus, which is a different situation. Unlike the situation in *Jones v. F.H. Deacon Hodgson Inc.*, there is no lacuna in the protection provided to the purchasers of the Hotel Units by the absence of a prospectus. The purchasers received the Offering Memorandum, statutory remedies under both the *Securities Act* and the *Condominium Act, 1998*, and any common law and equitable remedies for misrepresentation.

133. In my opinion, the purchasers, however, do not have a common law remedy based on a theory that a breach of the OSC's ruling retrospectively revoked the prospectus exemption making the distribution of Hotel Units an illegal contract. The conclusion of my analysis is that in the case at bar, the only remedies for any breach of the OSC's ruling are the statutory and common law misrepresentation claims to which I now turn.

66 Turning to the second and third branches of Mr. Singh's case, having concluded that Mr. Singh did not have a claim based on a breach of the OSC's ruling, I turned to Mr. Singh's common law and statutory claims for misrepresentation.

67 I concluded that although Talon had not breached the OSC ruling, that this finding did not preclude Mr. Singh's statutory or common law misrepresentation claims. I concluded that the Estimate contained several actionable misrepresentations. I concluded that the Estimates bore no relation to financial reality. I found the Estimates to be deceptive documents replete with misrepresentations of commission, omission, and of half-truth. These findings are an example of where the Court of Appeal agreed with my analysis.

68 However, I dismissed Mr. Singh's claim, for fraudulent misrepresentation because I did not believe that a claim for fraud had been pleaded. This is an example of where the Court of Appeal disagreed with my analysis.

69 As for the negligent misrepresentation claim, I dismissed the claim because I concluded that Mr. Singh had not proven that he reasonably relied on the Estimates and reasonable reliance is a constituent element of the common law negligent misrepresentation claim. Further, I concluded that Talon was protected from liability by the entire agreement clause and the other exculpatory provisions of the Agreement of Purchase and Sale and the related contracts that applied to preclude Mr. Singh's misrepresentation-based claims.

70 I dismissed Mr. Singh's statutory misrepresentation claim because the misrepresentations of the Estimate were not a part of the disclosure documents under the *Condominium, 1998*. At paragraphs 222-223 of my Reasons for Decision, I stated:

222. As appears from the above discussion, Mr. Singh's and Mrs. Lee's misrepresentation claims are rooted in the Estimate. The Estimate came before and was extraneous to the Offering Memorandum or Disclosure Documents directed by the OSC, and the Estimate is extraneous to the Disclosure Statements required by the *Condominium Act, 1998*.

223. Mr. Singh and Mrs. Lee do not allege actionable misrepresentations in the Offering Memorandum or false and misleading statements in the Disclosure Documents provided to them pursuant to the *Condominium Act, 1998*, and they thus have only their common law claim for negligent misrepresentation and their equitable claim for rescission potentially available to them.

71 Mr. Singh appealed to the Court of Appeal, and he relied on all four of his case theories.

72 The Court of Appeal granted the appeal based only on the negligent misrepresentation theory, and the Court left open the possibility that Mr. Singh might have a fraudulent misrepresentation claim.

73 To describe the Court of Appeal's reasons, it is helpful to begin with paragraphs 92-97 of Justice Rouleau's reasons for the Court. In those paragraphs, he summarized the Court's conclusions, as follows:

Overview

92. The plaintiffs appeal the motions judge's decision to dismiss the motions as against Talon on all three grounds they raised in the court below. They also appeal the dismissal of the claims against Shnaider, Levitan and Trump.

93. In my view, the appeal as against Talon can be decided on the basis that the motions judge, having found that four of the five elements for a claim of negligent misrepresentation were made out, erred in holding that the plaintiffs failed to establish the fifth element, reasonable reliance.

94. I would also hold that the motions judge erred in enforcing the entire agreement and other exculpatory clauses to bar the plaintiffs' actions. In light of the circumstances and context in which the clauses were entered into, it would be unconscionable to enforce those clauses to bar the plain-tiffs' claims.

95. In addition, I would set aside the motions judge's dismissal of Mrs. Lee's claim as time-barred. Although they raised limitation provisions in the *Securities Act* and the *Condominium Act* in their statement of defence, the defendants did not plead the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B., nor did they seek leave to amend to do so. Further, they failed to raise a *Limitations Act* defence in their written submissions on the motions for summary judgment. In these circumstances, it was not appropriate for the motions judge to invoke the *Limitations Act* to dismiss Mrs. Lee's claim.

96. I also disagree with the motions judge's conclusion that fraudulent misrepresentation had not been pleaded. Although the statement of claim does not use the words "fraudulent misrepresentation", all of the elements and materials facts for such a claim are pleaded and the claim was brought to the respondents' attention in the factum filed on the summary judgment motions. Because the motions judge did not make the necessary factual findings, this claim should simply be remitted to be determined on a subsequent motion or at trial.

97. With respect to the action against Shnaider, Levitan, and Trump, I agree that the claims that were the subject of the motions for summary judgment were properly dismissed. In my view, how-ever, the motions judge erred in dismissing the claims against the three individual defendants that were not properly before him.

74 To the above overview, which summarizes the findings of the Court of Appeal, it should be observed that in the context of concluding that it would be unconscionable to enforce the exculpatory provisions in the agreements of purchase and sale and in the other documents, the Court of Appeal held that Talon in contravention of the OSC's ruling marketed the Hotel Units as investments, investment vehicles, and as investment contracts. This is another example where the Court of Appeal disagreed with my analysis.

75 In the context of determining whether the exculpatory provisions in the sales contract were enforceable, the Court of Appeal also held that the Estimates provided rental or cash flow forecasts or guarantees or a financial projection or commitment and the providing of the Estimates was a breach of the OSC's ruling. Justice Rouleau stated at para. 129 of his judgment that it was unconscionable to enforce the exculpatory provisions to escape liability for misrepresentations made in breach of the terms of granting an exemption; he stated:

120. In my view, it would be unconscionable and would shock the conscience to allow a party to use an entire agreement or other exculpatory clause to escape liability for misrepresentations made in breach of the OSC's terms for granting an exemption from the Securities Act requirements. The entire agreement and other exculpatory clauses would operate to negate a negligent misrepresentation claim and the misrepresentation itself was only possible in this case because Talon evaded protective requirements under the Securities Act by obtaining the exemption and then breaching that exemption.

76 The Court concluded that Mr. Singh was entitled to the remedy of rescission. For reasons that will become clearer in the discussion below, it is important to repeat that although Mr. Singh appealed relying on all three of his theories of liability, the Court of Appeal expressly indicated that it was deciding the appeal only on the basis of the common law misrepresentation claim supporting a claim for rescission. The Court of Appeal felt it unnecessary to rule on whether Talon, without any ruling by the OSC, had lost the exemption from having to provide a prospectus and whether Mr. Singh had a rescission claim based on an illegal contract analysis.

77 In paragraph 159, the Court set aside my decision and made a substitute order as follows, with respect to Mr. Singh's action:

DISPOSITION

159. For these reasons I would set aside the motions judge's order and substitute an order:

1. rescinding Mr. Singh's agreement of purchase and sale;

[. . .]

3. as against Shnaider, Levitan and Trump, dismissing only those of the appellant's claims that were advanced for breach of the OSC Ruling and for misrepresentations;

4. remitting the claim for fraudulent misrepresentation to be decided on a further motion for summary judgment or at trial before the Superior Court;

[. . .]

6. for costs of the appeal on a partial indemnity basis to the appellants as against Talon fixed in the amount of \$35,000, inclusive of disbursements and applicable taxes.

78 In the result, Mr. Singh was successful in obtaining rescission based on his common law negligent misrepresentation claim because he had proven all the constituent elements of his claim and his claim was not barred by the exculpatory provisions in the contract documents that were unenforceable on the grounds of unconscionability.

79 In May 2017, Mr. Singh was repaid the amount of his deposit of \$173,400 plus interest due under the *Condominium Act, 1998*.

80 The rescission claims of other purchasers, however, remain unresolved. Talon refused to treat the cases as test cases applicable to determine the outcome of the sixteen individual cases.

81 Ms. Persaud's class action is intended to resolve the purchasers claims for rescission and a refund of the deposits.

82 In accordance with the provisions of s. 81 of the *Condominium Act, 1998*, the deposits are either being held in trust by Talon's lawyers, the Toronto law firm of Harris Sheaffer LLP or are insured by Northbridge Insurance. There is approximately \$20 million in trust or covered by insurance policies.

83 Ms. Persaud does not know how much of this money relates to deposits paid by purchasers of Hotel Units and how much relates to the deposits of purchasers of residential condominium units.

C. Procedural Background

84 Talon was not prepared to treat the outcome in the *Singh v. Talon* appeal as dispositive of the claims by purchasers who had paid deposits but not closed their Hotel Unit purchases, and on February 3, 2017, the Plaintiffs commenced this proposed class action.

85 Levine, Sherkin, Boussidan is the proposed Class Counsel.

86 The action included Ten Eight Vacations Ltd. notwithstanding that its corporate charter had been cancelled in 2016. For the purposes of this certification motion, I am going to assume that Ten Eight Vacations Ltd. will take the necessary steps to revive its corporate status or the Defendants may move to have Ten Eight Vacations Ltd.'s action dismissed. Alternatively, I am simply going to ignore Ten Eight Vacations Ltd. because the genuine necessary plaintiff is Ms. Persaud who signed the agreement of purchase and sale with Talon.

87 In their Statement of Claim, the Plaintiffs advanced the following causes of action: (a) breach of the OSC ruling; (b) a statutory misrepresentation claim pursuant to s.131.1 of the *Securities Act*; (c) fraudulent misrepresentation; and (d) negligent misrepresentation. In the proposed class action, the Plaintiffs seek rescission of the Class Members' agreements of purchase and sale and the return of their deposits. No claim for damages is being asserted.

88 The Plaintiffs also seek a declaration that all settlements between Talon and the purchasers entered into after the release of the Court of Appeal's decision in *Singh v. Trump* on October 13, 2016 are null and void.

89 The legal basis or the various causes of action supporting the Plaintiffs' claims, which reiterate three of the four theories advanced by Mr. Singh and discussed above, are set out in paragraphs 75-77 of the Amended Statement of Claim as follows:

75. The Plaintiffs plead all APS's entered into by purchasers of Hotel Units should be rescinded in accordance with the decision in *Singh v. Trump* in that:

- (a) Talon breached its obligations to the OSC in the Ruling. Accordingly, it is not entitled to rely upon the exemption provided by the OSC from the requirements of the Act. Talon, therefore, sold the Hotel Units to purchasers without registering as a dealer with the OSC and filing a prospectus. All sales of securities without a prospectus are void;
- (b) Talon's misrepresentations to purchasers constituted a misrepresentation under the provisions of the [Securities] Act;
- (c) Talon's misrepresentations constituted a negligent misrepresentation at common law;
- (d) Talon's misrepresentations constituted a fraudulent misrepresentation at common law; and
- (e) Talon failed to properly tender to purchasers of Hotel Units on the closing date fixed for completion of the APS's.

76. The Plaintiffs plead on their behalf and on behalf of the Class that they are entitled to rescission of their APS and repayment of their deposit plus interest plus legal costs from either Harris Sheaffer or Northbridge Insurance.

77. The Plaintiffs plead that any settlements entered into between purchasers of Hotel Units and Talon on or after October 13, 2016 should be set aside by this Court due to Talon's failure to advise purchasers they had a legal right to obtain rescission of their APS' as a result of the Court of Appeal's decision in *Singh v. Trump*.

90 The Plaintiffs bring their proposed class action on behalf of the following class:

All purchasers of hotel condominium units (the "Hotel Units") in the hotel portion (the "Trump Hotel") of the Trump International Hotel and Tower Toronto (the "Trump Tower") who paid deposits to the developer of the Trump Tower, the Defendant ("Talon"), but did not complete their transactions with Talon;

91 The Plaintiffs propose that Ms. Persaud be the Representative Plaintiff. Once again, it appears that Ten Eight Vacations Ltd.'s involvement is superfluous.

92 The Plaintiffs propose the following common issues:

(i) Background: The Court of Appeal held in *Singh v. Trump* that Talon breached representations 23, 24, 28 and 29 (the "OSC Representations") made to the Ontario Securities Commission (the "OSC") with respect to the marketing and sale of the Hotel Units in return for which Talon had been exempted (section 74) from the ordinary requirement under the *Securities Act*, R.S.O. 1990, c. S-5 (the "Securities Act") to file a prospectus (section 53) and register as a dealer with the OSC (section 25) prior to offering securities (the Hotel Units) for sale. The exemption was provided in a ruling issued by the OSC on May 25, 2004 (the "Ruling").

Question: What is the appropriate remedy for Talon's breach of the OSC Representations made to the OSC?

(ii) Background: The Court of Appeal held in *Singh v. Trump* that Talon made two negligent misrepresentations to the Plaintiffs Sarbjit Singh ("Singh") and Se Na Lee (the "Misrepresentations") as follows:

(a) Talon misrepresented in a forecast/projection distributed to potential purchasers entitled Estimated Return on Investment (the "Estimates") that it had used proper care to gather and use the best available information to forecast revenue, expenses and net income; and

(b) Talon misrepresented that the Hotel Units would be profitable upon the opening of the Trump Hotel, not after a period of "ramp-up" or "stabilization".

Question: Were the Misrepresentations misrepresentations as defined in the *Securities Act* (section 130.1)? Were the Misrepresentations material statements that were false, deceptive or misleading as defined by the *Condominium Act, 1998* (section 133) If the answer is yes to either question, what is the appropriate remedy?⁷

(iii) Were the Misrepresentations also fraudulent misrepresentations at common law? Is the answer is yes, what is the appropriate remedy?

(iv) In considering a claim that the Misrepresentations were negligent misrepresentations made to Class Members requiring proof of reasonable reliance by the Class Members, is the Court able to infer reliance by the Class Members on the Estimates?

(v) If any purchasers of Hotel Units agreed to a settlement with Talon on or after October 13, 2016 (the date *Singh v. Trump* was released by the Court of Appeal), was Talon obligated to disclose to those purchasers the Court of Appeal decision? If Talon did not make such disclosure, what is the appropriate remedy?

(vi) If any purchasers of Hotel Units agreed to a settlement with Talon on or after this class proceeding was commenced, February 3, 2017, was Talon obligated to disclose to those purchasers that a class proceeding was pending? If Talon did not make such disclosure, what is the appropriate remedy?

(vii) Is this class proceeding barred by virtue of section 4 of the *Limitations Act, 2002*, S.O. 2002, c. 28?

D. Certification: General Principles

93 The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (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 of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

94 For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.⁸ On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.⁹ The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources.¹⁰

95 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim.¹¹ However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.¹² In the context of the common issues criterion, the "some basis in fact" standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.¹³

96 The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.¹⁴ In particular, there must be a basis in the evidence to establish the existence of common issues.¹⁵ To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.¹⁶

97 The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification.¹⁷ Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.¹⁸

98 On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.¹⁹ The evidence on a motion for certification must meet the usual standards for admissibility.²⁰ While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.²¹ In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.²²

E. Cause of Action Criterion

1. General Principles: Cause of Action Criterion

99 The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*,²³ is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.²⁴

100 In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.²⁵

2. Analysis: Cause of Action Criterion

101 The Plaintiffs plead five causes of action.

102 Four causes of action are pled in support of their claim for rescission and for return of the deposits; namely: (1) Talon contravened the ruling of the OSC voiding the exemption and, therefore it unlawfully sold securities without a prospectus; (2) statutory misrepresentation contrary of the *Securities Act*; (3) statutory misrepresentation contrary to the *Condominium Act, 1998*; (4) negligent misrepresentation; and (5) fraudulent misrepresentation.

103 The Plaintiffs also plead a cause of action for rescission of the releases signed by purchasers who had settled their claims against Talon after October 13, 2016.

104 Albeit not particularly artfully, I am satisfied that the Plaintiffs have disclosed a cause of action for: negligent misrepresentation and fraudulent misrepresentation. They also have a cause for the subclass of purchasers who signed releases after October 13, 2016.

105 The Plaintiffs, therefore, satisfy the first criterion for certification.

106 For the reasons that I set out in *Singh v. Trump*, which aspect of my decision, I believe, survived the appeal to the Court of Appeal, I conclude that it plain and obvious that the Plaintiffs do not have a cause of action leading to rescission from an alleged breach of the OSC ruling.

107 In *Singh v. Trump*, I concluded that if I was wrong and there had been a sale of a security or a breach of the OSC's rule, then the breach of the ruling did not vitiate the exemption granted by the OSC and the purchasers were left with the remedies that the OSC prescribed for the sale of the Hotel Units.

108 For the purposes of the certification motion now before the court, I also conclude that it is plain and obvious that the Plaintiffs do not have a statutory cause of action under either the *Securities Act* or under the *Condominium Act*.

109 The Plaintiffs emphasized in their factum that all of their causes of action, including the statutory causes of action, crystallized when a purchaser paid his or her deposit between 2008 and 2012. Accepting the Plaintiffs at their word, it is plain and obvious that the statutory misrepresentation claims, which involve absolute limitation periods (i.e., discoverability is not a factor) now come too late.

110 Section 138(a) of the *Securities Act* includes a 180-day limitation period for proceedings under section 130.1 as follows:

Unless otherwise provided in this Act, no action shall be commenced to enforce a right created by this Part more than,

(a) *in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action . . .*

111 To rescind an agreement of purchase and sale under s. s. 72 of the *Condominium Act, 1998*, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor who must receive the notice within 10 days of the later of: (a) the date that the purchaser receives the disclosure statement; and (b) the date that the purchaser receives a copy of the agreement of purchase and sale executed by the declarant and the purchaser.

112 Thus, taking the Plaintiffs at their word that their statutory causes of action crystallized when they paid their deposits, it is now too late to rely on s. 131 of the *Securities Act* or on the *Condominium Act, 1998*.

113 The Plaintiffs also argue that the limitation period under s. 131 of the *Securities Act* has not begun to run because 180 days after the date of the transaction that gave rise to the cause of action has not occurred because no transaction occurred. With respect, this argument makes no sense. The transaction for which rescission is sought is the entering into of the agreements of purchase and sale and that transaction occurred when the deposits were paid.

114 The common law claims for negligent misrepresentation and fraudulent misrepresentation, however, are not statute barred, because there is a 10-year limitation period for a claim for the return of a deposit in a transaction involving the sale of a condominium unit.²⁶

F. Identifiable Class Criterion

1. General Principles: Identifiable Class Criterion

115 The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.²⁷

116 In *Western Canadian Shopping Centres Inc. v. Dutton*,²⁸ the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be

defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

117 In identifying the persons who have a potential claim against the defendant, the definition cannot be merits-based.²⁹ In *Frohlinger v. Nortel Networks Corp.*³⁰ at para. 21, Justice Winkler, as he then was, explained why merits-based definitions are prohibited; he stated:

21. The underlying reason for each of these prohibitions is readily apparent. Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. Theoretically, unsuccessful claimants would not be "class members" and would be free to commence further litigation because s. 27(3) of the CPA, which states in part:

A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding [. . .]

118 In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.³¹ An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.³² The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.³³ The class should not be defined wider than necessary, and 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.³⁴

119 A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a claim against the defendants.³⁵

2. Analysis: Identifiable Class Criterion

120 Talon submits that Ms. Persaud's class definition is overbroad and that class members would not be able to self identify.

121 In advancing this argument, Talon submits that the class definition includes a diverse group of purchasers including: (a) ten purchasers who only partially paid their deposits (the Early Defaulters); (b) approximately nine purchasers who purchased in bulk for resales (Resellers); (c) approximately three corporate purchasers who no longer exist (Non-existent Purchasers); (d) approximately 113 purchasers who did not take interim occupancy (Non-occupant Purchasers); (e) an unknown number of assignee purchasers who did not have dealings with Talon (Third Party Purchasers); (f) an unknown number of purchasers who accessed a website, lawyerDoneDeal.com, to review and download closing documents (Website Purchasers); (g) an unknown number of purchasers who bought for other purposes and not primarily as an investment (Occupant Purchasers); (h) an unknown number of purchasers who never attended in Toronto or met with a Talon representative (Absent Purchasers); (i) three purchasers against whom Talon has judgments (Judgment Debtor Purchasers); and (j) five purchasers who have judgments against Talon (Judgment Creditor Purchasers)³⁶.

122 Notwithstanding Talon's submission, in my opinion, subject to certain adjustments to the proposed definition, the Plaintiffs satisfy the identifiable class criterion.

123 By way of adjustments, the Judgment Debtor Purchasers and the Judgment Creditor Purchasers should not be included as class members. These purchasers' claims have been discharged by judgments.

124 Apart from Judgment Debtor Purchasers and Judgment Creditor Purchasers, the other putative class members should have no difficulty self-identifying.

125 The indicia of class membership are: (a) he or she signed or had signed on their behalf an agreement of purchase and sale with Talon to purchase a Hotel Unit; (b) pursuant to the agreement of purchase and sale, he or she paid or had paid on their behalf a deposit or a portion of a deposit; and (c) he or she did not close the purchase of the Hotel Unit.

126 The adjustments (underlined or struck out text) to the class definition to narrow the class to its appropriate membership are as follows:

All purchasers except "Excluded Purchasers", defined below, of hotel condominium units (the "Hotel Units") in the hotel portion (the "Trump Hotel") of the Trump International Hotel and Tower Toronto (the "Trump Tower") who: (a) signed or who had signed on their behalf agreements of purchaser and sale with the developer, the Defendant ("Talon"); (b) paid or who had paid on their behalf deposits or portions of deposits to Talon; the developer of the Trump Tower, the Defendant ("Talon"), but and (c) did not complete their transactions with Talon.

"Excluded Purchasers" are: (a) purchasers against whom Talon has obtained a judgment forfeiting their deposit(s); and (b) purchasers who have obtained a judgment against Talon for repayment of their deposit(s).

127 I appreciate that some class members may choose to opt out and that some class members may not have viable claims; for examples, subject to re-instatement of their corporate charters, the Non-existent Purchasers do not have the status to sue and depending upon which cause of action, the Third Party Purchasers who did not deal directly with a Talon Representative may fail to prove a claim, but class definitions are not merits-based and these putative Class Members will have no difficulty self-identifying as class members.

128 I conclude that the Plaintiffs satisfy the identifiable class criterion.

G. Common Issues Criterion

1. General Principles: Common Issues

129 The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.³⁷ The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.³⁸ In *Pro-Sys Consultants Ltd. v. Microsoft Corp.*,³⁹ the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

130 All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.⁴⁰

131 An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.⁴¹ Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.⁴²

132 Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; *i.e.*, by framing the issue in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member.⁴³ In *Rumley v. British Columbia*,⁴⁴ Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:

[. . . .] 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.

133 However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.⁴⁵

134 The common issue criterion presents a low bar.⁴⁶ An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.⁴⁷ Even a significant level of individuality does not preclude a finding of commonality.⁴⁸ A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.⁴⁹

135 As already noted above, in the context of the common issues criterion, the some basis in fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.

136 Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.⁵⁰

2. Common Issues: Discussion and Analysis

137 It is axiomatic that there cannot be a common issue for a cause of action that does not satisfy the cause of action criterion for certification. As explained above, I have found that only the negligent misrepresentation and fraudulent misrepresentation claims are certifiable. During the argument of the motion, I asked Ms. Persaud's proposed Class Counsel to submit a new set of common issues that would reflect the two certifiable causes of action.

138 Counsel submitted the following list of questions, which I have slightly edited. The new list of questions, however, did not faithfully respond to my request, because, and I do not fault him for trying, he would not abandon the other causes of action:

- (1) In this class proceeding is there issue estoppel with respect to the findings of fact and law of the Court of Appeal in *Singh v. Trump*, 2016 ONCA 747 (Ont. C.A.)?
- (2) Did Talon breach its obligations/representation to the Ontario Securities Commission as set out in the May 2004 ruling? If so, what the appropriate remedy.
- (3) Did Talon make representations contrary to the provisions of s. 130.1 of the *Securities Act*? If so, what is the appropriate remedy?
- (4) Did Talon make false, deceptive, or misleading material statements contrary to the provisions of s. 133 of the *Condominium Act, 1998*? If so what is the appropriate remedy?
- (5) Did Talon make fraudulent misrepresentations? If so, what is the appropriate remedy?
- (6) Did Talon make negligent misrepresentations? If so, what is the appropriate remedy?

(7) Can the requirement for reliance upon Talon's representation be inferred by the court?

(8) What is the appropriate limitation period governing the Plaintiff's cause(s) of action.

139 I shall, however, be equally resolute, and I, therefore, shall not certify any of the original questions and I shall not certify questions 2, 3, 4, 7, and 8 of the revised list. The new questions are either not based on certifiable causes of action or they raise individual issues and not common ones.

140 In the result, the Plaintiffs satisfy the common issues criterion for questions 1, 5, and 6 of the new list.

H. Preferable Procedure Criterion

1. General Principles: Preferable Procedure

141 Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.⁵¹

142 In *Fischer v. IG Investment Management Ltd.*,⁵² the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.⁵³ Arguments that no litigation is preferable to a class proceeding cannot be given effect.⁵⁴ Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.⁵⁵

143 Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

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.

144 To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.⁵⁶

145 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).⁵⁷

146 The court must identify alternatives to the proposed class proceeding.⁵⁸ The proposed representative plaintiff bears the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.⁵⁹ It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.⁶⁰

147 In *Fischer v. IG Investment Management Ltd.*, Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case? (2) What is the potential of the class proceeding to address those barriers? (3) What are the alternatives to class proceedings? (4) To what extent do the alternatives address the relevant barriers? and (5) How do the two proceedings compare?⁶¹

148 And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin*⁶² and *Bruno Appliance and Furniture Inc. v. Hryniak*,⁶³ one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.

149 In cases, particularly cases where the individual class members' respective harm is nominal, or cases where an aggregate assessment of damages in whole or in part is possible, a class action may more readily satisfy the preferable procedure criterion because the common issues trial may be the only viable means for remedying the wrong and for calling the wrongdoer to account because individual litigation may be prohibitively expensive.⁶⁴

150 In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act, 1992* envisions the prospect of individual claims being litigated and it should be noted that sections 12 and 25 of the *Act* empower the court with tools to manage and achieve access to justice and judicial economy; thus the inevitability of individual issues trials is not an obstacle to certification. In the context of misrepresentation claims, numerous actions have been certified notwithstanding individual issues of reliance and damages.⁶⁵

151 That said, in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion.⁶⁶ Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.⁶⁷ A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.⁶⁸

2. Analysis: Preferable Procedure

152 In the immediate case, a class proceeding is an appropriate method of advancing the claims of the class members and it would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.

153 The issue estoppel question is a particularly productive common issue, but all the certified common issues would go a great distance in advancing the litigation.

154 If Talon were successful on all three common issues, there is a dispositive result in favour of Talon and the action would be dismissed. If the Plaintiffs were successful on the estoppel issue, and the Plaintiffs also proved fraud, then there would be a dispositive result in favour of the Class Members. If the Plaintiffs were successful on the estoppel issue but the Plaintiffs did not prove fraud, the litigation would be substantially advanced and there would be individual issues trials to determine individual reliance by the Class Members.

155 In the immediate case, a class action represents a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims and provides access to justice, behaviour modification, and judicial economy.

156 I conclude that the preferable procedure criterion is satisfied in the immediate case.

I. Representative Plaintiff Criterion

1. General Principles: Representative Plaintiff Criterion

157 The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.⁶⁹

158 Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.⁷⁰

159 While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial.⁷¹ The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed.⁷²

2. Analysis: Representative Plaintiff

160 Ms. Persaud is a genuine representation of the claims of the members of the class to be represented, and she is capable of asserting a claim on behalf of all of the Class Members as against Talon.

161 All of Talon's arguments that Ms. Persaud does not have a claim or cannot represent the class members are belied by the fact that Talon is suing her and she could have and perhaps should have raised her claim as a counterclaim to Talon's claim.

162 The circumstance that Ms. Persaud directed title to the currently defunct Ten Eight Vacations Ltd. is a matter that can be rectified or ignored because Ms. Persaud is the person who signed the agreement with Talon to purchase a Hotel Unit. Her position is representative of the rest of the Class Members, and provided that she retains a new Class Counsel, she has no conflict with the rest of the Class Members. She qualifies to be a representative plaintiff.

163 Her current litigation plan, which is based on causes of action and questions that were not certified is deficient, but it should be a straight forward matter and relatively easy to amend the current overly complex plan to accommodate the three common issues that have been certified. Any disputes about the litigation plan can be resolved by the normal case management of the litigation.

164 There is, however, one major problem. The problem with respect to Ms. Persaud's qualifications to be a representative plaintiff is that she has selected Levine, Sherkin, Boussidan to be Class Counsel and that firm is also lawyer of record for the plaintiffs in sixteen individual actions.

165 The plaintiffs in those sixteen actions are putative Class Members. The plaintiffs in those sixteen actions must each make a decision whether to participate in the class action or to opt-out.

166 While conceding that the plaintiffs in each of the sixteen actions must obtain independent legal advice about whether to opt out of the class action, it is apparent that Levine, Sherkin, Boussidan wish to continue to act for the plaintiffs in the sixteen individual actions and also be Class Counsel for Ms. Persaud and her fellow Class Members. This is not permissible. Class Counsel cannot act for a representative plaintiff and also act for putative Class Members who have opted out of the class action.⁷³

167 Levine, Sherkin, and Boussidan argue that they have no conflict of interest in simultaneously acting for the plaintiffs in the sixteen actions and the Class Members because it has not been suggested that there is a conflict of interest and they have not been disqualified from acting simultaneously for the plaintiffs in the sixteen actions.

168 This argument is fallacious for two reasons. First, whether it has been suggested or not, there is indeed a conflict of interest in the law firm acting for the plaintiffs in the sixteen actions. The truth is that Levine, Sherkin, and Boussidan do have a conflict of interest, but it is inchoate or a waivable conflict arising from joint retainers with the plaintiffs in the sixteen actions.

169 The law firm has the inchoate conflict of interest associated with a joint retainer. Rule 3.4-5 of the *Law Society of Ontario's Rules of Professional Conduct* requires that in cases of joint retainers, where a conflict of interest develops that cannot be resolved, the lawyer cannot continue to act for both or all of the clients and may have to withdraw completely. The firm has joint retainers with the plaintiffs in the sixteen actions and those clients can waive the conflict in accordance with the *Rules of Professional Conduct* promulgated by the Ontario Law Society.

170 At the moment, the conflicts of interest associated with Levine, Sherkin, and Boussidans' joint retainers for the plaintiffs in the sixteen actions are not particularly acute because the plaintiffs in the sixteen actions are collectively seeking a judgment against Talon and the other defendants, and all of the plaintiffs in the sixteen actions are united in pursuing a claim against the defendants.

171 There is a pending summary judgment motion and thus the Plaintiffs in the sixteen actions are further advanced in their litigation than the Class Members. Conflicts of interest amongst the clients of the sixteen actions retainers, however, may yet arise and become quite acute, particularly if there are settlement negotiations with the plaintiffs in the sixteen actions.

172 There, however, is nothing inchoate or waivable in the conflict of interest arising from action for the plaintiffs in the sixteen actions and simultaneously acting for the Class Members.

173 For present purposes, the point to emphasize is that Levine, Sherkin, and Boussidans' argument that they have no conflicts of interest in acting for the plaintiffs in the sixteen actions is incorrect, and the firm's conflicts of interest will be exacerbated if it were to act simultaneously for the plaintiffs in the sixteen actions and also the Class Members, who are already being asked to give instructions to pursue fewer remedies and to pursue fewer defendants than the plaintiffs in the sixteen actions are pursuing.

174 The second reason why Levine, Sherkin, and Boussidan's argument is incorrect, is that with joint retainers outside of the Class Action, Levine, Sherkin, and Boussidan have a conflict of interest in acting for the Class Members who as a collective are

entitled to an unconflicted representation. It is not for the court to waive those conflicts and indeed the conflicts are irreconcilable and the *Class Proceedings Act, 1992* directs that the court not certify a class action if there is a conflict of interest.

175 In the context of class proceedings, there are three types of conflict of interest that require examination:⁷⁴ (1) conflicts of interest arising from a lawyer's direct financial interest in the class proceedings, which are an inherent conflict allowed by the entrepreneurial model of the class proceedings legislation; (2) conflicts arising from a divergence of interest between the representative plaintiff and class members; and (3) conflicts arising from the lawyer's divided loyalties arising outside of the class proceeding. In the immediate case, all three types of conflict of interest would be present should Levine, Sherkin, and Boussidan simultaneous act for the plaintiffs in the sixteen actions and for the Class Members.

176 As already noted, Class Members will seek a different set of remedies against Talon from the remedies being sought by the plaintiffs in the sixteen actions, and there is a different set of defendants in the sixteen actions and the class action that only includes Talon as a defendant. That is not an unconflicted representation, and it is a retainer that will raise enormous problems in settling the class action.

177 For certain, the Class Members cannot be used as a lever to increase the pressure on the defendants in the sixteen actions to settle the sixteen actions. There is an obvious conflict in Levine, Sherkin, and Boussidan purporting to act on a contingency fee basis for a collective while at the same time having joint retainers with the plaintiffs in sixteen individual actions.

178 There is the inherent conflict of interest of entrepreneurial class actions, where Class Counsel may be incentivized to recommend a settlement that provides a very provident recovery from contingency fees and an escape from the risks of litigation but which settlement may provide miserly access to justice for the Class Members. If Class Counsel also acts for the sixteen plaintiffs and the Class Members, the conflicts would propagate.

179 For example, the sixteen plaintiffs may be best served if the Class Members settled cheaply because the proportion of the deposits not returned to the Class Members will be the monetary resource for payment of the damages claims of the sixteen plaintiffs, claims not being advanced by the sixteen plaintiffs.

180 For example, the Class Members may be best served if they retained a greater proportion of the deposits and the sixteen plaintiffs received less for their deposits because the proportion of the deposits not returned to the plaintiffs in the sixteen actions will be the monetary resource for the Class Members' claims for costs and pre and post-judgment interest.

181 Further, the Class Members and the plaintiffs in the sixteen actions may differ on tactics and strategy. There is a strong potential for conflicting instructions to Levine, Sherkin, and Boussidan regarding the prosecution of the claims in the sixteen actions and the singular claim for rescission in the class action.

182 In my opinion, it would be inappropriate to make it a condition of the certification decision that Levine, Sherkin, and Boussidan remove itself as lawyer of record for the sixteen plaintiffs who after obtaining independent legal advice may decide to opt out of the class action. It is, however, appropriate to recognize that Levine, Sherkin, and Boussidan are disqualified as Class Counsel.

183 I note that if Levine, Sherkin, and Boussidan are disqualified as Class Counsel, then their conflict in advising the plaintiffs in the sixteen actions whether to participate instead in the Class Action is not removed, and, as already acknowledged by Levine, Sherkin, and Boussidan, the firm's clients should obtain independent legal advice about whether they should participate in the Class Action.

184 Therefore, I shall allow Ms. Persaud sixty days to retain a new Class Counsel and subject to court approval of her choice, her action shall be certified as a class action.

185 If Ms. Persaud fails to satisfy the above condition, then I shall dismiss her motion to certify the action as a class action, but her action may continue as an individual action to be consolidated with action CV-14-498306.

J. Conclusion

186 For the above reasons: (a) I conditionally approve the certification of Ms. Persaud's action as a class action; and (b) in any event, I consolidate the action in which Ms. Persaud is a defendant with the class action in which she is plaintiff.

187 I shall determine the matter of costs after it is determined whether or not Ms. Persaud has satisfied the conditions for certification.

188 Order accordingly.

Footnotes

1 S.O. 1992, c. 6.

2 R.S.O. 1990, c. S.5.

3 S.O. 1998, c. 19

4 *Singh v. Trump*, 2015 ONSC 4461 (Ont. S.C.J.).

5 *Singh v. Trump*, 2016 ONCA 747 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2016] S.C.C.A. No. 548 (S.C.C.).

6 (1986), 56 O.R. (2d) 540 (Ont. H.C.).

7 This is the version of the proposed common issue as rearticulated in the Plaintiffs' Reply Factum for the certification motion.

8 *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).

9 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 16.

10 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 26 to 29.

11 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 28 and 29.

12 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 16-26.

13 *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 (Ont. S.C.J.), aff'd, 2017 ONSC 6098 (Ont. Div. Ct.), leave to appeal refused (28 February 2018) [2018 CarswellOnt 8486 (Ont. C.A.)]; *Dine v. Biomet Inc.*, 2015 ONSC 7050 (Ont. S.C.J.), aff'd 2016 ONSC 4039 (Ont. Div. Ct.); *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Ont. Div. Ct.); *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.); *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (Ont. C.A.); *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 (Ont. S.C.J.); *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.).

14 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.); *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.).

15 *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21; *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.) at para. 25.

16 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 110.

17 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 22.

- 18 *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545 (S.C.C.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.); *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Ont. Div. Ct.).
- 19 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 50, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 16-26.
- 20 *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 (Ont. S.C.J.); *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (Ont. S.C.J.) at para. 13; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545 (S.C.C.).
- 21 *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 76.
- 22 *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 (B.C. S.C.), aff'd 2012 BCCA 260 (B.C. C.A.).
- 23 [1990] 2 S.C.R. 959 (S.C.C.).
- 24 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476 (S.C.C.).
- 25 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 25; *Abdoor v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.
- 26
- 27 *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).
- 28 2001 SCC 46 (S.C.C.) at para. 38.
- 29 *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (Ont. S.C.J.) at paras. 159-167; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 21; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 38.
- 30 [2007] O.J. No. 148 (Ont. S.C.J.).
- 31 *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.).
- 32 *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.) at paras. 121-146.
- 33 *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 22.
- 34 *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Ont. S.C.J.) at paras. 12-13, aff'd [2003] O.J. No. 3918 (Ont. Div. Ct.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 21.
- 35 *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 103-107 at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Ont. S.C.J.); *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22, leave to appeal ref'd [2007] O.J. No. 1991 (Ont. Div. Ct.); *Ragoonian Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Ont. Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at para. 10 at para. 10.

- 36 Messrs. or Mesdames Singh, Lee, Ram Harvey, and Yim have been repaid their deposits.
- 37 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 18.
- 38 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 39 and 40.
- 39 2013 SCC 57 (S.C.C.) at para. 106.
- 40 *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 (Ont. S.C.J.), aff'd, 2017 ONSC 6098 (Ont. Div. Ct.), leave to appeal refused (28 February 2018) [2018 CarswellOnt 8486 (Ont. C.A.)]; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 (Ont. C.A.) at para. 48; *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.) at para. 183; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.) at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512 (S.C.C.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545 (S.C.C.); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 40.
- 41 *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 (Ont. Div. Ct.) at paras. 3, 6.
- 42 *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Ont. Div. Ct.), var'd 2011 ONSC 3882; *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (Ont. S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C. S.C.) at para. 51, var'd on other grounds (2004), 42 B.L.R. (3d) 161 (B.C. C.A.).
- 43 *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.) at para. 132; *Frey v. Bell Mobility Inc.*, 2011 SKCA 136 (Sask. C.A.) at para. 48-50, leave to appeal refused, [2012] S.C.C.A. No. 42 (S.C.C.); 197; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), leave to appeal refused, [2008] S.C.C.A. No. 512 (S.C.C.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 29.
- 44 [2001] 3 S.C.R. 184 (S.C.C.) at para. 29.
- 45 *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) at paras. 44 — 46.
- 46 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Ont. Div. Ct.), aff'd [2010] O.J. No. 2683 (Ont. C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348 (S.C.C.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at para. 42.
- 47 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).
- 48 *Hodge v. Neinstein*, 2017 ONCA 494 (Ont. C.A.) at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 54.
- 49 *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (B.C. C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21 (S.C.C.).
- 50 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at paras. 114-119; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).
- 51 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.) at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).
- 52 2013 SCC 69 (S.C.C.) at paras. 24-38.
- 53 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).

- 54 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 45, aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).
- 55 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).
- 56 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.); *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).
- 57 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).
- 58 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at para. 35; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 28.
- 59 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras. 48-49.
- 60 *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 (Ont. C.A.) at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 62-67.
- 61 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.) at para. 125; *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras. 27-38.
- 62 2014 SCC 7 (S.C.C.).
- 63 2014 SCC 8 (S.C.C.).
- 64 *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (Ont. S.C.J.) at para. 9; *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at paras. 215-216, leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Ont. S.C.J.); *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.).
- 65 *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Ont. Div. Ct.) at para. 59; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (Ont. S.C.J.) at paras. 340, 350-351, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Ont. Div. Ct.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.) at para. 103; *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Ont. S.C.J.); *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy v. BDO Dunwoody LLP*, [2006] O.J. No. 2729 (Ont. S.C.J.); *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (Ont. S.C.J.) at para. 20; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 35; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at paras. 48-49, rev'g (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 660 (S.C.C.).
- 66 *Arabi v. Toronto Dominion Bank*, [2006] O.J. No. 2072 (Ont. S.C.J.), aff'd [2007] O.J. No. 5035 (Ont. Div. Ct.); *Mouhertos v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.).
- 67 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.).
- 68 *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.) at para. 26.
- 69 *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (Ont. S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (Ont. S.C.J.) at para. 40), aff'd [2003] O.J. No. 4708 (Ont. C.A.).
- 70 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 41.

- 71 *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (Ont. C.A.);
 Cloud v. Canada (Attorney General) (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 95; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 76; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 100.
- 72 *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at paras. 62-67; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.).
- 73 *Vaeth v. North American Palladium Ltd.*, 2016 ONSC 5015 (Ont. S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.); *Logan v. Canada (Minister of Health)*, [2002] O.J. No. 522 (Ont. S.C.J.).
- 74 P. Perell, "Class Proceedings and Lawyers' Conflict of Interest" (2009), 35 *Advocates' Quarterly* 202.

TAB 23

2018 ONSC 4333
Ontario Superior Court of Justice

Price v. H. Lundbeck A/S

2018 CarswellOnt 11824, 2018 ONSC 4333, 294 A.C.W.S. (3d) 286

**JENNIFER PRICE, Individually, and MATTHEW JANZIC, a Child, by
his Natural Mother and Litigation Guardian, Jennifer Price (Plaintiffs)
and H. LUNDBECK A/S and LUNDBECK CANADA INC. (Defendants)**

Perell J.

Heard: May 28, 2018; May 29, 2018; May 30, 2018; May 31, 2018

Judgment: July 16, 2018

Docket: CV-14-518698

Counsel: Casey R. Churko, Anthony Tibbs, Venessa Vuia, for Plaintiffs

Frank J. McLaughlin, Brandon Kain, Jacqueline Cole, for Defendants

Subject: Civil Practice and Procedure; Corporate and Commercial; Evidence; Torts

MOTION by plaintiffs for certification of class proceeding.

Perell J.:

A. Introduction

1 Approximately three and a half years ago, pursuant to the *Class Proceedings Act, 1992*,¹ Matthew Janzic and his mother Jennifer Price in her personal capacity and in her capacity as litigation guardian for Matthew commenced a proposed class action against H. Lundbeck A/S and Lundbeck Canada Inc. (collectively "Lundbeck"), which are pharmaceutical companies that manufacture the drug "citalopram," under the brand name Celexa®.

2 Citalopram is an SSRI (selective serotonin reuptake inhibitor) indicated for the treatment of depression, and the thrust of Ms. Price's proposed class action is that Lundbeck failed to warn women that Celexa® may be a "teratogen," which is any agent that can disturb the development of an embryo or fetus and thereby cause congenital malformations, which, in turn, can cause the pregnancy to spontaneously abort or the child to be born with birth defects.

3 This is a motion for certification of the action. The motion was fiercely and rudely contested.² The parties asserted the routine arguments about the certification criteria, but they asserted them *ad nauseum*, and they asserted innumerable straw man arguments (knocking down an argument their opponent had not made) and innumerable *ad hominem*, mean, and taunting arguments. They distorted and misapplied the "some basis in fact" or the "no basis in fact" tests that are applied to four of the five certification motion, and they took much of the evidence and argument outside the boundaries of what is appropriate for a certification motion.

4 Only the oral argument in court of the motion was polite. It proceeded over four days. I reserved judgment.

5 I have now decided that Ms. Price's action satisfies only two of the five criteria for certification; therefore, her motion for certification should be dismissed without costs.³

B. Evidentiary Background

6 Ms. Price supported her certification motion with the following evidence:

- *Paul Battaglia* of Toronto, Ontario swore an affidavit dated February 12, 2018. Mr. Battaglia is the President of Trilogy Class Action Services, a class action administration, advertising, and notice plan firm located in Toronto.
- *Dr. Anick Bérard*, PhD of Montreal, Québec swore an affidavit dated June 6, 2017. She was cross-examined. Dr. Bérard is a pharma-epidemiologist who is a professor at the Faculty of Pharmacy of the Université de Montréal. She has a doctorate in epidemiology and biostatistics from McGill University. She did post-doctoral work at the Harvard School of Medicine. She is a member of the Teratology Society and of the Organization of Teratology Information Services. She has supervised nearly 70 graduate students in teratology. Her published papers include studies of antidepressants, including SSRIs, and congenital malformations. She has worked with Health Canada and the FDA (U.S. Food and Drug Administration). She has been an expert witness in proceedings in the U.S. and Canada.
- *Pamela Bews* of Abbotsford, British Columbia swore an affidavit dated July 6, 2017. While pregnant, Ms. Bews was prescribed Celexa® and her daughter was born with disfigured teeth and severe Ebstein's Anomaly, a serious heart condition.
- *Dr. Robert M. Cabrera*, PhD, of Houston, Texas, USA, swore an affidavit dated December 5, 2017. He was cross-examined. Dr. Cabrera is a professor in the Department of Cellular and Molecular Biology at Baylor College of Medicine in Texas. He completed his graduate studies at Texas A&M University Health Center and the Institute of Biosciences and Technology. He is a teratologist and a member of the Teratology Society. He has conducted *in vitro* animal studies about SSRIs and presented his research at the Teratology Society. His research projects included a citalopram *in vitro* animal study.
- *Deanna Gardner* of Peterborough, Ontario swore an affidavit dated July 6, 2017. While pregnant she was prescribed Celexa®, and her daughter was born with a cleft foot.
- *Dr. David Healy*, MD swore affidavits dated July 5, 2017 and December 15, 2017. He was cross-examined. Dr. Healy is a professor of psychiatry at Bangor University, affiliated with the University of Wales. He has a doctorate from the University College Dublin. He is a Fellow of the Royal College of Psychiatrists. He has expertise in psychopharmacology and experience in epidemiology. He has a clinical practice. He has been a consultant for pharmaceutical companies, including Lundbeck. His publications include articles about the teratogenic effects of SSRIs, and he has been an expert witness and a consultant on birth defects cases, including cases involving SSRI's, including escitalopram, paroxetine, sertraline, and citalopram.
- *Lori Lovett* of Ottawa, Ontario swore an affidavit dated July 5, 2017. While pregnant, Ms. Lovett was prescribed Celexa®. An ultrasound revealed that her unborn child could be suffering from Tetralogy of Fallot and esophageal atresia. After a caesarean section birth, the child was born and then died 13 hours after delivery.
- *Dr. Derelie Mangin*, MBChB of Hamilton, Ontario swore an affidavit dated December 30, 2017. She was cross-examined. Dr. Mangin is a graduate of the Otago Medical School and holds the Nancy Gordon Chair in family medicine and Associate Chair, Research at McMaster University in Hamilton. She has a clinical practice affiliated with the University's medical centre. She is the Director of the Primary Care Research Unit at Christchurch School of Medicine, University of Otago. She has researched and published papers about antidepressants for primary care patients.
- *Noble K. McIntyre*, JD swore an affidavit dated December 5, 2017. Mr. McIntyre is an American personal injury attorney practising in Oklahoma, U.S. with a speciality in mass torts litigation in pharmaceutical and medical device cases. He graduated from the University of Oklahoma College of Law and began his law practice in 1995.

• *Jennifer Price* of Stoney Creek, Ontario swore an affidavit dated July 6, 2017. She was cross-examined. While pregnant she was prescribed Celexa,® and her son Matthew was born with several severe birth defects including ventricular septal defect, pulmonary valve stenosis, and absent fifth distal phalanx.

• *Katherine Stygiest* of Prince George, British Columbia swore an affidavit dated July 4, 2017. While pregnant she was prescribed Celexa®. An ultrasound showed that her unborn child had a small recessed jaw. The unborn child was subsequently diagnosed to have Treacher Collins Syndrome, a congenital disorder characterized by craniofacial deformities involving the ears, eyes, cheekbones, and jawbone. The child was born with severe micrognathia (undersized jaw), no ears, malformed or under-formed cheek bones, a severe cleft palate, and a hole between his throat and esophagus. The child died three hours after birth.

• *Venessa Vuia* of Toronto, Ontario swore an affidavit dated January 26, 2018. She is a lawyer with Merchant Law Group LLP, counsel for the Plaintiffs. She was cross-examined.

7 Lundbeck resisted the certification motion with the following evidence:

• *Dr. Michael Brunskill Bracken*, PhD, of New Haven, Connecticut, swore an affidavit dated November 9, 2017. He was cross-examined. Dr. Bracken is an epidemiologist who specializes in perinatal epidemiology. He has a doctorate in epidemiology from Yale University. He is the Susan Dwight Bliss Professor Emeritus of Epidemiology, a Senior Research Scientist and a former Professor of Obstetrics and Gynecology, Reproductive Science and Neurology at Yale University. He is the founding Director of the Yale Perinatal Epidemiology Unit and Co-Director of its successor, the Yale Centre for Perinatal, Pediatric and Environmental Epidemiology.

• *Dr. Jeffrey Brent*, MD, PhD, of Denver, Colorado swore an affidavit dated November 9, 2017. He was cross-examined. Dr. Brent is a medical toxicologist. He has a doctorate in biochemistry from Mt. Sinai School of Medicine, New York. He is a practicing physician at the University of Colorado Hospital and The Children's Hospital of Colorado and is the Distinguished Clinical Professor of Medicine in the Division of Clinical Pharmacology and Toxicology of the Department of Medicine at the University of Colorado School of Medicine and Hospital. He also holds secondary appointments in the Department of Emergency Medicine and the Colorado School of Public Health.

• *Dr. Donna Stewart*, MD, OC, of Toronto, Ontario, swore affidavits dated November 7, 2017 and January 31, 2018. She was cross-examined. Dr. Stewart is a medical doctor licensed to practice in Ontario and a certified specialist in Psychiatry by the Royal College of Physicians and Surgeons of Canada. She is the Head of Research and Academic Development at University Health Network Centre for Mental Health in Toronto and a Senior Scientist at Toronto General Hospital Research Institute. She established North America's first perinatal psychiatry service for pregnant and postpartum women. Dr. Stewart reviewed the medical records of Mesdames Bews, Gardner, Lovett, Price, and Stygiest.

• *Katherine Stubits* of Toronto, Ontario, swore an affidavit dated April 30, 2018. Ms. Stubits is a law clerk at McCarthy, Tétrault LLP, lawyer of record for Lundbeck.

C. Procedural Background

8 On December 22, 2014, Ms. Price commenced a proposed class action against Lundbeck.

9 Ms. Price brings her action on behalf of the following class:

(i) Women who were prescribed Celexa® in Canada and subsequently aborted, delivered, or miscarried children with congenital malformations after ingesting citalopram while pregnant,

(ii) family members who may make claims under Family Compensation Legislation following the death of, or injury to, such children,⁴

- (iii) such children born to such women, and
- (iv) provincial and territorial governments who paid health care costs on their behalf.

10 On March 23, 2018, Ms. Price filed a "Certification Statement of Claim" as an appendix to her factum. In her Certification Statement of Claim, Ms. Price asserts four causes of action; namely: (a) failure to warn; (b) failure to contraindicate; (c) strict liability to fetuses who die *in utero*; and (d) statutory derivative claims, *i.e.*, defendant's relief claims and subrogated claims on behalf of provincial health insurers. For the purposes of the certification motion, she predominately relied on the failure to warn cause of action.

11 Ms. Price's cause of action in negligence is pleaded in paragraphs 10 to 17 of her Certification Statement of Claim, as follows:

A. Negligence

- (1) Duty
- (2) Breach
- (3) Causation

10. Celexa® is or may be a Teratogen.

11. Before and after Lundbeck marketed Celexa® in Canada, Lundbeck knew or ought to have known that Celexa® is or may be a Teratogen.

- (a) Scientific literature indicated that citalopram's biological mechanism of action could cause Congenital Malformations.
 - (i) The human body naturally regulates serotonin, a vasoconstrictor and neurotransmitter that can be teratogenic.
 - (ii) SSRIs affect the body's natural regulation of serotonin in a way that increases the risk of Congenital Malformations.
- (b) Dog, rabbit, rat, and other animal studies indicated that Celexa® is developmentally toxic.
- (c) Lundbeck received adverse event reports of Congenital Malformations in children born to women who ingested Celexa® during pregnancy.
- (d) Epidemiological studies published in medical and scientific journals identified a causal association between Celexa® and Congenital Malformations.

12. Lundbeck owed the Plaintiffs duties of care.

- (a) Lundbeck owed the Mother a duty of care to inform her prescribing physician that Celexa® is or may be a Teratogen.
- (b) Lundbeck owed the Mother a duty of care to warn her that Celexa® is or may be a Teratogen.
- (c) Lundbeck is strictly liable, or alternatively owed a duty of care to the Child for his Congenital Malformations.
 - (i) The Child could not give informed consent to accept or reject Celexa®.
 - (ii) Lundbeck did not intend the Child to benefit from Celexa®. The Child did not benefit from Celexa®.

13. From 1999, Lundbeck breached a duty of care to warn that citalopram is or may be a Teratogen.

14. Lundbeck did not establish the efficacy of citalopram as an anti-depressant during pregnancy.

(a) Depression is an ordinary emotion during pregnancy.

(b) Depression naturally remits without pharmaceutical intervention.

(c) Depression relapses after discontinuation. Discontinuation can cause withdrawal syndrome.

(d) Treatment for depression can be deferred until after pregnancy.

15. From when and after it marketed Celexa®, Lundbeck failed to provide patients or their physicians with a clear, complete, and current warning in any product monograph that Celexa® is or may be a Teratogen. Particulars include the following:

(a) No product monograph included any statement about the established or suspected risk of birth defects during pregnancy.

(b) The "consumer" information section of the monographs told patients to tell their doctor or pharmacist if they are or intend to become pregnant.

(c) The physician information section of the monographs:

(i) did not contraindicate the use of citalopram in pregnancy for the treatment of mild and moderate depression;

(ii) did not provide any "Warning" that citalopram was a known or suspected Teratogen;

(iii) provided an unclear "Precaution" about nonexistent "expected" benefits of citalopram, but not the foreseeable teratogenic risks;

(iv) did not provide or reference in any manner adverse reaction reports of Congenital Malformations when used during pregnancy; and

(v) provided unclear, uncurrent [sic, out-of-date] and incomplete summaries of animal studies in the Toxicology section.

16. As a result of Lundbeck's breach of its duties to warn the Mother and her prescribing physician that Celexa® is a Teratogen, the Mother's physician prescribed Celexa® to the Mother for use in pregnancy, the Mother took Celexa® while pregnant, and the Child developed Congenital Malformations.

17. Lundbeck's breaches of its duties of care were a factual and legally proximate cause of the Child's Congenital Malformations and the legally compensable loss and expense consequent thereon.

[. . .]

12 A parallel Celexa® proceeding against Lundbeck, *Bergeron v Lundbeck Canada Inc.*, No. 500-06-000734-168 (Montreal), was stayed pending the outcome of this certification motion.

13 On July 7, 2015, Ms. Price delivered the first tranche of her certification motion record including affidavits from Drs. Bérard and Healy and from Mesdames Bews, Gardner, Lovett, Price, and Stymiest.

14 On November 9, 2017, Lundbeck responded by filing affidavits from Drs. Bracken, Brent, and Stewart.

15 In December 2017, Ms. Price delivered reply affidavits from Drs. Cabrera, Healy, and Mangin and from Mr. McIntyre.

16 On January 31, 2018, Lundbeck delivered a further affidavit from Dr. Stewart.

17 Cross-examinations took place in Canada, the United States, and the United Kingdom between February 2 and March 9, 2018.

D. The Representative Plaintiffs and the Putative Class Members' Histories

18 For the present purposes of this certification motion, it is not necessary to say more about the circumstances of Ms. Price and of her putative Class Member witnesses other than they were women who were prescribed Celexa® during pregnancies and that their children were born with birth defects and sadly some of the newborns died shortly after birth.

E. Estimate of Class Size

19 Lundbeck did not provide information that would assist the court in determining the class size.

20 The Plaintiffs estimate that the class will consist of approximately 8,600 mothers who were prescribed citalopram (those who ingested Celexa® or generic versions of citalopram), plus the children born with birth defects, plus the family claimants, plus the governments who paid health care costs on behalf of the mothers and children.

21 The Plaintiffs' estimate was based on 6.8 million births during the 18 years that Celexa® has been available in Canada. The assumptions then of the estimate were that: 12.5% of the birth mothers were exposed to SSRIs; 25.1% of those exposed to SSRI's were prescribed Celexa®; and there was a 4% incidence of birth defects.

F. Background Science

1. Depression and its Treatment

22 Depression is a psychiatric disorder identified through diagnostic criteria established by the World Health Organization and American Psychiatric Association. Depression is often co-morbid with other common psychiatric disorders, such as: anxiety, posttraumatic stress disorder, obsessive compulsive disorder, and eating disorders. Depression is also a major component of bipolar disorder. Major depression affects approximately 7-12% of the population. It is the leading cause of disability for women aged 15-44 and a major contributor to overall disease. Approximately 35% of pregnant women present with depressive symptoms and at least 10% are depressed.

23 The harm caused to pregnant women by depression includes: emotional suffering, difficulty performing usual activities, family conflict, inadequate diet, the use of tobacco, alcohol, and other harmful substances, the potential for self-harm and suicide, the failure to seek prenatal care, and poor weight gain during pregnancy. Risks to the baby from the mother's depression include: preterm birth, low birth weight, neonatal intensive care unit admissions, impairment in mother-infant bonding, infant sleep difficulties, cognitive, behavioural and emotional problems, and developmental delay.

24 Major depression is a common and treatable mental disorder, and several therapies exist. Potential options include: (a) evidence-based psychotherapy (cognitive behavioural therapy or interpersonal therapy); (b) electroconvulsive therapy; and (c) antidepressant medications, including: (i) serotonin norepinephrine reuptake inhibitors ("SNRIs"); (ii) tricyclic antidepressants ("TCAs"); (iii) monoamine oxidase inhibitors ("MAOIs"), which, however, are inappropriate for pregnant women; and (iv) selective serotonin norepinephrine reuptake inhibitors ("SSRIs").

25 Before 1989, when SSRIs were introduced in Canada, most depression (including during pregnancy) was treated with electroconvulsive therapy or TCAs. The introduction of the first SSRI in 1989 — fluoxetine (Prozac®) — changed the treatment of depression because it was as effective as the TCAs but had fewer side effects and was safer in cases of overdose.

26 During the early 1990s, additional SSRIs came to Canada, including fluvoxamine (Luvox®), paroxetine (Paxil®) and sertraline (Zoloft®).

27 By the time citalopram arrived in Canada, SSRIs were well-established as a first-line treatment of depression. Today, the SSRIs are the most commonly prescribed antidepressants during pregnancy. The consensus in clinical guidelines is that it is appropriate to use SSRIs, including citalopram, to treat pregnant women who suffer from depression.

2. Teratogens

28 A teratogen is any agent that can disturb the development of an embryo or fetus and thereby cause congenital malformations, which, in turn, can cause the pregnancy to spontaneously abort or the child to be born with birth defects.

29 Teratogens can be diseases, parasites, medications, illegal drugs, tobacco, alcohol, or environmental exposures. Everything is potentially teratogenic. An example of a disease causing serious birth defects is the zika virus.

30 Some teratogens cause one congenital malformation, others cause more than one.

31 Several chemical substances are known to cause congenital malformations; e.g., alcohol, retinoic acid (vitamin A), methyl mercury, and cigarette smoke (nicotine), but there are currently very few drugs that have been identified as teratogens; e.g., thalidomide, some anti-epileptic drugs and isotretinoin.

3. Congenital Malformations

32 Congenital malformations, also known as congenital anomalies, congenital abnormalities or birth defects, are structural or functional anomalies that occur during intrauterine life. Any organ or part of an organ in the developing embryo can be disrupted and altered during embryological development, resulting in a malformation. Congenital malformations can be identified prenatally, at birth, or later in infancy. Some of the errors in embryogenesis are lethal and can result in an early spontaneous abortion, often before the pregnancy has been recognized.

33 Every pregnancy has a baseline risk of congenital malformations. Approximately 3-5% of newborns are born with a major congenital malformation and approximately 10% have minor malformations that are diagnosed later in the first year of life. Major malformations interfere with normal functions and can even threaten life. Minor malformations are important from a cosmetic standpoint, but do not interfere with life functions.

34 The vast majority of congenital malformations are either due to single or multiple gene absences or abnormalities or are idiopathic, which is to say that they are a disease or condition that arises spontaneously or for which the cause is unknown.

35 Only a very small percentage of congenital malformations, estimated at 1-3%, are known to have been caused by teratogens and many of these include non-chemical factors; e.g., excessive heat, radiation, surgery, amniocentesis, intracytoplasmic sperm injection, maternal health conditions such as diabetes, phenylketonuria, and periods of hypotension, and intrauterine infections such as chicken pox or rubella.

36 For the purposes of this certification motion, it shall be important to note that illnesses - and depression is an illness - can be a cause of birth defects. Thus, depression, the underlying condition for which citalopram is prescribed, is associated with an increased risk of congenital malformations.

37 There are a multitude of different types of malformations. Congenital malformations include: anencephaly; cardiac defects; clubfoot; craniosynostosis; Ebstein's anomaly; gastroschisis; hypospadias; neural tube defects; omphalocele; pulmonary valve stenosis; right-ventricular outflow obstruction; Tetralogy of Fallot; Treacher-Collins syndrome; ventricular septal deficit; and anomalies of the bowel, ears, esophagus, eyes, fingers, hands, lower limb (including pelvic girdle), kidney, lungs, musculoskeletal, neck, palate, pancreas, ribs, spleen, teeth, trachea, toes, and vertebrae.

38 There are no common etiological factors, which is to say that there is no common explanation for the cause or causes of the multitude of congenital malformations, and, thus each malformation has its own etiology, its own risk factors, its own criteria for screening and diagnosis, and each occurs at different baseline rates. For examples:

- Clubfoot is a malformation in which one or both feet are turned inward. Most cases are isolated defects and are idiopathic, although clubfoot can occur as part of some congenital syndromic complexes (e.g., 1/3rd of cases of spina bifida include clubfoot). A number of genetic factors are important in some cases. The incidence of clubfoot varies with both ethnicity and gender. Clubfoot occurs twice as often in males as in females.
- Craniosynostosis is an anomaly in which the spaces between the bones of the cranium close prematurely; it is thought to be caused by maternal thyroid disease, certain hematological syndromes, vitamin deficiency, beta-glucuronidase deficiency, Hurler Syndrome, Morquio syndrome, mucolipidosis, and environmental exposure during pregnancy to aminopterin, diphenylhydantoin, clomiphene oxymetazoline, isotretinoin, or valproic acid.
- Gastroschisis is a defect in the interior abdominal wall exposing digestive organs that may be lying uncovered outside the body on the fetal or neonatal abdomen; it is associated with and perhaps caused by alcohol or tobacco use in pregnancy.
- Hypospadias is a disorder in males in which the urethral orifice is located at a site other than the penile head. It usually occurs as an isolated anomaly, but can be part of a larger syndromic complex. Although most cases are idiopathic, genetic factors have been implicated in the causation of hypospadias because it tends to run in families. Caucasians are at an increased risk of hypospadias, particularly in families of Italian or Jewish origin. Hormonal factors (for example, insufficient testicular testosterone production or a defect in the gene producing the enzyme 5-alpha reductase, which activates testosterone), are also associated with hypospadias. Synthetic chemicals that interact with hormone receptors, and in vitro fertilization (due to the progesterone that is administered to women after IVF) is associated with hypospadias.
- Neural Tube Defects are a group of anomalies resulting from failure of the neural tubes to fuse during neurulation, with the two major types being anencephaly and spina bifida. These defects may occur in association with several genetic syndromes, and have been associated with folic acid, vitamin B12, specific genetic mutations, maternal diabetes or obesity, alcohol use, radiation exposure, methotrexate use, hyperthermia, maternal exposure to cigarette smoke, arsenic, large amounts of caffeine, a low calorie diet (including dieting or fasting), or decreased consumption of fruits and vegetables.
- Omphalocele is an umbilical defect in the anterior abdominal wall that allows abdominal contents (most typically the stomach, bowel and liver) to protrude through the defect covered by a membrane. It may occur as an isolated defect, but often as part of a genetic syndrome (most commonly the Beckwith-Wiedemann syndrome), and trisomy (an extra copy of a chromosome) is present in almost half of the cases.
- Right-ventricular outflow obstruction is a heart abnormality in which the normal flow of blood out to the right ventricle and into the pulmonary artery is impeded. Right-ventricular outflow obstruction is a heart abnormality that is caused by at least 10 separate genetic abnormalities and by other factors including smoking.

G. Citalopram (Celexa®)

39 Citalopram (Celexa®) is an SSRI. It was introduced in Canada in 1999. A s-enantiomer of citalopram called escitalopram (Cipralex®) was introduced in Canada in 2005 and is known as Lexapro® in the United States.

40 Physicians prescribe citalopram for the following non-approved or "off-label" uses: (a) anxiety; (b) post-traumatic stress disorder; (c) obsessive compulsive disorder; and (d) eating disorders.

41 The usual range of dose for citalopram is 20 to 40 mg. The dose will depend upon the illness type and severity and other individual factors, including the patient's past treatment, other drugs the patient may be taking, and the presence of drug side effects.

42 Citalopram has been approved around the world for the treatment of depression. This includes Health Canada, which required Lundbeck to undergo an extensive review process before obtaining approval to market citalopram under the brand Celexa®.

43 Although it is Ms. Price's purpose in this proposed class action to prove differently, at present, there is no proven causal association between citalopram (Celexa®) with congenital malformations, and citalopram is not at present considered to be a teratogen. To date, no regulatory agency, medical group, or teratology organization has declared citalopram unsafe to use in reproductive-aged or pregnant women.

44 In contrast to citalopram, in 2005, the regulators in both the United States and Canada required GlaxoSmithKline Inc. to add warnings to its product monograph for Paxil (paroxetine), which is a competing SSRI antidepressant. The warning was with respect to a twofold increased risk of major congenital malformations and several specific types of cardiovascular malformations - compared to other antidepressants. Health Canada issued a Safety Alert in 2005 for Paxil warning of a possible increased risks of birth defects. A class action relating to paroxetine was certified in British Columbia in 2012; *i.e., Bartram (Litigation guardian of) v. GlaxoSmithKline Inc.*⁵ Unlike the case at bar, the representative plaintiff in *Bartram* did not allege that the defendant's drug was the cause of birth defects generally.

45 In the United States, notwithstanding the change to the monograph for paroxetine, the FDA did not require the same change for citalopram. Health Canada did not apply the paroxetine findings to citalopram, and Health Canada has never issued any safety alert or required the addition of risk information to the Celexa® Product Monograph pertaining to the risks of congenital malformation.

H. Product Monograph for Celexa®

46 The Product Monograph for Celexa® states that citalopram is indicated for the treatment of symptomatic relief of depressive illness. The indication encompasses: (a) major depressive disorder; (b) persistent depressive disorder; and (c) unspecified depressive disorder with the specifiers anxious distress, mixed features, melancholic features, atypical features, mood congruent psychotic features, peripartum onset, seasonal pattern or premenstrual dysphoric disorder.

47 For present purposes, the following excerpts from the Product Monograph are pertinent:

Product Monograph

Celexa®

Citalopram Hydrobromide Tablets

10 ; 20 and 40 tpg. as citalopram tablets

Antidepressant

Lundbeck Canada Inc.

[. . .]

[. . .]

THERAPEUTIC CLASSIFICATION

Antidepressant

ACTION AND CLINICAL PHARMACOLOGY

Celexa® (citalopram hydrobromide) is a highly selective and potent serotonin (5-hydroxytryptamine 5-HT) reuptake inhibitor with minimal effects on the neuronal reuptake norepinephrine (NE) and dopamine (DA). The ability of citalopram to potentiate serotonergic activity in the central nervous system via inhibition of the neuronal reuptake of serotonin is thought to be responsible for its antidepressant action. Tolerance to the inhibition of serotonin reuptake is not induced by long-term (14 days) treatment of rats with citalopram

[. . . .]

INDICATIONS AND CLINICAL USE

Celexa® (citalopram hydrobromide) is indicated for the symptomatic relief of depressive illness. [. . . .]

CONTRAINDICATIONS

Celexa® (citalopram hydrobromide) is contraindicated in patients with known hypersensitivity to citalopram hydrobromide or the excipients of the drug product.

[. . . .]

SEROTONIN SYNDROME

Rarely, the occurrence of serotonin syndrome has been reported in patients receiving SSRIs. A combination of symptoms, possibly including: agitation, confusion, tremor, myoclonus and hyperthermia, may indicate the development of this condition.

[. . . .]

PREGNANCY AND NURSING MOTHERS

The safety of Celexa® during pregnancy and lactation has not been established. Therefore, Celexa® should not be used during pregnancy, unless, in the opinion of the physician, the expected benefits to the patient markedly outweigh the possible hazards to the fetus.

Celexa® is excreted in human milk. Celexa® should not be administered to nursing mothers unless, in the opinion of the treating physician, the expected benefits to the patient markedly outweigh the possible hazards to the child.

[. . . .]

INFORMATION FOR THE PATIENT

Please read this information before you start to take your medicine. Keep the leaflet while you are taking Celexa®; you may want to read it again. This leaflet does not contain all the information about this medicine. For further information or advice please see your doctor or pharmacist.

[. . . .]

What you should tell your doctor before taking Celexa®

- All your medical conditions, including heart problems, history of seizures, liver or kidney disease, diabetes.
- Any medications (prescription or non-prescription) which you are taking or have taken within the last 14 days, especially a monoamine oxidase inhibitor (e.g., phenelzine, tranylcypromine, moclobemide or selegiline), or any other antidepressant, lithium, tryptophan or cimetidine.

- If you ever had an allergic reaction to any medication.
- If you are pregnant or thinking of becoming pregnant; or if you are breast feeding.
- Your habits of alcohol consumption.

When not to use Celexa®

- You should not be taking Celexa® if you are pregnant or breast feeding.

Do not take Celexa® if you are allergic to it; or to any of the components of its formulation (for list of components see the section on What Celexa® contains).

Stop taking Celexa® and contact your doctor immediately if you experience an allergic reaction or any severe side effect.

48 The Toxicology section of the first product monograph contained a discussion of the reproductive studies in animals that noted that teratogenic effects were seen in rats, but only at toxic doses that far exceeded human therapeutic doses. The Toxicology section noted that no teratogenic effects were seen at the highest dose that could be assessed in rabbits.

49 Lundbeck revised the warnings in the product monograph in 2004, in regard to the risk of poor neonatal adaptation syndrome in newborns of pregnant women who used citalopram in the third trimester.

50 Lundbeck revised the warnings in 2011 to add warnings about the risk of persistent pulmonary hypertension of the newborn in babies of pregnant women who used citalopram during the second half of their pregnancy.

51 In 2011, Lundbeck revised the product monograph to provide further information regarding the animal reproductive studies, including the following statement in the Warnings and Precautions section of the monograph:

In animal reproductive studies citalopram has been shown to have adverse effects on embryo/fetal and postnatal development, including teratogenic effects when administered at doses greater than human therapeutic doses. There are no adequate and well controlled studies in pregnant women: therefore, citalopram should be used in pregnancy only if the potential benefit the patient justifies the potential risk to the fetus.

52 The Toxicology section of the 2011 product monograph stated that all doses in which adverse teratogenic effects occurred in animals well exceeded the standard therapeutic human dose for humans in rats, and were not confirmed in a second rat study, nor in studies for rabbits.

I. Citalopram (Celexa®) and Congenital Defects

53 Etiology is the study of cause or causes, and epidemiology is the branch of medical science that studies the etiology of diseases and that identifies risk factors for disease or medical conditions. Epidemiology focuses on "general causation;" i.e., whether or not an agent has the capacity to cause a disease or medical condition rather than on "specific causation;" i.e., whether or not an agent did cause a disease or medical condition to be suffered by a specific person.

54 There are a different kinds of epidemiological studies that are employed to determine the positive or adverse effects of drugs. Epidemiological studies are designed to determine whether there is an "association," which may or may not be causal, between an agent and a disease and medical condition. Association is a necessary but not sufficient precondition for a causal connect between an agent and a consequence or effect

55 The highest level of epidemiological evidence is the randomized control trial often referred to as an RCT. It is, however, unethical to include pregnant women in an RCT, and thus the cause and effect data on SSRIs including citalopram comes from case reports, retrospective observational studies, and meta-analysis studies, lower levels of epidemiological evidence.

56 Case reports and retrospective observational studies are in and of themselves inadequate to draw a conclusion about whether there is causal relationship between the drug and an effect. The meta-analysis groups information from epidemiological studies and seeks to draw general conclusions, but is only as valid as the included studies and also may suffer from a variety of biases that must be accounted for in any epidemiological study or statistical analysis.

57 Using a variety of different methodologies derived from the branches of mathematics that develop techniques for organizing and analyzing information, an epidemiological study determines whether there is an association between an agent and a condition, state or event including a disease or syndrome. An association between an agent and a condition exists when the agent and condition occur together more frequently than one would expect by chance. If an association is established, then information in the study is examined to determine whether or not the association can be explained as causal. To determine causation, the researcher uses a variety of statistical methodologies and analytical tools including professional judgment and his or her knowledge from other fields of science.

58 In the immediate case, the Plaintiffs do not take the position that citalopram causes all congenital malformations. Rather, the Plaintiffs' argument is that there is some basis in fact for concluding that citalopram causes some major congenital malformations; *i.e.*, that citalopram is a teratogen and that there was a breach of a duty to warn that citalopram is a teratogen. The Plaintiffs' argument that (Celexa®) is a teratogen is based on Dr. Carbrera's opinion that there is a plausible biological explanation of how citalopram could disrupt the development of an embryo or fetus and Dr. Bérard's epidemiological evidence that there was some basis in fact for a possible association between SSRIs and congenital malformations.

59 Dr. Bérard, Ms. Price's epidemiology expert, reviewed the science literature that examined whether there was an association between SSRIs and cardiac birth defects or an association between SSRIs and any (overall) birth defects, and she also considered the research literature on SSRIs regardless of whether the authors found an increased risk of SSRIs being a teratogen.

60 Dr. Bérard's opinion, which was based on both statistically significant and non-statistically significant data and which Lundbeck criticized as not being a proper systematic literature review was that there is some basis in fact that citalopram use during pregnancy increases the risk of spontaneous abortion and major congenital malformations and is therefore a teratogen. It was further her opinion that the Celexa® product monograph did not adequately warn of citalopram's teratogenicity.

61 Dr. Bracken, Lundbeck's epidemiology expert, conducted a systematic review of the scientific literature examining the potential for an association between citalopram and all specific congenital malformations in humans. He analyzed 25 observational studies involving the potential association between SSRIs and congenital malformations, and 18 observational studies involving the potential association between congenital malformations and citalopram specifically. The studies were published over 20 years and involved several million women.

62 Dr. Bracken found there was no support in the literature for the proposition that maternal SSRI exposure including exposure to citalopram increases the risk of congenital malformations. He noted while there were occasional reports of statistically significant associations of citalopram (and its isomer escitalopram) with a malformation, the random nature of these associations was demonstrated by a lack of consistency in the type of malformation. He reported that there was no evidence of a single congenital malformation being associated with citalopram. He said that this conclusion was supported by every independent reviewer of the data and by the authors of the 25 published SSRI papers in the literature, including Dr. Bérard's paper.

63 Dr. Bracken noted that when a multitude of possible associations are studied between many malformation types and several drug exposures in a broad range of populations, typically some associations are reported that meet nominal statistical significance; however, this was not observed for citalopram, and in his opinion, it was not seen for any SSRI when account was taken of the multiple comparisons being made.

64 It was Dr. Bracken's opinion that chance as the explanation for any associations was not eliminated. He concluded that there was no robust and replicable statistically significant association between citalopram and any specific congenital malformation — nor with malformations "overall" that is free from evident bias and confounding. He concluded that there was too much heterogeneity in the data to permit a valid meta-analysis of whether citalopram could or did cause congenital malformations.

65 Dr. Bracken concluded that the absence of any association precluded the need for a detailed Bradford Hill causation analysis, but Dr. Bérard opined that a Bradford Hill full causation analysis would confirm the conclusion that no causal association between citalopram and any congenital malformation.

66 Dr. Brent, Lundbeck's medical toxicologist did an epidemiological analysis and concluded that there was no significant association between citalopram use and clubfoot, craniosynostosis, encephaly, gastroschisis, hypospadias, lower limb anomalies, musculoskeletal anomalies, neural tube defects, omphalocele, and right-ventricular outflow obstruction.

67 Dr. Breck opined that the proposition that any pregnancy in which there was use of citalopram resulted in a congenital malformation because of the citalopram was neither credible nor plausible. In his assessment, the research data did not support an overall increase in the rate of congenital malformations associated with citalopram use in pregnancy. The great majority of pregnancies resulting in infants with congenital malformations did not involve citalopram use and the great majority of pregnancies in which the mother used citalopram did not result in congenital malformations.

68 Dr. Brent concluded that there is no medical or scientific support for the allegation by Drs. Bérard and Healy that therapeutic use of citalopram during pregnancy can cause any and all birth defects. He said that a review of the relevant medical and scientific data indicated that citalopram use is not associated with a significantly increased rate of abortion and citalopram use in pregnancy is not significantly associated with any of the individual defects enumerated by Dr. Bérard.

69 To date, no peer-reviewed academic paper, including a 2012 paper by Dr. Bérard, has identified citalopram as a teratogen.

J. Legal Background: Products Liability Claims and the Duty to Warn

70 The elements of a claim in negligence are: (1) the defendant owes the plaintiff a duty of care; (2) the defendant's behaviour breached the standard of care; (3) the plaintiff suffered compensable damages; (4) the damages were caused in fact by the defendant's breach; and, (5) the damages are not too remote in law.⁶

71 Manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge.⁷ The warnings must be reasonably communicated and detailed to give the consumer a full indication of each of the specific dangers that arise from the ordinary use of the product.⁸ If a product, although suitable for the purpose for which it is manufactured, is at the same time dangerous to use, the manufacturer of the product has a duty to warn of the attendant dangers in using the product.⁹

72 In the case of medical products, given their substantial risk of harm from improper use, the standard of care is correspondingly high and there will almost always be a heavy onus on the manufacturer to provide clear, complete and current information concerning the dangers inherent in the ordinary use of its product.¹⁰

73 There is a high standard of care. In *Buchan v. Ortho Pharmaceutical (Can.) Ltd.*,¹¹ Justice Robins stated at para. 18:

18. Once a duty to warn is recognized, it is manifest that the warning must be adequate. It should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard; and it should not be neutralized or negated by collateral efforts on the part of the manufacturer. The nature and extent of any given warning will depend on what is reasonable having regard to all the facts and the circumstances relevant to the product in question.

74 In cases involving highly technical products intended to be used under the supervision of experts or where the nature of the product is such that the consumer will not realistically receive information directly from the manufacturer without the intervention of a learned intermediary, the duty of the manufacturer is discharged if the manufacturer provides the learned intermediary (for example, physicians or surgeons), rather than the consumers, with an adequate warning of the potential dangers associated with the use of its product.¹²

75 In the context of manufacturers of pharmaceuticals and medical devices the learned intermediary is the physician that prescribes the drug or medical device. The legal theory here is that where a consumer places primary reliance on the judgment of a learned intermediary, then the manufacturer will satisfy its duty to warn the consumer by adequately warning the learned intermediary of the risks inherent in the use of the product.¹³

K. Citalopram (Celexa®) and the Duty to Warn

76 As noted above, it was Dr. Bérard opinion the Celexa® product monograph did not adequately warn of citalopram's teratogenicity.

77 Dr. Healy said that although there are differences in risks between patients owing to the presence of additional concurrent risk factors in some patients, it is possible to estimate overall increased risks of congenital malformations as a single outcome and of specific types of congenital malformations within that outcome, and to apply that population-wide estimate to every citalopram patient as a foundation for determining whether the Canadian product monographs adequately warned doctors and patients that Celexa® is teratogenic.

78 Dr. Healy's evidence was that the risk of congenital malformations as a single outcome has been examined for SSRIs as a class of antidepressants with a common mechanism of action, and the data from citalopram can be further extracted from the SSRI class data. It was Dr. Healy's opinion that SSRIs pose unacceptable risk-benefit ratios and that the data for problems on citalopram is strong. It was his opinion that Citalopram can cause birth defects in children born to mothers who take it during pregnancy. He said that Lundbeck knew about the risk of birth defects from citalopram from the point of first marketing in Denmark in 1984, and it was his opinion that Lundbeck inappropriately marketed citalopram to women of child-bearing age in a way that minimized its risks and overstated its utility.

79 It was Dr. Mangin's opinion that Lundbeck's failure in its product monograph to reference the evidence of teratogenicity in each stage of pregnancy adversely affected the process of shared decision making between each Canadian physician and patient who contemplated using Celexa®. She said that Canadian physicians have a duty to relay information about teratogenic risks, but they were unable to discharge that duty when prescribing Celexa® because Lundbeck did not disclose any of the data from the maternal studies that showed that Celexa® may be a teratogen. She said all patients must be informed of the potential teratogenic risks, regardless of the severity of their depression or the stage of their pregnancy. She said the absence of disclosure of any of the studies showing an association affected all Canadian physicians and patients.

L. Certification: General Principles

80 The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (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 of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

81 For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.¹⁴ On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.¹⁵ The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) providing access to justice for litigants; (2) encouraging behaviour modification; and (3) promoting the efficient use of judicial resources.¹⁶

82 The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim.¹⁷ However, the plaintiff must show "some basis in fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action.¹⁸ In the context of the common issues criterion, the "some basis in fact" standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.¹⁹

83 The "some basis in fact" test sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.²⁰ In particular, there must be a basis in the evidence to establish the existence of common issues.²¹ To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.²²

84 The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification.²³ Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.²⁴

85 On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.²⁵ The evidence on a motion for certification must meet the usual standards for admissibility.²⁶ While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.²⁷ In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.²⁸

M. Cause of Action Criterion

1. General Principles: Cause of Action Criterion

86 The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. T & N plc*,²⁹ is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*. To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.³⁰

87 In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.³¹

2. Analysis: Cause of Action Criterion

88 Lundbeck did not dispute that the Plaintiffs have pleaded a tenable duty to warn products liability cause of action.

89 Lundbeck did challenge the Plaintiffs' cause of action based on an alleged duty "to contraindicate the use of citalopram in pregnancy for the treatment of mild and moderate depression." Practically speaking, this challenge is moot because it is either subsumed by the Plaintiffs' duty to warn cause of action or the point need not be decided because, as I shall explain below, there are no common issues being advanced other than the duty to warn issue.

90 Lundbeck also challenged the inclusion of H. Lundbeck A/S as a party defendant for want of properly pleading the basis of a claim against the parent corporation. Because I am dismissing the certification motion on other grounds, I need not decide whether as a matter of pleading H. Lundbeck A/S. is a proper party to the action, which is a remedial matter in any event.

91 I conclude that the Plaintiffs' action satisfies the cause of action criterion.

N. Identifiable Class Criterion

1. General Principles: Identifiable Class Criterion

92 The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.³²

93 In *Western Canadian Shopping Centres v. Dutton*,³³ the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

94 In identifying the persons who have a potential claim against the defendant, the definition cannot be merits-based.³⁴ In *Frohlinger v. Nortel Networks Corp.*³⁵ at para. 21, Justice Winkler, as he then was, explained why merits-based definitions are prohibited; he stated:

21. The underlying reason for each of these prohibitions is readily apparent. Merits-based class definitions require a determination of each class member's claim as a pre-condition of ascertaining class membership. Carrying that concept to its logical conclusion, it would mean that at the conclusion of a class proceeding only those individuals who were successful in their claims would be members of the class and, therefore, bound by the result. Theoretically, unsuccessful claimants would not be "class members" and would be free to commence further litigation because s. 27(3) of the CPA, which states in part:

A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding [. . .]

95 In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.³⁶ An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.³⁷ The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.³⁸ The class should not be defined wider than necessary, and 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.³⁹

96 A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a claim against the defendants.⁴⁰

2. Analysis: Identifiable Class Criterion

97 Lundbeck makes several objections to the proposed class definition. None of these objections undermine the satisfaction of the identifiable class criterion.

98 Lundbeck objects to the class definition's reference to "congenital malformations" as vague and overbroad. This objection, which has some traction, however, is better dealt with in the context of the commonality and preferable procedure criteria. This objection, however, does not undermine the satisfaction of the identifiable class criterion.

99 Moving on to another objection, in *Goodridge v. Pfizer Canada Inc.*,⁴¹ I held that the inventor of a drug does not have a duty of care to consumers who use a generic version of the drug, and in the immediate case, Lundbeck objects that the proposed definition includes as Class Members persons who were prescribed Celexa® but ingested a generic version of citalopram. I agree with Lundbeck that persons who would have received the product monograph of the generic drug manufacturer should not be Class Members. Lundbeck's objection about generic drug consumers, however, is not fatal to the class definition. The problem in the definition can be remedied by changing the definition to read: "Women in Canada who were prescribed and ingested Celexa® while pregnant"

100 I disagree with Lundbeck's objection that the proposed definition should be qualified so that Class Members are limited to persons who were prescribed Celexa® only for depression; i.e., Lundbeck submits that the class should not include persons who were prescribed Celexa® for an off-label use, for example, for the treatment of obsessive compulsive disorder. I disagree because it is not plain and obvious that these persons who were prescribed and ingested Celexa® and whose doctors relied on the product monograph in prescribing Celexa® for its off-label uses do not have a claim, especially in circumstances where Lundbeck is aware of the off-label uses being made of its drug.

101 Lundbeck objects to the inclusion of women who "aborted [. . .] or miscarried children with congenital malformations." The rationale for this objection is that there are many causes of spontaneous abortions and many aborted fetuses are normal; i.e. without an apparent defect, and, thus, Lundbeck submits that many Class Members who were prescribed and ingested Celexa® will not be able to identify themselves as Class Members. I disagree with Lundbeck's objection, which conflates identification of a claimant with the difficulty of that claimant proving her claim. If it were determined at a common issues trial or at an individual issues trial that Celexa® can cause spontaneous abortions (general causation), then it may be the case that a Class Member would have the difficulty of proving specific causation, but that is a problem of proving a claim not identifying oneself as person with a potential claim.

102 Further, there may be Class Members who prior to the miscarriage had the unfortunate experience of an ultrasound that reveals a congenital malformation and who had a spontaneous abortion. These persons should not be excluded from class membership nor should persons who have the unfortunate experience of ingesting Celexa®, then having a spontaneous abortion or miscarriage of a deformed fetus that reveals a congenital malformation.

103 In my opinion, with the revision noted above, Ms. Price's action satisfies the identifiable class criterion.

O. Common Issues Criterion

1. General Principles: Common Issues

104 The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.⁴² The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.⁴³ In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,⁴⁴ the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is that individuals who have litigation concerns

in common ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings.

105 All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.⁴⁵

106 An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.⁴⁶ Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.⁴⁷

107 Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; *i.e.*, by framing the issue in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member.⁴⁸ In *Rumley v. British Columbia*,⁴⁹ Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:

[. . . .] 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.

108 However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.⁵⁰

109 The common issue criterion presents a low bar.⁵¹ An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.⁵² Even a significant level of individuality does not preclude a finding of commonality.⁵³ A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.⁵⁴

110 As already noted above, in the context of the common issues criterion, the some basis in fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class.

111 Where questions relating to causation or damages are proposed as common issues, the plaintiff must demonstrate with supporting evidence that there is a workable methodology for determining such issues on a class-wide basis.⁵⁵

2. Common Issues: Discussion and Analysis

112 Formerly, Ms. Price proposed the following common issues:

1. Is citalopram or may citalopram be teratogenic?
2. If so, did the Defendants breach a duty to warn Canadian physicians and patients that citalopram is or may be teratogenic? In particular:
 - (a) Did the Defendants owe and breach a duty to contraindicate citalopram for use during pregnancy?
 - (b) Did any Celexa® Product Monograph clearly, completely, or currently disclose that citalopram is or maybe teratogenic?

113 In her reply certification factum, Ms. Price sought only the certification of the following common issue:

1. From 1999, did the Defendants breach of duty to warn Canadian physicians and patients that citalopram is or may be teratogenic?

114 In my opinion, both parties had mistaken conceptions of the some basis in fact test for commonality and their own mistaken conceptions of how the some basis in fact test should be applied. The conceptual differences between the parties explain why there was 6,000 pages of legal authorities, brutish cross-examinations, and an almost 10,000-page evidentiary record for a motion that is ordained by the highest authorities to be procedural in nature and not a determination of the merits.

115 The common issues debate in the immediate case was the litigation equivalent of *Clostridium difficile* (*C. difficile*), a bacterium that causes diarrhea and more serious intestinal conditions that are painful and may even be lethal. In plaguing one another, Ms. Price accused Lundbeck of attempting to have a certification motion that was hearing on the merits of the causes of action and to substitute the test for a summary judgment motion or the test for a criminal conviction instead of applying the some basis in fact test for the certification criteria, which criteria she asserted were obviously and overwhelmingly demonstrably satisfied. In plaguing one other, Lundbeck aggressively and rudely accused Ms. Price of having retained experts who were unqualified because of partisanship, incompetence, and irrelevance. Lundbeck accused Ms. Price of having a totally speculative case without a theory, without a methodology of proof, and without an air of reality.

116 Lundbeck submitted that based on the evidence of her own experts, Ms. Price's common issues did not satisfy the some basis in fact test because the Plaintiffs' evidence demonstrated that there was no basis in fact for common issues regarding whether citalopram can cause congenital malformations or regarding whether Lundbeck failed to warn.

117 In response, Ms. Price bitterly and sarcastically submitted that Lundbeck was in effect attempting to hijack the certification process and make a hearing on the merits.

118 In my opinion, there was considerable merit to Ms. Price's submission. It is one thing for a defendant to show that there are no facts that exist that would support the plaintiff's case; i.e., that there is no basis in fact for the plaintiff's case; however, but it is a far different thing for a defendant to show that the facts that do exist do not support the plaintiff's case, which is what Lundbeck attempted to do in the immediate case. What Lundbeck attempted would be appropriate for a summary judgment motion or for a trial. It was not appropriate for a procedural motion.

119 Lundbeck's approach to the some basis in fact test was wrong. It submitted that its approach was the one that I adopted and that was affirmed by the Divisional Court in *Batten v. Boehringer Ingelheim (Canada) Ltd.*⁵⁶ That submission was also wrong. In *Batten*, there was no evidence that the absence of an antidote was a hazard for which a warning was required. In the immediate case, nobody questions that congenital malformations are a hazard, and indeed Lundbeck gave some warning to pregnant women in its product monograph about using the drug during a pregnancy. The issue of something to warn about exists in the immediate case.

120 The some basis in fact test simply means there must be some admissible evidence showing that the factual issue exists.⁵⁷ Pleadings not being evidence will never satisfy the test, and depending on the circumstances of the particular case, it may or may not be necessary to have expert testimony to satisfy the test.

121 In the immediate case, notwithstanding that Ms. Price retained four experts and notwithstanding that she delivered a humungous evidentiary record, she submitted that this mountain of evidence was superfluous because pharmaceutical class actions intrinsically satisfy the some basis in fact test. That particular submission was wrong, and if correct would belie the requirement that a plaintiff must support certification with some evidence, which Ms. Price was doing in any event. Ms. Price's submission about the some basis in fact test was wrong, but on the duty to warn issue, she did provide admissible evidence from Drs. Dr. Bérard, Healy, and Mangin that there was a real issue about a breach of the duty to warn.

122 While I was little helped by the competing arguments of the parties about the some basis in fact test and how it applies to the common issues criterion, hard upon the commencement of the hearing of the certification motion, Ms. Price made a strategic choice to seek certification based on only a duty to warn common issue. That choice did reduce the problems of dealing with the parties' mutually exclusive wrong approaches to the same basis in fact test.

123 Based on one common issue, Ms. Price sought certification for one action, an omnibus claim (involving approximately 130 congenital malformations) or she sought certification for more than one class action (each discrete action based on groupings of congenital malformations) focusing on the single proposed common issue about the duty to warn. This decision substantially reduced the still painful task of deciding whether her proposed action or actions satisfied the common issues and the preferable procedure criteria for certification for one or more class actions, but it eliminated the need to resolve many of the issues that had been hotly contested up until the commencement of the hearing of the certification motion.

124 Ms. Price's decision obviated the need to determine whether or not there existed a real issue about causation and about whether that issue was common across the class. Lundbeck's argument based on its wrongheaded and dogged approach to some basis in fact was that there was no basis in fact for a general causation common issue, but it was no longer necessary for the court to determine whether there was a certifiable general causation issue at all. General causation is no longer a proposed common issue.

125 From the commencement of the action on December 22, 2014 until the argument of the motion beginning on May 28, 2018, the focus of the parties was on the issue of whether there was some basis in fact that citalopram is a teratogen, which is to say the critical common issue for the certification motion was general causation; *i.e.*, whether there was some basis in fact that citalopram could cause birth defects. However, Ms. Price's strategic decision to focus on the duty to warn issue obviated the need to decide the original common issues based on causation; there is now only the need to decide the commonality of the duty to warn common issue.

126 Ms. Price's strategic decision leaves the identification issues, all the causation issues, and the damage assessment issues for individual issues trials. Since Ms. Price is no longer advancing the common issues that the parties plagued each other with for over three years, save insofar as their arguments are pertinent to determining the existence and the commonality of the duty to warn issue, I need not decide whether the originally proposed common issues satisfy the common issues criterion, and I need not decide whether the originally proposed common issues would satisfy the preferable procedure criterion.

127 In the immediate case, in the determination of whether there is some basis in fact for the common issue, it is necessary to keep in mind that a common issue about general causation has been certified in a great many product's liability class actions and other types of negligence class actions, but in the immediate case, Ms. Price is no longer proposing a general causation issue.

128 In the immediate case, it is also necessary to keep in mind, as I held in *Wise v. Abbott Laboratories, Ltd.*,⁵⁸ which was a summary judgment and not a certification motion, that an association between a product and a dangerous condition may give rise to a duty to warn even if the association has not been demonstrated to be causal. Indeed, in *Wise*, I said that even something less than an association such as adverse event reports or other indications that something is amiss in the use of the drug may be enough to trigger a duty to warn including taking steps to change the warnings in a product monograph. In the *Wise* case, I decided that the defendant Abbott had a duty to warn, but I did not determine whether Abbott breached that duty because I concluded that the Wises had not proven general causation and hence their action should be summarily dismissed. A failure to warn that causes no harm is not culpable negligence; no harm, no foul.

129 In the immediate case, there is some basis in fact for an issue that Lundbeck breached a duty to warn Canadian physicians and patients that citalopram is or may be teratogenic. That issue actually exists; *i.e.*, notwithstanding Lundbeck's arguments, there is an air of reality to the duty to warn issue. However, the duty to warn issue is not a common issue; it exists but it does not satisfy the test of commonality.

130 From a public policy perspective and from a legal policy perspective, it makes sense that a duty to warn might be triggered before it was actually known whether or not the possibly dangerous thing is capable of causing harm. This is especially sensible with respect to drugs like an SSRI because it is unethical to prospectively test drugs in pregnant women and thus none of the randomized clinical trials for citalopram or the other SSRIs was able to test for congenital malformations. However, from a public policy perspective and from a legal policy perspective, it also makes sense that liability for a breach of a duty to warn still requires that the harm be caused by the threatening thing.

131 Upon analysis, while Ms. Price's proposed duty to warn issue exists, it has a fatal design flaw with respect to the commonality of the issue for her proposed class action, even accepting the truth of her expert witnesses' opinions. Ms. Price's strategic decision was too clever by half. The proposed duty to warn issue is a real issue, but it is not a common issue for two reasons.

132 First, the duty to warn itself is not common across the class because commonality does not exist and cannot be semantically manufactured over such a broad range of dangers. Commonality does not exist in the case at bar because congenital malformations present a broad range of potential hazards ranging from the risk of minor human body imperfections of a cosmetic nature to major imperfections that destroy the quality of a person's life or that destroy life itself.

133 As noted above, the adequacy of a warning depends upon the nature and gravity of the potential hazard and the nature and extent of any given warning will depend on what is reasonable having regard to all the facts and the circumstances relevant to the product in question. In the case there may be commonality for one or even some combinations of the more hazardous congenital malformations, but there is no conceivable commonality in warning about birth defects generally as if they were all of the same gravity.

134 Second, the duty to warn issue is not common because the resolution of it will not avoid duplication of fact-finding or legal analysis, because its resolution is not capable of meaningful extrapolation to assist each Class Member, and because even if the duty to warn issue was resolved favourably for the Class Members, its resolution will not form a substantial part of each Class Member's case and very substantial individual inquiries will be required for each Class Member claims. Put bluntly, the duty to warn issue does not connect the dots for a common issues trial that has any utility for a class proceeding that inevitably end with individual issues trials with very significant causation issues associated with the breach of the duty to warn.

135 These points can be demonstrated by using the examples of the causes of action of Mesdames Bews, Gardner, Lovett, Price, and Stymiest. Each of their cases is built on the issue that Lundbeck breached a duty to warn that citalopram may cause congenital malformations. Notwithstanding Lundbeck's arguments to the contrary, the issue of whether Lundbeck breached a duty to warn exists and has an air of reality to it, but the issue is not a common issue because the breach of the duty would be inconsequential across the Class and each individual Class Member would be unharmed by the breach of the duty to warn unless they were actually harmed as a consequence of their ingestion of citalopram.

136 Take just Ms. Price as an example, assuming it was established at a common issues trial that Lundbeck did breach a duty to warn that Celexa® may cause congenital malformations, Ms. Price would then be entitled to compensation only if she proves at her inevitable individual issues trial that her ingesting citalopram could be (general causation) and was in her particular case (specific causation) the explanation as to why Matthew was born with septal defect, pulmonary valve stenosis, and absent fifth distal phalanx.

137 As another example using Ms. Price's and Ms. Gardner's individual cases, assume again that it was proven at the common issues trial that Lundbeck did breach a duty to warn that citalopram may cause congenital malformations and assume further that Ms. Price was successful at her individual issues trial in proving that citalopram could and did cause Matthew's pulmonary valve stenosis, the cause of action of Ms. Gardner would not gain anything from the issue estoppel and she would not be entitled to compensation for the breach of the duty to warn unless she proved that Celexa® could and did cause her daughter to be born with a club foot. A common issues trial just about a breach of a duty to warn does not take the individual Class Members pursuit of justice very far in the circumstances of the immediate case.

138 After three-and-a-half years of litigation, Ms. Price apparently came to the strategic decision that there was some basis in fact for both the existence and the commonality of a duty to warn issue. That there may have been some basis in fact for an issue about whether citalopram is a teratogen was of no moment for the purposes of certification because this issue could be resolved at individual issues trials.

139 Moreover, there were very serious problems with Ms. Price's original proposal of causation issues about general causation. Based on Dr. Cabrera's evidence, there was no some basis in fact for concluding that there was a plausible biological means by which citalopram could cause each and every birth defect and there was some basis in fact in the epidemiological evidence for concluding that citalopram might be a cause of cardiac congenital malformations; however, that evidence does not provide some basis in fact for the proposition that citalopram is the cause of all congenital malformation and that evidence is not some basis in fact of a universal proposition that would be useful for a class proceeding. In other words, showing that there is some basis in fact for believing that citalopram is a teratogen only shows that some birth defects may be caused by citalopram and does not help in proving that the many and different congenital malformations in children born of mother's who had ingested Celexa® were caused by citalopram.

140 But as I have already said, all of the parties' arguments about whether there is some basis in fact for a common issue based on general causation is of no moment because there is no such common issue being proposed. And while there is some basis in fact for an issue about a duty to warn, it is not a common issue for the reasons set out above.

141 I conclude that the common issues criterion is not satisfied in the case at bar.

P. Preferable Procedure Criterion

1. General Principles: Preferable Procedure

142 Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.⁵⁹

143 In *Fischer v. IG Investment Management Ltd.*,⁶⁰ the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established. Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.⁶¹ Arguments that no litigation is preferable to a class proceeding cannot be given effect.⁶² Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.⁶³

144 Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

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.

145 To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.⁶⁴

146 In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s) and their importance in relation to the claim as a whole; (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s).⁶⁵

147 The court must identify alternatives to the proposed class proceeding.⁶⁶ The proposed representative plaintiff bears the onus of showing that there is some basis in fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative.⁶⁷ It is not enough for the plaintiff to establish that there is no other procedure which is preferable to a class proceeding; he or she must also satisfy the court that a class proceeding would be fair, efficient and manageable.⁶⁸

148 In *Fischer v. IG Investment Management Ltd.*, Justice Cromwell pointed out that when the court is considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case? (2) What is the potential of the class proceeding to address those barriers? (3) What are the alternatives to class proceedings? (4) To what extent do the alternatives address the relevant barriers? and (5) How do the two proceedings compare?⁶⁹

149 And in light of the Supreme Court of Canada's directives in *Hryniak v. Mauldin*⁷⁰ and *Bruno Appliance and Furniture Inc. v. Hryniak*,⁷¹ one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.

150 In cases, particularly cases where the individual class members' respective harm is nominal, or cases where an aggregate assessment of damages in whole or in part is possible, a class action may more readily satisfy the preferable procedure criterion because the common issues trial may be the only viable means for remedying the wrong and for calling the wrongdoer to account because individual litigation may be prohibitively expensive.⁷²

151 In undertaking a preferable procedure analysis in a case in which individual issue trials are inevitable, it should be appreciated that the *Class Proceedings Act, 1992* envisions the prospect of individual claims being litigated and it should be noted that sections 12 and 25 of the *Act* empower the court with tools to manage and achieve access to justice and judicial economy; thus the inevitability of individual issues trials is not an obstacle to certification. In the context of misrepresentation claims, numerous actions have been certified notwithstanding individual issues of reliance and damages.⁷³

152 That said, in a given particular case, the inevitability of individual issues trials may obviate any advantages from the common issues trial and make the case unmanageable and thus the particular case will fail the preferable procedure criterion.⁷⁴ Or, in a given case, the inevitability of individual issues may mean that while the action may be manageable, those individual issue trials are the preferable procedure and a class action is not the preferable procedure to achieve access to justice, behaviour modification, and judicial economy. A class action may not be fair, efficient and manageable having regard to the common issues in the context of the action as a whole and the individual issues that would remain after the common issues are resolved.⁷⁵ A class action will not be preferable if, at the end of the day, claimants remain faced with the same economic and practical hurdles that they faced at the outset of the proposed class action.⁷⁶

2. Analysis: Preferable Procedure

153 It is axiomatic that if the common issues criterion is not satisfied, the preferable procedure criterion is not satisfied.⁷⁷ Therefore, in the immediate case, I can quickly conclude that the preferable procedure criterion is not satisfied.

154 I, however, would have come to the same conclusion even if Ms. Price had established a common issue about the breach of the duty to warn. In considering the preferable procedure criterion, the court should consider the nature of the proposed common issue and its importance in relation to the claim as a whole and it should consider the individual issues which would remain after determination of the common issue. In the immediate case, the deferral of the general causation issue to individual issues trials meant that there was little utility to a common issues trial in making progress to access to justice, and thus the preferable procedure criterion is not satisfied.

155 Moreover, I would have come to the same conclusion even if Ms. Price had not made her strategic decision and even if it were established that she satisfied the common issues criterion for her originally proposed common issues had satisfied the common issues criterion.

156 As originally conceived, Ms. Price's overly ambitious class action would not have been efficient and it would not have been manageable. The proposed general causation issue purporting to cover all of the numerous congenital malformations ranging from the minor to the life threatening had no methodology other than the idea that the congenital malformations could be connected to discrete groups of body parts or body systems. That methodology, however, would have not produced a common issues trial but rather a grouping of trials tried one after another while the Class Members waited for an individual determination of whether their child's congenital malformation was caused by ingesting citalopram. A class proceeding would not be the preferable procedure in these circumstances.

157 By these reasons for decision, I do not suggest that it is impossible to design a certifiable class action involving a drug alleged to be a teratogen. However, citalopram is not thalidomide and Ms. Price's proposed class action is a quantum jump in diversity, complexity, and manageability than say *Bartram (Litigation guardian of) v. GlaxoSmithKline Inc.*⁷⁸ which focused just on cardiac congenital malformations.

158 I conclude that the preferable procedure criterion is not satisfied in the case at bar.

Q. Representative Plaintiff Criterion

1. General Principles: Representative Plaintiff Criterion

159 The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.⁷⁹

160 Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact.⁸⁰

161 Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim.⁸¹

162 While a litigation plan is a work in progress, it must correspond to the complexity of the particular case and provide enough detail to allow the court to assess whether a class action is: (a) the preferable procedure; and (b) manageable including the resolution of the common issues and any individual issues that remain after the common issues trial.⁸² The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed.⁸³

2. Analysis: Representative Plaintiff

163 Because Ms. Price's proposed class action does not satisfy the common issues and the preferable procedure criteria, it follows that the representative plaintiff criterion cannot be satisfied for the simple reason that if there is no certifiable common issue and a class action is not the preferable procedure for disposing of the Class Members' claims, then Class Counsel cannot produce a workable litigation plan,

164 Had the common issues and preferable procedure criteria been satisfied, then Ms. Price personally would have qualified to be a representative plaintiff. In those circumstances, all the criteria would have been satisfied and the defects in her litigation plan could have been remedied. However, those circumstances did not exist and therefore the representative plaintiff criterion was not satisfied in the case at bar.

R. Conclusion

165 For the above reasons, the certification motion is dismissed. The parties have agreed that there shall be no order as to costs.⁸⁴

Motion dismissed.

Footnotes

1 S.O. 1992, c.6.

2 Both sides can be commended for their energy and diligence to their cause. However, although reciprocally provoked and frustrated by their opponent, both sides were bullying, arrogant, obstinate, and sanctimonious. Ms. Price's motion record comprised over 8,000 pages. Ms. Price's Book of Authorities comprised 1,556 pages. Her factum was 255 pages. Her reply factum was 406 pages and included an 18-page single-spaced table entitled "Annoying and Meaningless Clichés and Phrases Employed by Lundbeck," (defined to be unhelpful, officious, and claying phrases in Lundbeck's factum with no measurable and quantifiable meaning or phrases that signal where the factum misstates the evidence). In her reply factum, Ms. Price described Lundbeck's 276-page factum as actually being 300 pages with proper margins and spacing, and she said a factum of this length was "disgusting," and she submitted that her own factum would have been over 600 pages if she had stooped to Lundbeck's level of improper argument. Ms. Price's reply factum also included a "Table of Dot Dot Dots," where she complained about "Lundbeck's abuse of ellipsis." Lundbeck's responding motion record comprised over 791 pages. Its factum was 276 pages and included a chart entitled "Table of Misleading Assertions in Plaintiffs' Factum." Lundbeck's Books of Authorities totaled 4,589 pages. Lundbeck's factum was riddled with peevishness and disdain for Ms. Price, Class Counsel, and the Plaintiffs' witnesses, sparing neither the lay witnesses nor the experts.

3 The parties have agreed that there shall be no order as to costs. But, for that agreement, I would have, at least, considered making the very rare award of costs to the unsuccessful party. Lundbeck's over-the-top resistance to certification, which disregarded the fact-

finding boundaries of such motions, might have justified it having to pay costs notwithstanding its success or I might have made each party bear their own costs, which is what they agreed.

- 4 *Family Compensation Act*, R.S.B.C. 1996, c. 126; *Fatal Accidents Act*, R.S.A. 2000, c. F-8; *Fatal Accidents Act*, R.S.S. 1978, c. F-11; *Fatal Accidents Act*, C.C.S.M. c. F50; *Family Law Act*, R.S.O. 1990, c. F. 3; *Fatal Accidents Act*, S.N.B. 2012, c. 104; *Fatal Accidents Act*, R.S.P.E.I. 1988, c. F-5; *Fatal Accidents Act*, R.S.N.L. 1990, c F-6; *Fatal Accidents Act*, R.S.Y. 2002, c. 86; *Fatal Accidents Act*, R.S.N.W.T. 1988, c. F-3; *Fatal Accidents Act*, R.S.N.W.T. (Nu.) 1988, c F-3.
- 5 2012 BCSC 1804 (B.C. S.C.), aff'd, 2013 BCCA 462 (B.C. C.A.).
- 6 *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 (S.C.C.) at para. 3.
- 7 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 (S.C.C.); *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at para. 20; *Lambert v. Lastoplex Chemicals Co.* (1971), [1972] S.C.R. 569 (S.C.C.) at p. 574.
- 8 *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at paras. 20-21; *Lambert v. Lastoplex Chemicals Co.* (1971), [1972] S.C.R. 569 (S.C.C.) at pp. 574-75.
- 9 *Lambert v. Lastoplex Chemicals Co.* (1971), [1972] S.C.R. 569 (S.C.C.).
- 10 *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at para. 23.
- 11 (1986), 54 O.R. (2d) 92 (Ont. C.A.).
- 12 *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at paras. 28-29; *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 54 O.R. (2d) 92 (Ont. C.A.) at paras. 23, 59.
- 13 *Hollis v. Birch*, [1995] 4 S.C.R. 634 (S.C.C.) at para. 27.
- 14 *Sauer v. Canada (Minister of Agriculture)*, [2008] O.J. No. 3419 (Ont. S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Ont. Div. Ct.).
- 15 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 16.
- 16 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 26 to 29.
- 17 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 28 and 29.
- 18 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 16-26.
- 19 *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 (Ont. S.C.J.), aff'd, 2017 ONSC 6098 (Ont. Div. Ct.), leave to appeal refused (28 February 2018) [2018 CarswellOnt 8486 (Ont. C.A.)]; *Dine v. Biomet Inc.*, 2015 ONSC 7050 (Ont. S.C.J.), aff'd 2016 ONSC 4039 (Ont. Div. Ct.); *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Ont. Div. Ct.); *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.); *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (Ont. C.A.); *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 (Ont. S.C.J.); *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.).
- 20 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.); *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.).
- 21 *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 (Ont. S.C.J.) at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (Ont. S.C.J.) at para. 21; *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (Ont. S.C.J.) at para. 25.
- 22 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 110.

- 23 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 22.
- 24 *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.); *Taub v. Manufacturers Life Insurance Co.* (1998), 40 O.R. (3d) 379 (Ont. Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Ont. Div. Ct.).
- 25 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 50, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at paras. 16-26.
- 26 *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744 (Ont. S.C.J.); *Williams v. Canon Canada Inc.*, 2011 ONSC 6571 (Ont. S.C.J.), aff'd 2012 ONSC 3692 (Ont. Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 (Ont. S.C.J.) at para. 13; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.).
- 27 *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 76.
- 28 *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057 (B.C. S.C.), aff'd 2012 BCCA 260 (B.C. C.A.).
- 29 [1990] 2 S.C.R. 959 (S.C.C.).
- 30 *II76560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 19, leave to appeal granted, (2003), 64 O.R. (3d) 42 (Ont. Div. Ct.), aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. C.A.) at p. 679, leave to appeal to S.C.C. ref'd, (2000), [1999] S.C.C.A. No. 476 (S.C.C.).
- 31 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 41, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g, (2004), 65 O.R. (3d) 492 (Ont. C.A.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Ont. Div. Ct.) at p. 469.
- 32 *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.).
- 33 2001 SCC 46 (S.C.C.) at para. 38.
- 34 *Keatley Surveying Ltd. v. Teranet Inc.*, 2012 ONSC 7120 (Ont. S.C.J.) at paras. 159-167; *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 21; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 38.
- 35 [2007] O.J. No. 148 (Ont. S.C.J.).
- 36 *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (Ont. C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Ont. Div. Ct.), which had aff'd [2002] O.J. No. 2764 (Ont. S.C.J.).
- 37 *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 (Ont. S.C.J.) at paras. 121-146.
- 38 *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (Ont. S.C.J.) at para. 22.
- 39 *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 (Ont. S.C.J.) at paras. 12-13, aff'd [2003] O.J. No. 3918 (Ont. Div. Ct.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 21.
- 40 *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at para. 103-107 at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Ont. S.C.J.); *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Ont. S.C.J.) at para. 22, leave to appeal ref'd [2007] O.J. No. 1991 (Ont. Div. Ct.); *Ragoongan Estate v. Imperial Tobacco Canada Ltd.* (2005), 78 O.R. (3d) 98 (Ont. S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Ont. Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Ont. Gen. Div.) at para. 10 at para. 10.

- 41 2010 ONSC 1095 (Ont. S.C.J.).
- 42 *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 18.
- 43 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at paras. 39 and 40.
- 44 2013 SCC 57 (S.C.C.) at para. 106.
- 45 *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 (Ont. S.C.J.), aff'd, 2017 ONSC 6098 (Ont. Div. Ct.), leave to appeal refused (28 February 2018) [2018 CarswellOnt 8486 (Ont. C.A.)]; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 (Ont. C.A.) at para. 48; *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.) at para. 183; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.) at paras. 145-46 and 160, leave to appeal to S.C.C. refused, (2009), [2008] S.C.C.A. No. 512 (S.C.C.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (B.C. C.A.), leave to appeal to S.C.C. ref'd, (2006), [2005] S.C.C.A. No. 545 (S.C.C.); *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 40.
- 46 *Fehringer v. Sun Media Corp.* (2002), [2003] O.J. No. 3918 (Ont. S.C.J.) at paras. 3, 6.
- 47 *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 (Ont. S.C.J.) at para. 126, leave to appeal granted [2010] O.J. No. 3183 (Ont. Div. Ct.), var'd 2011 ONSC 5882 (Ont. Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 (Ont. S.C.J.) at paras. 50-52; *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 (B.C. S.C.) at para. 51, var'd on other grounds (2004), 42 B.L.R. (3d) 161 (B.C. C.A.).
- 48 *McCracken v. Canadian National Railway*, 2012 ONCA 445 (Ont. C.A.) at para. 132; *Frey v. Bell Mobility Inc.*, 2011 SKCA 136 (Sask. C.A.) at para. 48-50, leave to appeal refused, [2012] S.C.C.A. No. 42 (S.C.C.); 197; *Wuttunee v. Merck Frosst Canada Ltd.*, 2009 SKCA 43 (Sask. C.A.), leave to appeal refused, (2009), [2008] S.C.C.A. No. 512 (S.C.C.); *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.) at para. 29.
- 49 [2001] 3 S.C.R. 184 (S.C.C.) at para. 29.
- 50 *Dell'Aniello c. Vivendi Canada inc.*, 2014 SCC 1 (S.C.C.) at paras. 44 — 46.
- 51 *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Ont. Div. Ct.), aff'd [2010] O.J. No. 2683 (Ont. C.A.), leave to appeal to S.C.C. refused (2011), [2010] S.C.C.A. No. 348 (S.C.C.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at para. 42.
- 52 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).
- 53 *Hodge v. Neinstein*, 2017 ONCA 494 (Ont. C.A.) at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 54.
- 54 *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (B.C. C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21 (S.C.C.).
- 55 *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57 (S.C.C.) at paras. 114-119; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).
- 56 2017 ONSC 53 (Ont. S.C.J.), aff'd, 2017 ONSC 6098 (Ont. Div. Ct.), leave to appeal to C.A. refused (February, 28, 2018) [2018 CarswellOnt 8486 (Ont. C.A.)].
- 57 *Fehr v. Sun Life Assurance Co. of Canada*, 2016 ONSC 7659 (Ont. S.C.J.) at para. 52.
- 58 2016 ONSC 7275 (Ont. S.C.J.).

- 59 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.) at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).
- 60 2013 SCC 69 (S.C.C.) at paras. 24-38.
- 61 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.).
- 62 *1176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (Ont. S.C.J.) at para. 45, aff'd (2004), 70 O.R. (3d) 182 (Ont. Div. Ct.).
- 63 *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).
- 64 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.); *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.); *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.).
- 65 *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 52, leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50 (S.C.C.), rev'g (2003), 65 O.R. (3d) 492 (Ont. Div. Ct.); *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (Ont. C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106 (S.C.C.).
- 66 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at para. 35; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68 (S.C.C.) at para. 28.
- 67 *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras. 48-49.
- 68 *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 (Ont. C.A.) at para. 62; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 62-67.
- 69 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.) at para. 125; *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69 (S.C.C.) at paras. 27-38.
- 70 2014 SCC 7 (S.C.C.).
- 71 2014 SCC 8 (S.C.C.).
- 72 *Marcantonio v. TVI Pacific Inc.*, [2009] O.J. No. 3409 (Ont. S.C.J.) at para. 9; *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at paras. 215-216, leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Ont. S.C.J.); *Markson v. MBNA Canada Bank*, 2007 ONCA 334 (Ont. C.A.).
- 73 *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.); *OPA v. Ottawa Police Services Board*, 2014 ONSC 1584 (Ont. Div. Ct.) at para. 59; *Cannon v. Funds for Canada Foundation*, 2012 ONSC 399 (Ont. S.C.J.) at paras. 340, 350-351, leave to appeal to Div. Ct. refused, 2012 ONSC 6101 (Ont. Div. Ct.); *Ramdath v. George Brown College of Applied Arts & Technology*, 2010 ONSC 2019 (Ont. S.C.J.) at para. 103; *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.), leave to appeal to Div. Ct. refused, 2011 ONSC 1035 (Ont. S.C.J.); *Hickey-Button v. Loyalist College of Applied Arts & Technology* (2006), 267 D.L.R. (4th) 601 (Ont. C.A.); *Murphy v. BDO Dunwoody LLP*, [2006] O.J. No. 2729 (Ont. S.C.J.); *Lewis v. Cantertrot Investments Ltd.*, [2005] O.J. No. 3535 (Ont. S.C.J.) at para. 20; *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, [2003] O.J. No. 2069 (Ont. Div. Ct.) at para. 35; *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at paras. 48-49, rev'g (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), leave to appeal to S.C.C. refused, (2001), [2000] S.C.C.A. No. 660 (S.C.C.).
- 74 *Arabi v. Toronto Dominion Bank*, [2006] O.J. No. 2072 (Ont. S.C.J.), aff'd [2007] O.J. No. 5035 (Ont. Div. Ct.); *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (Ont. Gen. Div.).
- 75 *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 (Ont. C.A.).
- 76 *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (Ont. C.A.) at para. 26.

- 77 *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53 (Ont. S.C.J.) at para. 209, aff'd, 2017 ONSC 6098 (Ont. Div. Ct.), leave to appeal to C.A. refused (February 28, 2018) [2018 CarswellOnt 8486 (Ont. C.A.)]; *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950 (Ont. S.C.J.) at para. 140, additional reasons, 2017 ONSC 1095 (Ont. S.C.J.); *O'Brien v. Bard Canada Inc.*, 2015 ONSC 2470 (Ont. S.C.J.) at para. 221.
- 78 2012 BCSC 1804 (B.C. S.C.), aff'd, 2013 BCCA 462 (B.C. C.A.).
- 79 *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (Ont. S.C.J.) at paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (Ont. S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (Ont. C.A.).
- 80 *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (Ont. S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (Ont. S.C.J.) at para. 55; *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (Ont. S.C.J.) at paras. 71-77; *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (Ont. S.C.J.) at para. 2, leave to appeal granted, [2002] O.J. No. 2135 (Ont. S.C.J.), varied (2003), 64 O.R. (3d) 208 (Ont. Div. Ct.), varied [2003] O.J. No. 2218 (Ont. C.A.).
- 81 *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 (S.C.C.) at para. 41.
- 82 *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), rev'd on other grounds (2000), 51 O.R. (3d) 236 (Ont. C.A.); *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (Ont. C.A.) at para. 95; *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at para. 76; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.) at para. 100.
- 83 *Caputo v. Imperial Tobacco Ltd.*, [2004] O.J. No. 299 (Ont. S.C.J.) at paras. 62-67; *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.).
- 84 [Missing text.]

TAB 24

1999 CarswellOnt 578
Ontario Court of Appeal

R. v. F. (D.S.)

1999 CarswellOnt 578, [1999] O.J. No. 688, 118 O.A.C. 272, 132 C.C.C. (3d) 97,
169 D.L.R. (4th) 639, 23 C.R. (5th) 37, 41 W.C.B. (2d) 315, 43 O.R. (3d) 609

Her Majesty The Queen, Respondent and F., D.S., Appellant

Morden A.C.J.O., Austin, O'Connor J.J.A.

Heard: December 3, 1998

Judgment: March 9, 1999

Docket: CA C27704

Counsel: *Anil K. Kapoor*, for the appellant.

Scott C. Hutchison, for the respondent.

Subject: Criminal; Evidence

APPEAL by accused from conviction for 10 counts including assault with weapon, assault causing bodily harm, threatening, and sexual assault.

The judgment of the court was delivered by O'Connor J.A.:

1 After a trial by Simmonds J. and a jury, the appellant was convicted on ten counts in an indictment alleging that he had assaulted and abused his wife during a period of approximately one year.¹ The appellant was sentenced to a term of imprisonment of three and one-half years.

2 The appellant appeals his convictions and submits that the trial judge erred in the following four respects:

- (a) in admitting evidence of discreditable conduct of the appellant that did not form part of the allegations in the indictment;
- (b) in admitting expert evidence relating to the behavioural characteristics of women who report living in abusive relationships;
- (c) in instructing the jury on the issue of consent under s. 265(3)(b) of the *Criminal Code* with respect to the count of sexual assault; and
- (d) in instructing the jury on the issue of self-defence on a charge of assault with a weapon.

3 For the reasons set out below, I would dismiss the appeal.

Facts

4 The appellant and complainant were married in August 1993. After their honeymoon, they moved into a house that they had purchased, and lived together until the complainant left the appellant in early August 1994. The ten charges were based on allegations made by the complainant of abuse on five separate occasions during the time they lived together.

5 The complainant testified that in November 1993 the appellant became angry when he learned that she had given a key for the house to her brother. He held a knife to her throat and threatened to kill her. The complainant disclosed this incident to

her sister-in-law and mother-in-law the same night it occurred, and to a priest about a month later. She did not report it to the police until August 5, 1994, shortly after she had left the appellant.

6 The second incident occurred in April 1994. The complainant testified that she entered the bedroom and heard the appellant making sexual comments over the telephone. The appellant hung up, but the complainant took the phone, pushed the redial button and screamed at the woman to leave her husband alone. The appellant punched the complainant a number of times with a closed fist. The next night the complainant went to a hospital where the doctor found that there was substantial bruising of the complainant's hand. When asked about the origin of the injury to her hand by the doctor and later by her brother, she stated that she had fallen down a flight of stairs. The complainant did not report this incident to the police until August 5, 1994.

7 Next, the complainant testified that in July 1994 when she and the appellant were driving home from a visit with her brother, the appellant hit her with his hand. Later, at home, he held her on a loveseat for half an hour and repeatedly head-butted her. The complainant tried to leave a number of times but the appellant prevented her from doing so. These events were not reported to the police on August 5, 1994 when the complainant reported other abuse. The complainant testified that in December 1994 she had a flashback, after which she first reported this incident to the police.

8 The fourth incident about which the complainant testified occurred on August 2, 1994. In the course of an argument, the complainant waved kitchen tongs at the appellant and said she felt like shoving the tongs down his throat. The appellant grabbed the complainant and threw her up against the fridge. He took the tongs and jammed them into her neck causing her neck to bleed. The appellant put the complainant in a headlock, threw her to the floor and punched and kicked her for about 10 minutes. The complainant reported this incident to the police on August 5, 1994. A week later, the complainant went to a walk-in clinic, and the doctor found that she had a crusted scab on her neck. The complainant told the doctor about the incident that caused the injury.

9 Lastly, the complainant testified that on the night of August 3, 1994 she was in bed. The appellant got into bed and started to fondle her breasts. She told him not to touch her. When he tried to feel between her legs, she jumped out of bed and said she was going downstairs. The appellant replied, "if you leave now I'll kick both you and your brother out." The complainant started crying and got back into bed. The appellant held her hands behind her head and had sexual intercourse with her. The complainant testified that she did not consent to the intercourse. She did not report this incident to the police until August 9, 1994.

10 At trial, the position of the defence was that the complainant was not a credible witness and that the events that she described either did not happen at all or did not happen the way she described them. In arguing that the complainant was not credible, the defence attached importance to the complainant's delay in reporting some of the incidents set out above, to her inconsistent description of the cause of the injuries to her hand in April 1994 and to the fact that she remained in the marital relationship for a considerable time after some of the incidents about which she later complained.

11 The complainant's explanations for not immediately leaving the relationship and disclosing the abuse were not complicated. In some instances, she explained, she was embarrassed, in others that she was frightened, and on another occasion she thought the appellant would change.

12 The appellant did not testify.

Analysis

1. Evidence of Discreditable Conduct

13 The appellant submits that the trial judge erred in permitting the complainant to testify about abusive behaviour of the appellant that was not included in any of the allegations covered by the ten counts in the indictment. The appellant argues that the prejudicial effect of this evidence of discreditable conduct outweighed any probative value it had in establishing that the appellant was guilty of the offences with which he was charged.

14 In this regard, the complainant testified that shortly after the marriage, the appellant started calling her names and using abusive language. Within the first few months of the marriage, he began to push and shove her and sometimes hit her. After the incident with the knife in November 1993, the appellant's conduct became worse; the appellant would punch, slap and kick her at least once a week. The complainant also testified that although the couple had consensual sexual relations throughout the marriage, on many occasions the appellant had sexual intercourse with her without her consent.

15 Further, the complainant described the appellant as a very controlling person in dealing with the couple's financial and social arrangements and also as a person who frequently became angry. She testified that as a result she was frightened of the appellant.

16 In *R. v. B. (L.)* (1997), 116 C.C.C. (3d) 481 (Ont. C.A.) at p. 490 Charron J.A. set out the principles which govern the admissibility of evidence of discreditable conduct:

Because of the inherently prejudicial nature of evidence of discreditable conduct it is subject to a general exclusionary rule unless the "scales tip in favour of probative value" (*R. v. Morin, supra*, at p. 368) [[1988] 2 S.C.R. 345, 44 C.C.C. (3d) 193]. The trial judge who is charged with the delicate process of balancing the probative value of the proposed evidence against its prejudicial effect should inquire into the following matters.

1. Is the conduct, which forms the subject-matter of the proposed evidence, that of the accused?
2. If so, is the proposed evidence relevant and material?
3. If relevant and material, is the proposed evidence discreditable to the accused?
4. If discreditable, does its probative value outweigh its prejudicial effect?

17 In this case there is no dispute regarding the first and third criteria. The evidence in issue described conduct of the appellant and was discreditable to him. The appellant argues, however, that this evidence ought to have been excluded under both the second and fourth prongs of the test in *B. (L.)*.

Relevance and Materiality

18 In *B. (L.)*, Charron J.A. described the relevance and materiality of evidence at p. 492 in the following manner:

It is relevant "where it has some tendency as a matter of logic and human experience to make the proposition for which it is advanced more likely than that proposition would appear to be in the absence of that evidence" (Paciocco & Stuesser, *supra*, at p. 19 [*Essentials of Canadian Law: The Law of Evidence* (1996)]). It is material if it is directed at a matter in issue in the case.

Generally, this basic threshold of relevance and materiality can be tested by asking what inference is sought to be made from the proposed evidence and whether it has some tendency to advance the inquiry before the court.

19 In this case, the trial judge held that the evidence of discreditable conduct was admissible for three purposes: to complete the narrative of the complainant's description of her relationship with the appellant; to demonstrate the possible motive or animus of the appellant in committing the offences alleged; and to bolster the credibility of the complainant by providing an explanation for her failure to leave the relationship and report the allegations of abuse earlier than she did. I will consider each of these purposes separately.

20 In cases involving allegations of physical and sexual abuse in the course of an ongoing relationship, courts have frequently admitted evidence of discreditable conduct to assist the court in understanding the relationship between the parties and the context in which the alleged abuse occurred.

21 In *R. v. Litchfield* (1993), 86 C.C.C. (3d) 97 (S.C.C.), the Supreme Court of Canada held that the evidence of sexual abuse of different complainants by the accused should have been admitted with respect to the counts relating to each of the other complainants. At p. 116 Iacobucci J. reasoned as follows:

While this evidence could be characterized as evidence of similar acts or events, the evidence was not tendered solely to show that the respondent was a person of bad character or of a disposition likely to commit the alleged offences. Rather, the evidence provided information highly relevant to understanding the context in which the alleged offences occurred and shed light on the nature of the respondent's relationship with his patients, particularly the standard of medical treatment he provided.

See also *R. v. B. (S.)* (March 20, 1996), Doc. CRIM(J) 5194/94 (Ont. Gen. Div.); *R. v. Craig* (February 20, 1986), Doc. 833/84 (Ont. C.A.); and *R. v. Dovak* (December 20, 1989), Doc. CA1128/88 (Ont. C.A.); leave to appeal to the Supreme Court of Canada refused [1990] 1 S.C.R. vii (S.C.C.).

22 In this case it was important to put the complainant's evidence supporting the charges in the context of the overall relationship. The complainant's evidence was that the allegations underlying the charges were consistent with the attitude and behaviour that the appellant exhibited towards her throughout the one year period that they lived together. The challenged evidence would enable the jury to more fairly evaluate the complainant's evidence regarding the specific allegations. Excluding that evidence would have left the jury with an incomplete and possibly misleading impression of the relationship. In my view, the disputed evidence was relevant for the purpose of setting forth the contextual narrative in the course of which the alleged events occurred.

23 The trial judge also held that the discreditable conduct evidence was admissible for the purpose of demonstrating the motive or animus of the appellant in committing the offences alleged. It is well established that evidence of motive is admissible to prove the doing of an act as well as the intent with which the act is done. *R. v. Jackson* (1980), 57 C.C.C. (2d) 154 (Ont. C.A.) at p. 167.

24 On several occasions courts have held that evidence of discreditable conduct, in particular evidence of abusive behaviour towards a complainant, is admissible for this purpose. *R. v. Summerbell* (March 5, 1996), Doc. CA C12645 (Ont. C.A.); *R. v. MacDonald* (1974), 20 C.C.C. (2d) 144 (Ont. C.A.); *R. v. Pheasant* (1995), 47 C.R. (4th) 47 (Ont. Gen. Div.) and *R. v. B. (S.)*, *supra*.

25 In this case, the evidence, which in general terms described a pattern of abusive behaviour towards the complainant, if accepted, was capable of assisting the jury in understanding why the appellant did what was alleged in the indictment. This evidence demonstrated an animus on the appellant's part towards the complainant that was consistent with the offences with which he was charged. The trial judge was correct in holding that the impugned evidence was relevant for this purpose.

26 Finally, the trial judge held that the discreditable conduct evidence could be relevant to the explanation by the complainant for her failure to leave the relationship and to report the abuse earlier. The complainant was vigorously challenged in cross-examination about the delay in reporting some of the allegations and her delay in leaving the marriage. The complainant's evidence about the pattern of ongoing abuse and her fear of the appellant were important parts of her explanation for her conduct in this regard. The evidence of discreditable conduct was also relevant for this purpose.

27 In my view the trial judge was correct in holding that the evidence of discreditable conduct was relevant for the purposes set out above. The evidence was also clearly material, in that it was directed at the central issue in the case, the credibility of the complainant.

Probative Value/Prejudicial Effect

28 The fourth step in the test set out in *B. (L.)* is to determine whether the probative value of the evidence in question outweighs its prejudicial effect.

29 In assessing the probative value, Charron J.A. in *B. (L.)* indicated that consideration should be given to the strength of the evidence, the extent to which it supports the inferences sought to be made and the extent to which the matters it tends to prove are in issue. The trial judge concluded that the discreditable conduct evidence in this case had significant probative value.

30 The complainant was the only witness who gave evidence of discreditable conduct. The strength of that evidence obviously depended on the jury's assessment of her credibility. However the evidence, if accepted, was strongly supportive of the Crown's case. It helped to show the animus of the appellant without which the jury may have wondered why, in a seemingly otherwise normal relationship, the appellant would behave as the complainant described. The evidence enabled the jury to understand the relationship and, importantly, strongly supported the complainant's explanation for not leaving or reporting sooner. It therefore related to the central issues in the case. I agree with the trial judge that the probative value of this evidence was high.

31 The trial judge carefully considered the prejudicial effect of the evidence. The primary concern with this type of evidence is that the jury may misuse it by inferring guilt based on the bad character or disposition of an accused.

32 There are a number of factors which reduce the potential prejudicial effect of the evidence in this case. First, the evidence was highly probative of material issues in the case. In *B. (L.)* at p. 505, Charron J.A. observed that high probative value will tend to make it less likely that the evidence will be used improperly.

33 Next, the evidence of discreditable conduct was entirely that of the complainant. This was not a case in which the complainant's credibility was bolstered by a third party testifying about the discreditable conduct of the appellant. If the jurors did not accept the complainant's evidence about the charges, they were unlikely to have been greatly swayed by the additional evidence of discreditable conduct. See Gregg, "Other Acts of Sexual Misbehaviour and Perversion as Evidence in Prosecutions for Sexual Offences" (1965), 6 Ariz. L.R. 212 at p. 220.

34 Finally, in the charge to the jury, the trial judge gave a very clear limiting instruction on the purpose for which the jury could use the evidence, and importantly, the trial judge instructed the jury that they could not use this evidence to conclude that the appellant was the type of person who would be disposed to commit the offences with which he was charged.

35 In my view, the trial judge correctly concluded that the probative value of this evidence outweighed its prejudicial effect and properly held the evidence to be admissible. I therefore see no merit in this ground of appeal.

2. Expert Evidence

36 At trial, the Crown sought to call Deborah Sinclair to give expert evidence about what she referred to in a written report as the "battered women's syndrome." In the course of her evidence on a *voir dire*, Ms. Sinclair described this "syndrome" as that condition experienced by many women who report living in abusive intimate relationships including the effect of the abuse upon them and their behavioural patterns in responding to that abuse.

37 Ms. Sinclair has a Bachelor's Degree in psychology and sociology and a Master's Degree in social work (with both a research and clinical component). For approximately 19 years she had worked, studied, taught and written in the area of violence and abuse in intimate relationships. She estimated that she had been involved in counselling approximately 600 families in which domestic violence had been reported. Her evidence had been accepted as that of an expert in the area of domestic abuse by courts in Ontario on approximately 36 different occasions.

38 After the *voir dire*, the trial judge ruled that most of the proposed evidence of Ms. Sinclair was inadmissible. Specifically, the trial judge excluded Ms. Sinclair's evidence that described the general behavioural pattern or profile of abused persons in intimate relationships and also her opinion that the complainant came within this profile and was therefore suffering from having been in an ongoing abusive marital relationship.

39 However, the trial judge admitted Ms. Sinclair's evidence with respect to the following matters:

1. a statement of the forms of abuse listed in her report;

2. opinion evidence as to the observed tendency of persons who report living in abusive intimate relationships to remain in or leave a relationship following an incident of abuse;
3. opinion evidence as to the observed tendency of persons who report living in an abusive intimate relationship to disclose or not disclose the fact or extent of alleged abuse or to minimize or to fabricate in relation to such matters, while continuing in a relationship; and
4. the extent to which her evidence concerning the foregoing is based upon her own experience, surveys, studies and general literature in the relevant areas.

40 The trial judge held that this evidence was admissible for the limited purpose of assisting the jury in evaluating the complainant's explanation as to why, following some of the alleged incidents of abuse, she did not immediately leave the relationship and accurately report the alleged abuse.

41 Ms. Sinclair's evidence before the jury was extremely brief; after the description of her qualifications, the examination-in-chief covered less than four pages of transcript and the cross-examination one page. In answer to the specific questions permitted by the ruling of the trial judge, Ms. Sinclair expressed the opinions that it was quite typical for persons who are battered or abused in a relationship to remain in the relationship for a period of time; that it was quite unusual for persons who are being abused in intimate relationships to report it to outsiders before they are ready to leave the relationship; and that it was not unusual for those persons to minimize or fabricate what has happened to them if they are reporting an injury to a health care person or someone else.

42 In her charge to the jury, the trial judge gave a careful instruction on the limited use that could be made of this evidence. She said the following:

The purpose of such evidence is to assist you in determining whether an inference adverse to the credibility of the complainant should be drawn based on the evidence of the manner and timing and consistency of her disclosure. It may or may not assist you in that respect. Your duty is to consider the evidence of Ms. Sinclair and weigh it in the balance. You must not be overwhelmed or unduly swayed by the credentials of a particular witness just because he or she is permitted to give expert evidence. While her evidence concerning observed behaviours in persons who report abuse in intimate relationships may or may not assist you in assessing the credibility of the complainant in the manner I have described, I emphasize you must not use her evidence and it is not relevant for any other purpose. You may not, for example, use her evidence to increase or bolster the credibility of the complainant. Aside from considering her evidence in relation to the credibility of the complainant in the manner which I have described, you may not use her evidence for the purpose of assessing the likelihood that the events described by [the complainant] occurred.

43 In *R. v. Mohan* (1994), 29 C.R. (4th) 243 (S.C.C.), Sopinka J. set out the four criteria for the admission of expert evidence at p. 252:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

44 The appellant accepts that the expert evidence of Ms. Sinclair was relevant and that there was no exclusionary rule that would have prevented her from testifying. The appellant contends, however, that the trial judge erred in admitting the evidence because there was not a sufficient evidentiary foundation to establish that the evidence was either reliable or necessary.

45 The reliability of expert evidence is not one of the four criteria set out in *Mohan*, however, it clearly is an essential requirement for the admission of expert evidence. In some cases, reliability has been considered as a element of the relevancy criteria (see for example *Mohan*) and in others as part of the need to have a qualified expert (*R. v. McIntosh* (1997), 117 C.C.C. (3d) 385 (Ont. C.A.)).

Reliability

46 The appellant makes three arguments about the reliability of the expert evidence admitted by the trial judge. The first arises from what the appellant submits is an inconsistency in the reasoning of the trial judge in excluding some parts of Ms. Sinclair's evidence and admitting others.

47 The evidence that was excluded described the profile or general behavioural patterns of persons who had been abused, and included an opinion that the complainant came within this profile and was therefore suffering from the impact of having been in an ongoing abusive marital relationship.

48 In rejecting this evidence the trial judge noted that Ms. Sinclair's opinion was based almost entirely on her own experience. The trial judge held that the absence of evidence of an objective test of the reliability of such an opinion and of an objective means of evaluating the reliability of the opinion disqualified the evidence. The trial judge's reasoning in this respect turned on Ms. Sinclair's evidence that there was no existing profile or comprehensive statement of the impacts on or behaviour patterns of an abused person that would support a conclusion that one person had been abused and another had not.

49 In reaching this conclusion, the trial judge was applying, correctly in my view, the requirement for the admissibility of expert evidence which was subsequently articulated by Finlayson J.A. in *R. v. McIntosh*, *supra*, at p. 392, as follows:

Paraphrasing freely from the definition of "science" in *The Shorter Oxford English Dictionary on Historical Principles*, it seems to me that before a witness can be permitted to testify as an expert, the court must be satisfied that the subject-matter of his or her expertise is a branch of study in psychology concerned with a connected body of demonstrated truths or with observed facts systematically classified and more or less connected together by a common hypothesis operating under general laws. The branch should include trustworthy methods for the discovery of new truths within its own domain. I should add that it would be helpful if there was evidence that the existence of such a branch was generally accepted within the science of psychology.

See also *R. v. M. (B.)* (1998), 115. O.A.C. 117 (Ont. C.A.) per Rosenberg J.A.

50 The evidence that the trial judge admitted was considerably narrower in its scope and its purpose than the excluded evidence. The admitted evidence was limited to the observed tendency of persons who have been abused to remain in the relationship for some time and to not immediately disclose the abuse. It was not admitted to establish that the complainant had been abused, as she alleged, but rather to put in context her explanation for not having immediately left the relationship and disclosed the abuse. The effect of the evidence was that the complainant's explanation was not as unusual as it might otherwise seem.

51 The difference between the excluded evidence and that admitted by the trial judge was described well in the respondent's factum, "... there is a difference between saying 'people who behave this way have been abused' (a diagnosis) and saying 'people who have been abused may behave this way' (an explanation of behaviour based on clusters of observed tendencies)."

52 Ms. Sinclair's opinion, with respect to this evidence, was based on her own clinical experience. However, she testified that her opinion was consistent with the findings of a number of studies including a Statistics Canada survey of 12,000 women carried out in 1993, the Report of the Canadian Panel on Violence which was based on hundreds of interviews, separate studies by Dr. Murray Strauss and Dr. Richard Gells in the United States and Dr. Richard Jaffe in Canada.

53 Although it would have been preferable if these studies had been produced and evidence had been led with respect to the methodology employed and the specific conclusions reached, I am satisfied that there was a sufficient basis to find that

the subject matter of the admitted evidence met the test for reliability discussed in *McIntosh*. That, it seems to me, was the fundamental difference between the evidence that was admitted and the excluded evidence. I find no inconsistency in the trial judge's reasoning in this respect.

54 Next, the appellant argues that the trial judge erred in admitting the evidence because the studies referred to by Ms. Sinclair had not been produced. Although, as I said above, it would have been preferable if those studies had been made available, that is a matter that went to the weight not the admissibility of Ms. Sinclair's evidence. At trial, it was open to the defence to challenge Ms. Sinclair's general statements about the empirical or scientific support for her opinions. It did not do so. I do not think the trial judge erred in this respect.

55 Thirdly, although the appellant accepts that the expert evidence was relevant, he argues that the evidence should have been excluded because its reliability was questionable, its probative value was minimal, and its probative value was outweighed by its prejudicial effect. The first difficulty with this argument is that at trial the defence did not seriously challenge the reliability of the admitted evidence; there is no basis in the evidence to support the submission that its reliability was questionable.

56 In any event, the concern that the jury would use this evidence for a purpose unfairly prejudicial to the appellant was minimal. The evidence was straightforward, easily understood and lasted a matter of minutes in the course of a very lengthy trial. This was not a case in which there was a danger that the expert evidence would overwhelm the other evidence and unfairly influence the jury. Further, as I set out above, the trial judge gave a clear instruction on the limited purpose for which the evidence was admitted. I see no merit in this argument that the probative value of this evidence was outweighed by its prejudicial effect.

57 In my view, the trial judge did not err in admitting this evidence because of concerns about its reliability.

Necessity

58 Next, the appellant argues that Ms. Sinclair's evidence failed to meet the necessity criterion set out in *Mohan* because the jury did not need this evidence in order to appreciate the complainant's explanation for failing to leave the relationship and disclose the abuse. In this respect, the appellant argues that Ms. Sinclair's evidence did not relate to matters that were outside the normal experience of the jury.

59 In *Mohan, supra*, Sopinka J. described the requirement for necessity at p. 254, in the following manner:

What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury": as quoted by Dickson J. in *R. v. Abbey, supra* [[1982] 2 S.C.R. 24]. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village) v. Smith*, [1931] S.C.R. 672, at p. 684, this court, quoting from *Beven on Negligence* (4th ed. 1928), p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge".

60 In *R. v. Lavallee* (1990), 55 C.C.C. (3d) 97 (S.C.C.), the Supreme Court of Canada held that the expert evidence of a psychologist describing "the battered wife syndrome" was admissible to assist the jury in evaluating Ms. Lavallee's perception of imminent danger in the context of her plea of self-defence. In the reasons of the majority, Wilson J. explained the need for the evidence as follows at p. 112:

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.

At p. 111, she stated:

The need for expert evidence in these areas can, however, be obfuscated by the belief that judges and juries are thoroughly knowledgeable about "human nature" and that no more is needed. They are, so to speak, their own experts on human behaviour.

See also, *R. v. C. (G.)* (1996), 110 C.C.C. (3d) 233 (Nfld. C.A.).

61 The appellant argues that *Lavallee* is distinguishable because the context was different. In *Lavallee*, the Supreme Court reasoned that Ms. Lavallee's perception of imminent danger was critical to the issue of self-defence and could not be evaluated without reference to the history of battering and the expert opinion as to the psychological impacts of that battering. That, it is argued, is a more difficult matter to understand than the complainant's explanation in this case for not immediately leaving the relationship and disclosing the abuse. The appellant submits that the different elements of the complainant's explanation, embarrassment, fear and hope are basic human emotions within the normal experience of the jury.

62 Although it is correct that the purpose of the evidence in *Lavallee*, to support a plea of self-defence, was different from the purpose for which the evidence of Ms. Sinclair was admitted in this case, the observations of the court in *Lavallee* about the necessity of expert evidence to assist the jury in answering questions such as why an abused woman would remain in a relationship are applicable and, in my view, lend support to the respondent's argument that these matters are beyond the normal experience of jurors.

63 The appellant submits that, rather than relying on *Lavallee*, this case should be guided by this court's decision in *R. v. D. (D.)* (1998), 113 O.A.C. 179 (Ont. C.A.). In *D. (D.)*, it was held that expert evidence explaining the delayed disclosure by a child sexual abuse victim was not necessary to assist a jury and should not have been admitted. At pp. 185-6, Finlayson J.A. said the following:

This brings me to the fourth, and perhaps the most compelling, reason for rejecting Dr. Marshall's evidence: necessity. Once the expert concedes that delays in making disclosure about unpleasant matters, including the fact of the commission of a crime, are not restricted to children and can apply with equal force to adults, the question naturally arises: what does his testimony supply that is outside the normal experience? This is not a case like *R. v. Norman (D.L.)* (1993), 68 O.A.C. 22, 87 C.C.C. (3d) 153 (C.A.), which dealt with a syndrome unique to the complainant in that case known as child abuse accommodation syndrome. This testimony could apply to any complainant and not just in a sexual assault case. It is not necessary to assist the trier of fact in deciding any material fact. In permitting Dr. Marshall to testify, the trial judge did a disservice to the jury. He underestimated its capacity to understand this behaviour and to make a judgment based on the jurors' collective knowledge of the behaviour of children and adults.

Finlayson J.A. went on to hold that the complainant's explanation for not disclosing the sexual assaults, a concern that her mother might ground her, had nothing to do with a psychological disorder and came within the normal experience of the jurors.

64 In this case, the question is whether the expert evidence was necessary to enable the jury to properly appreciate the complainant's explanation for not immediately leaving the relationship and disclosing the abuse. This involved more than simply understanding the meaning of the words used by the complainant in giving her explanation. It also involved appreciating the context in which the explanation was given; by that I mean appreciating that persons who are abused in intimate relationships may respond differently because of that relationship than they would in other circumstances.

65 There is no exact way to draw the line between what is within the normal experience of a judge or a jury and what is not. The normal experiences of different triers of fact may differ. Over time the subject matters that come within the normal experiences of judges and juries may change. The normal experiences of those in one community may differ from those in other communities. In the end, the court in each case will be required to exercise its best judgment in deciding whether a particular subject matter is or is not within the normal experience of the trier of fact.

66 It seems to me that in cases being tried with a jury, the trial judge is in a better position than this court to determine whether expert evidence is necessary to assist the jury in evaluating evidence or drawing inferences from it. The trial judge has the advantage of hearing the evidence in issue, observing the jury and being able to appreciate the dynamics of the particular trial. In addition, the trial judge may also be in a better position to determine what may come within the normal experience of the average juror in the community in which the case is being tried. For those reasons, in my view, this court should show some deference to the decisions of trial judges in this area.

67 Although I am inclined to think that the expert evidence admitted in this case would come within the normal experience of many jurors, I am not prepared to interfere with the decision to admit the evidence on this basis. The trial judge was obviously alive to the requirements set out in *Mohan*. She carefully reviewed the proposed evidence, the purpose for which it was being tendered and reached a considered judgment that it was admissible. I am unable to conclude that she erred in doing so. In my view, this ground of appeal therefore fails.

3. Charge to the Jury — Sexual Assault/Consent

68 The trial judge left the jury with alternate theories of liability on the charge of sexual assault. First, she instructed the jury that they could find there was no consent because the complainant resisted. Alternatively, she directed that if the jury found that the complainant submitted or did not resist the appellant by reason of threats or the fear of the application of force to herself or to her brother, they could find the Crown had proven a lack of consent under s. 265(3) of the *Criminal Code*.

69 Section 265(3)(b) provides as follows:

265. (3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(b) threats or fear of the application of force to the complainant or to a person other than the complainant.

70 The appellant argues that this alternate theory of culpability should not have been left with the jury because it lacked an air of reality.

71 In support of this argument, the respondent relied on the evidence of the complainant that, when she was leaving the bedroom because the appellant had been engaging in unwanted sexual advances, the appellant said to her "if you leave now I'll kick both you and brother out." At that point, the complainant testified, she turned around, started crying and came back because she was afraid for both herself and her brother. Shortly afterwards the sexual intercourse took place without her consent.

72 The appellant contends that the words "if you leave now I'll kick both you and your brother out" did not constitute a threat of the application of force within the meaning of s. 265(3)(b).

73 The trial judge instructed the jury that the threat referred to in s. 265(3)(b) is a threat to apply force to the complainant or another person; that they should examine the words objectively to determine whether those words would convey a threat to apply force to a reasonable person who found herself in the position of the complainant with the past history of abuse by the appellant; that it was necessary that the appellant have intended to threaten to apply force to the complainant or her brother; and that the reaction or belief of the complainant as to whether these words constituted a threat was not an element of their consideration as to whether or not they in fact constituted a threat.

74 In many situations, a threat "to kick someone out of a house" would not constitute a threat to apply force; it would be nothing more than a colloquial expression of an intent to cause that person to leave the house. However, given the complainant's evidence and the history of ongoing physical abuse, it was open to the jury in this case to find that the appellant's language did constitute a threat to apply physical force and the complainant submitted to the act of intercourse by reason of that threat. Counsel for the appellant (not Mr. Kapoor) did not object to this evidence being put to the jury as a basis on which they could find a threat of the application of force. I am not satisfied that the trial judge erred in leaving the alternate theory of culpability under s. 265(3)(b) with the jury.

4. Charge to the Jury — Re Self-Defence

75 At trial, the appellant argued that if the jury found that the appellant pushed the kitchen tongs into the complainant's neck on August 2, 1994, they should find that he was acting in self-defence. The complainant testified that immediately before the assault by the appellant she had waved the tongs in the appellant's face and said that she felt like shoving the tongs down his throat. The trial judge's charge on the issue of self-defence covered eleven pages of the transcript. The appellant accepts that the charge was proper except for the following comment which came at the very end of the instruction on this issue:

Finally, please remember again that lawful self-defence proceeds from necessity. The instinctive and intuitive need for self-preservation. It cannot be used as a cloak for aggression, retaliation or revenge. [Emphasis added].

76 The trial judge repeated this instruction in response to a question from the jury.

77 The appellant argues that the problem with this instruction is that it leaves the impression that even if the appellant complied with the self-defence provisions of the *Criminal Code*, the appellant could not avail himself of self-defence if he acted out of "aggression, retaliation or revenge." The appellant submits that a person acting in self-defence may also act aggressively, or in a retaliatory manner. Accepting this submission for purposes of this argument, I do not read the last sentence set out above as qualifying or limiting the instruction on self-defence that preceded it.

78 I note that counsel at trial did not object to this aspect of the charge on any of the three opportunities he had to do so: when invited to make a mid-charge comment immediately after the direction was given, at the conclusion of the charge, or when the instruction was repeated to the jury in answer to a question. The failure of defence counsel to comment on the charge "says something about both the overall accuracy of the jury instructions and the seriousness of the alleged misdirection." *R. v. Jacquard* (1997), 113 C.C.C. (3d) 1 (S.C.C.) at p.19.

79 I am satisfied that given the thorough and accurate review by the trial judge of the law of self-defence there was no possibility that the jury would have been misled by the reference referred to above. This ground of appeal therefore fails.

Conclusion

80 In summary, for all of the above reasons, I would dismiss the appeal.

Appeal dismissed.

Footnotes

1 The ten counts comprised three charges of assault, two of assault with a weapon, two of threatening and one each of assault causing bodily harm, unlawful confinement and sexual assault.

TAB 25

2006 CarswellOnt 506
Ontario Superior Court of Justice

Setterington v. Merck Frosst Canada Ltd.

2006 CarswellOnt 506, [2006] O.J. No. 376, 145 A.C.W.S. (3d) 566, 26 C.P.C. (6th) 173

CAROL SETTERINGTON, JACQUELINE WRIGHT, ERROL WRIGHT, JEANETTE LEWIS, WAYNE LEWIS, JAMES VENABLES, MARY JANE McNICHOLL, JOSEPH VALIUS, GRACE DI CARO, SAM SPINA, ROBERT TIBONI, WILLIAM JAMES RUCK AND VIOLET ALINE RUCK (Plaintiffs) and MERCK FROSST CANADA LTD., MERCK FROSST CANADA & CO. and MERCK & CO., INC. (Defendants)

Winkler R.S.J.

Heard: January 26, 2006

Judgment: February 2, 2006

Docket: 04-CV-45435CP

Counsel: Harvey T. Strosberg, Q.C., Michael J. Peerless, Paul Miller for Plaintiffs
Caroline Zayid for Defendants
Evatt Merchant, Casey Churko for Merchant Group

Subject: Civil Practice and Procedure

MOTION by plaintiffs for order determining carriage of certain class proceedings.

Winkler R.S.J.:

The Nature of the Motion

1 The plaintiffs in this action (the "Setterington action") bring a motion before this Court to obtain orders in relation to the carriage of eight intended class proceedings commenced in Ontario against Merck Frosst Canada Ltd. and related companies ("Merck"). The subject matter of the lawsuits involves problems alleged to be associated with a painkiller marketed commercially as "Vioxx". Merck is said to have manufactured, marketed, distributed and sold Vioxx in Canada.

2 By Order of Hockin J. six of the actions were consolidated into the Setterington action and they go forward as that single action with an amalgamated counsel team. Another action commenced on behalf of a putative class of "third party payors", more specifically various public and private insurers and union and employers' drug benefit plans, has been stayed on consent and will be included as a sub-class in the Setterington action. Counsel in that action have joined the team of counsel prosecuting the Setterington action. These actions are but a fraction of the litigation that has been commenced elsewhere in Canada and in the United States relating to the same subject matter.

3 The proposed representative plaintiffs in the Setterington action will be seeking certification under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, for a class described in the Fresh as Amended Statement of Claim as "all persons in Canada, including their estates, other than residents of Quebec, who were prescribed and who ingested Vioxx".

4 Counsel for the representative plaintiffs in the Setterington action have entered into an agreement with other Canadian law firms from across the country to represent and pursue the claims of class members against the defendants. This group is comprised of some nineteen law firms across Canada, including counsel for the third party payor sub-class. A "Steering Committee" of seven counsel has been appointed from this group of firms to direct the conduct of the lawsuit and to appear as counsel in the proceedings.

5 The orders regarding carriage are necessary because another intended class proceeding has been commenced in Ontario by Daniel Walsh and others against Merck (the "Walsh action"), with the Saskatchewan law firm, the Merchant Law Group as counsel. The proposed class in the Walsh action is an international class of persons who have purchased, been prescribed or ingested Vioxx purchased in Canada. This is substantially similar to the class described in the Setterington action. The essence of the Walsh action is the same as the Setterington action with three exceptions: in Walsh the plaintiffs do not bring suit on behalf of OHIP in the form of a subrogated action; the Walsh action does not contain a claim on behalf of third party payors; and, in Walsh the plaintiffs join as a defendant Her Majesty the Queen as represented by the Minister of Health for Canada and the Attorney General of Canada ("Federal Government").

6 The plaintiffs in the Setterington action are seeking a stay of the Walsh action, a declaration that no other class action may be commenced in Ontario relating to Vioxx, and costs of this carriage motion. The Walsh plaintiffs respond by saying that both actions ought to be permitted to proceed to certification and the "winner" given carriage after the certification is argued. In the alternative they propose that it be ordered, if the national consortium of law firms is given carriage, that their counsel, the Merchant Law Group, be permitted to participate in the consortium of law firms in the conduct of the proposed national class proceeding.

Factual Background

7 Vioxx is a Cyclooxygenase-2 (Cox-2) specific inhibitor in the class of drugs known as non-steroidal anti-inflammatory drugs. By Notice of Compliance dated October 25, 1999, Vioxx was first approved for use in Canada as a Schedule "F" Drug under the *Food and Drugs Act*, R.S.C. 1985, c. F-27. It was approved for acute and chronic treatment of the signs and symptoms of osteoarthritis, as well as for the relief of pain in adults and for the treatment of primary dysmenorrheal (menstrual) pain.

8 On September 30, 2004, Merck announced a worldwide voluntary withdrawal of Vioxx, effective immediately due to concerns of an increased risk of cardiovascular events, including heart attack and strokes from use of the drug. It was following the withdrawal of Vioxx and its removal from the market that the plethora of lawsuits was brought against Merck, including the instant proceedings giving rise to the motion in issue.

Law and Analysis

9 It is not uncommon to have two or more class proceedings commenced with respect to the same subject matter, seeking certification for similar classes which either overlap significantly or are identical. In these situations, if acceptable to the representative plaintiffs, counsel for different representative plaintiffs often agree to work together thus sharing the burden and cost of the litigation and the remuneration if successful. They also share the risk if unsuccessful. However, as in this case, if an agreement to work together towards a common goal cannot be reached, a proposed representative plaintiff in one action may bring a carriage motion to stay all other class proceedings relating to the same subject matter. In this instance the Setterington plaintiffs bring such a motion.

10 The CPA confers upon a court a broad discretion to case manage the proceedings before it and in furtherance of this objective, the specific jurisdiction to determine a carriage motion is found in ss. 12 and 13 of the Act:

12. 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.

13. 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.

11 In addition, s. 138 of the *Courts of Justice Act*, R.S.O. 1990 c. 43, provides that "as far as possible, multiplicity of legal proceedings shall be avoided." This is particularly germane with respect to class actions in that most carriage motions, as is the case here, will involve multiple proceedings by essentially the same class against the same defendant for the same relief. For

the purposes of the application of this principle on a practical basis in class proceedings, it is not necessary that the multiple proceedings mirror each other in every respect. Rather, the court will look to the essence of the proceedings and the similarities between them to determine whether permitting two or more to proceed would offend the prohibition against multiplicity.

12 It cannot be ignored that in seeking a stay of one class proceeding in favour of another, the proposed representative plaintiff seeking the stay is asking the court to rule that the putative class will be better served if he or she is permitted to prosecute the action. An inherent element in such a request is an affirmation that the counsel chosen by the moving party is similarly better suited to prosecute the action than the counsel of choice in the other action or actions. In fact, in many cases, there may be little difference between the proposed representative plaintiffs and the moving party will be relying upon the skill and experience of his or her chosen counsel and their resources as the distinguishing feature militating in favour of his or her action being permitted to go forward in preference to all other actions.

13 Cumming J. addressed a number of the issues arising in carriage motions in *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* (2000), 4 C.P.C. (5th) 169 (Ont. S.C.J.). He held that a court faced with a carriage motion in respect of multiple class proceedings should consider the best interests of the putative class members, the objectives of the CPA and fairness to the defendants in its determination. (See also *Ricardo v. Air Transat A.T. Inc.* (2002), 21 C.P.C. (5th) 297 (Ont. S.C.J.) and *Gorecki v. Canada (Attorney General)* (2004), 47 C.P.C. (5th) 151 (Ont. S.C.J.))

14 On this motion, there is little to choose between the proposed representative plaintiffs. There is no indication that either named group is superior to the other in respect of its ability to represent the putative class. I note, however, that the Walsh action only names two actual representative plaintiffs and leaves the identities of the remainder to the imagination in that they are identified merely as "John Does". This is not a practice that can be reconciled with the requirements of the CPA with respect to representative plaintiffs and, accordingly, for the purposes of this motion I am only considering the attributes of the actual named plaintiffs.

15 Given the relative similarity between the proposed representative plaintiffs, a determination based on the factors enunciated by Cumming J. in *Vitapharm* must of necessity turn on analysis of the claims advanced and the attributes of the competing counsel.

Nature and Scope of the Causes of Action Advanced

16 Counsel for both plaintiff groups concede that the claims advanced in the competing actions are in essence product liability claims. The two actions differ, as stated above, in three material respects. Firstly, the Walsh action adds as a defendant the Federal Government. Secondly, Setterington includes a subrogated claim on behalf of OHIP. Thirdly, the Setterington action contains the claim for third party payors whereas the Walsh action does not.

17 The Walsh plaintiffs assert that their claim is superior and better serves the interest of the putative class in that they have named the Federal Government as a defendant while at the same time avoiding the "conflict" inherent in the Setterington action of an included subrogated OHIP claim. I cannot accede to these arguments.

18 Setterington counsel contend that the choice to name defendants in a class action is one that should be left to the proposed representative plaintiffs acting on the advice of experienced counsel. I agree. When the court is asked to choose between proceedings, the analysis must be qualitative rather than quantitative. The mere inclusion of a multitude of defendants is not sufficient to provide a basis for the preference of one action over another. At this stage of the proceeding, the Setterington plaintiffs assert, based on the advice of their counsel, that there is insufficient information to posit a sustainable claim against the Federal Government. That is a permissible exercise of judgment within the purview of a proposed representative plaintiff. Indeed, as held by the Supreme Court of Canada in *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 (S.C.C.), plaintiffs are entitled to restrict the claims in a class proceeding to make it more amenable to certification. (See *Rumley*, para. 30; See also *Pearson v. Inco Ltd.*, [2005] O.J. No. 4918 (Ont. C.A.)).

19 In this case, the Setterington plaintiffs provided a sufficient explanation for their decision not to include the Federal Government as a defendant at this stage of the proceeding. The purpose of a carriage motion is not to parse the action finely or

overly analyse it for purposes of comparison but rather to scrutinize each for any glaring deficiencies. Here there are different theories underlying the causes of action in the two competing Statements of Claim and each plaintiff group urge that their approach is to be preferred. However, on a carriage motion it is inappropriate for the Court to embark upon an analysis as to which claim is most likely to succeed unless one is "fanciful or frivolous", to adopt the words of Rady J. in *Gorecki*. Contrary to the submissions of the Walsh plaintiffs, I see none of these defects in the Setterington action.

20 Similarly, the alleged "conflict" regarding the inclusion of the subrogated OHIP claim by the Setterington plaintiffs is not a defect at all but rather the proper observance of an obligation imposed on all plaintiffs in Ontario under the *Health Insurance Act*, R.S.O. 1990, c. H.6, s.31(1). Indeed, by its failure to include the subrogated OHIP claim, the Walsh action is defective. In any event, as in most Ontario class proceedings, the plaintiffs' counsel are retained by OHIP to protect its interests which, as held by the Supreme Court of Canada in *Ledingham v. Ontario (Hospital Services Commission)* (1974), [1975] 1 S.C.R. 332 (S.C.C.), are subordinate in priority to the rights of individual plaintiffs.

21 The third difference in the two actions, the inclusion of the third party payors as a subclass, enures to the benefit of the Setterington action because of efficiency this brings to the proceeding.

The Counsel Factors

22 The factors pertinent to the decision regarding choice of counsel, in the context of the *Vitapharm* approach focusing on the interests of the putative class, the objectives of the act and fairness to the defendants, include the degree of preparation in support of advancing the action and the relative experience and resources of counsel. In this regard, if one of the actions was significantly more advanced than the other, it would be construed as an advantage both in the efficiencies that would be lost and potential unfairness to the defendants should the other action be selected. This is not a factor here. Both the Setterington and the Walsh actions were commenced within days of each other. In terms of preparation both counsel groups are roughly equal at this stage. They have consulted experts and have established liaison with counsel in similar litigation in the United States.

23 Turning then to the resources and experience of counsel, the Walsh plaintiffs advanced the argument that the court should consider a Vioxx based class proceeding being conducted by the Merchant Group in Saskatchewan as a prevailing factor in the experience of counsel analysis. The certification motion in that proceeding has been argued and is currently under reserve. The Walsh plaintiffs contend that this gives the Merchant Group a decided advantage that augurs in favour of them taking carriage of the Ontario action. While this means logically that the Merchant Group has argued one more Vioxx specific certification motion than the Setterington counsel group at this stage, to give it greater consideration than that would be to ignore the vast wealth of experience of the Setterington counsel group in class action litigation generally and certification proceedings in particular. The counsel group on the Setterington action is comprised of many pre-eminent class action counsel from across Canada. They have extensive experience at every court level involving certification of class proceedings that is not matched by the Merchant Group, regardless of its experience in general litigation.

24 Indeed, the public perception of the experience of the Setterington counsel group is also evident in the fact that the Setterington counsel team has been contacted by some 6,600 putative class members. There is no evidence in this respect relating to the Walsh action. It ought not to be ignored as well that the ability to communicate with large numbers of putative class members speaks to the relative resources of counsel. The Setterington counsel team consists of 19 law firms from nine provinces across Canada. Eight of these firms are located in Ontario where this action will be based. Their combined resources, financial and otherwise, and breadth of experience are significant. This is in stark contrast to the Merchant group which has no office in Ontario and has not provided any evidence that the senior counsel of the group, who are not called to the bar in Ontario, are entitled to practice in Ontario under the current Law Society bylaws. This is not intended to detract from the laudable initiatives of the governing bodies of the legal profession to encourage mobility among lawyers with the consequent economies that can be generated for clients. However, there are practical realities to class action litigation that augur in favour of having at least some of the counsel for the plaintiffs based in the jurisdiction where the litigation is to be conducted.

25 Another issue arose during the course of the motion that has an impact on its disposition. Counsel for the Setterington plaintiffs brought to the attention of the court a Statement of Claim filed in another intended class proceeding involving Merck

as a defendant. In that action, the Merchant Group is acting as counsel for a putative class of plaintiffs that includes employees, shareholders, mutual funds, brokerage firms, venture capital firms, pension funds, insurance companies and the Canada Pension Plan, amongst others, seeking damages for losses in share values allegedly caused by Merck's misrepresentations. The loss claimed is \$26 billion. If this claim were successful in whole or in part it could seriously jeopardize the recovery of the claims of the putative class members in the instant proceedings. In my view this securities lawsuit commenced and prosecuted by the Merchant Group brings them into direct conflict with the interests of the putative class proposed in the Setterington or Walsh actions and would, in itself, be a sufficient basis to preclude the Merchant Group from acting as counsel for that class.

26 That the existence of the securities litigation was not brought to the attention of the court causes me additional concern. There has been some confusion generally between the concept of onus of proof and that of disclosure in the context of a carriage motion. It is incumbent on representative plaintiffs and their counsel seeking orders of the nature sought here to make full disclosure to the court of all factors that could logically impact on the determination of the motion. As with most matters conducted under the CPA, the court is required to consider first and foremost the interests of the silent class members. On a carriage motion, much as in the case of a settlement approval hearing, there is a requirement of utmost good faith on the part of counsel to forego reliance on the adversarial system as a fact-finding mechanism and place all material facts which can have any bearing on the issues before the court, whether these may be against their interests or not. It would be to ignore the reality of class proceedings to disregard the fact that counsel granted carriage of a class proceeding stand to reap a substantial fee if successful. Accordingly, there must be a concomitant obligation to ensure full and frank disclosure of all material facts because the protection of the interests of the silent class members, in those circumstances, demands no less. This precept was stated by this Court in *McCarthy v. Canadian Red Cross Society* (2001), 8 C.P.C. (5th) 350 (Ont. S.C.J.) at para. 21 in the context of a settlement approval but it is equally apposite here:

21...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.

27 I cannot accede to the alternative submission of the Walsh plaintiffs that an order should go mandating that their counsel be included in the Setterington counsel group. Apart from the conflict issue identified above, there is clear animosity between the two counsel groups, precipitated no doubt by the inclusion of "scandalous" statements in the Walsh plaintiffs' materials relating to various members of the Setterington counsel team. Although these passages were withdrawn at the beginning of the hearing of this matter, the lingering effects are such that it would not be in the best interests of the class going forward to order the groups to work together.

Conclusion and Disposition

28 For the foregoing reasons I am of the view that it would be more advantageous for the class to have the Setterington action proceed with its counsel group prosecuting that action. This would be consistent with the goals of the CPA and, in consideration of the progress of the proceedings, does not in any way present any unfairness to the defendants.

29 An order will go granting carriage to the Setterington counsel group, staying the Walsh action and precluding commencement of any other class proceedings relating to this claim. In all of the circumstances I am not inclined to make any order as to costs which is the usual course in carriage motions.

Order accordingly.

TAB 26

2009 CarswellOnt 6583
Ontario Superior Court of Justice

Sharma v. Timminco Ltd.

2009 CarswellOnt 6583, [2009] O.J. No. 4511, 181 A.C.W.S. (3d) 860, 99 O.R. (3d) 260

RAVINDER KUMAR SHARMA (Plaintiff) and TIMMINCO LIMITED, PHOTON CONSULTING LLC, ROGOL ENERGY CONSULTING LLC, MICHAEL ROGOL, DR. HEINZ SCHIMMELBUSCH, ROBERT DIETRICH, RENÉ BOISVERT, ARTHUR R. SPECTOR, JACK L. MESSMAN, JOHN C. FOX, MICHAEL D. WINFIELD, MICKEY M. YAKSICH, and JOHN P. WALSH (Defendants)

ROBERT GOWAN (Plaintiff) and TIMMINCO LIMITED, AMG ADVANCED METALLURGICAL GROUP N.V., RENÉ BOISVERT, ROBERT J. DIETRICH and HEINZ C. SCHIMMELBUSCH (Defendants)

Perell J.

Heard: October 26, 2009

Judgment: October 29, 2009

Docket: 09-CV-378701-ooCP, 09-CV- 380757-ooCP

Counsel: James C. Orr, Alex Dimson for Plaintiff, Ravinder Kumar Sharma
C. Scott Ritchie, Q.C, Michael A. Eizenga, A. Dimitri Lascaris for Plaintiff, Robert Gowan

Subject: Civil Practice and Procedure; Corporate and Commercial

Perell J.:

Introduction and Overview

1 Part XXIII.1 of the *Ontario Securities Act*, R.S.O. 1990, c. S.5 came into force on December 31, 2005, and since its enactment, entrepreneurial class actions law firms have been interested in pursuing an action under it. This is a motion to determine which of two firms will have carriage of an action against Timminco Ltd., a Canadian metals company listed on the TSX. Between 2007 and April 2008, after announcing a series of contracts to sell silicon, Timminco saw its \$0.30 share price climb skyward. The two law firms' proposed Part XXIII.1 actions, which were commenced in the late spring of 2009, followed the crash of Timminco's share price.

2 In April, 2008, Kim Orr Barristers P.C., a Toronto-based class actions law firm, on its own behalf - and without any client, began investigating to determine whether an action could be brought against Timminco at common law and under Part XXIII.1 of the *Ontario Securities Act*. At the time when Kim Orr's investigation began, Timminco's shares were trading at around \$23.00 per share.

3 In August 2008, Siskinds, a London-based class action law firm, on its own behalf, and without any client - began a similar investigation with a similar purpose. When Siskinds began its investigation, Timminco's shares were trading at a price of \$23.00 per share.

4 On November 11, 2008, Timminco released its quarterly results and reported that previously released information about costs, production volumes, and revenues might no longer be valid. Over the next ten trading days, Timminco's share price dropped from \$7.93 to \$3.10.

5 On May 14, 2009, when Timminco's shares were trading at \$1.55 per share, Kim Orr commenced a proposed class action against Timminco and others. The statement of claim advanced claims for negligence and negligent misrepresentation and subject to the leave being granted an action under Part XXIII.1 of the *Ontario Securities Act*.

6 On June 11, 2009, when Timminco's shares were trading at \$1.58 per share, on behalf of Robert Gowan, Siskinds commenced a proposed class action against Timminco. The statement of claim advanced claims for negligence and negligent misrepresentation, and if leave of the court is granted, Siskinds intends to amend the pleading to pursue the statutory claims under Part XXIII.1 of the *Ontario Securities Act*.

7 Now Kim Orr and Siskinds respectively bring carriage motions and move for orders staying the other firm's proposed class action.

8 Kim Orr, which has a relationship with the American law firm Milberg LLP submits that it would be in the best interests of the class members to grant it carriage of the class action because with its expertise in class actions, knowledge of the relevant securities laws, association with a pre-eminent American class action law firm, it is in the best position to prosecute the action.

9 Siskinds submits that having regard to the criteria that the court has developed to choose between rival class counsel, it is in the class' best interest that it be granted carriage of the action against Timminco. Unkindly, Siskinds draws attention to a serious stain on the reputation of Milberg LLP, and Siskind raises concerns about the American law firm's involvement in an Ontario class action.

10 To resolve this carriage dispute, I shall: (1) set out the law about carriage disputes; (2) describe the law firms, persons and parties involved; (3) describe the general factual background to the proposed class actions and to the carriage dispute; (4) set out in a chart some of the contrastable features of the rival actions; (5) describe the nature of the rival causes of action and the theories of the claims (6) explain my conclusion, which will involve an analysis of the competing theories (or battle plans) of the rival law firms; and (7) conclude and set out the court's order.

11 Although it was a very difficult decision and a very close call, for the reasons that follow, I conclude that Kim Orr should have carriage of the class proceedings.

Carriage Motions

12 Where two or more class proceedings are brought with respect to the same subject matter, a proposed representative plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject matter: *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.) at para. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.).

13 There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action and one action must be selected: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) at para. 14. See also *Ford v. F. Hoffmann-La Roche Ltd.*, [2001] O.J. No. 3682 (Ont. S.C.J.), aff'd [2002] O.J. No. 2010 (Ont. C.A.).

14 The primary consideration on a class action carriage motion is arriving at a solution that is in the best interests of all class members, is fair to the defendants, and consistent with the policy objectives of the *Class Proceedings Act, 1992*: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) at para 48; *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.); *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (Ont. S.C.J.); *Whiting v. Menu Foods Operating Ltd.*, [2007] O.J. No. 3996 (Ont. S.C.J.).

15 On a carriage motion, it is inappropriate for the court to embark upon an analysis as to which claim is most likely to succeed unless one is "fanciful or frivolous": *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.) at para. 19.

16 Where there is a competition for carriage of a class proceeding, the circumstance that one competitor joins more defendants is not determinative; rather, what is important is the rationale for the joinder and whether or not it is advantageous for the class to join the additional defendants: *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (Ont. S.C.J.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.).

17 In determining who should be appointed as lawyer of record in a class action, the court may consider, among other things: (1) the nature and scope of the causes of action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced; (3) the state of each class action, including preparation; (4) the number, size and extent of involvement of the proposed representative plaintiffs; (5) the relative priority of commencing the class action; (6) the resources and experience of counsel; and (7) the presence of any conflicts of interest. See: *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) and [2001] O.J. No. 3673 (Ont. S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.); *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.); *Whiting v. Menu Foods Operating Ltd.*, [2007] O.J. No. 3996 (Ont. S.C.J.); *Genier v. CCI Capital Canada Ltd.*, [2005] O.J. No. 1135 (Ont. S.C.J.).

18 I foreshadow the discussion and analysis below to say that for the case at bar, I do not find particularly helpful factors numbered 3, 4, 5, 6, and 7. I also do not find helpful for the case at bar, a comparison between the retainer agreements and what I will later refer to as the "beauty pageant" factors of a carriage motion, where the rival law firms describe their current talents and past accomplishments. I regard the involvement of Milberg LLP as a sterile or neutral factor. This carriage motion turns on factors 1 and 2.

The Personae

19 *Siskinds* is a London, Ontario, based law firm with offices in London, Toronto, and Windsor. It has an affiliate, *Siskinds, Desmeules*, in Quebec. It has 70 plus lawyers. At *Siskinds*, 15 lawyers focus their practices exclusively or almost exclusively on class actions.

20 *Siskinds* was one of the pioneer law firms in class action litigation in Ontario. It has expertise and experience in the full range of class proceedings, and its reputation is as one of the pre-eminent class action firms in Canada. It has been lead or co-lead in approximately 70 class proceedings. In the past six years, it has commenced over 20 securities class actions, including approximately 14 claims under Part XXIII.1 of the *Ontario Securities Act*.

21 *Dimitri Lascaris* is the *Siskinds'* partner in charge of *Siskinds'* securities class actions group, and he is the partner in charge of the Timminco file. His partner, *Charles M. Wright* swore an affidavit in support of *Siskinds'* motion for carriage.

22 *Kim Orr* is a Toronto-based class action firm that was founded in January, 2008. Its lineage includes other class action firms, including Roy Elliott Kim O'Connor LLP (REKO), McGowan, Elliott & Kim LLP, and Elliott & Kim LLP. These firms also were pioneers of class action litigation, and they are regarded as among the pre-eminent class action firms in Canada.

23 *Won Kim* is the *Kim Orr* partner in charge of the Timminco file. *Victoria Paris*, another partner, swore an affidavit in support of her firm's motion for carriage.

24 *Kim Orr* has a relationship with *Milberg, LLP*, a New York City-based law firm. The American law firm has agreed to assist *Kim Orr* in the prosecution of the Timminco class action. How *Milberg LLP* is to be paid is to be made a matter of court approval at some future time. In the meantime, *Milberg LLP* will keep track of its work in progress.

25 *Milberg, LLP* and its predecessor law firms have been recognized as one of the leading class action law firms in the United States. In the securities area, it has recently been involved in several humungous cases including: *In re Vivendi Universal, S.A. Securities Litigation*, *In re Tyco International Ltd. Securities Litigation*, *In re American Express Financial Advisors Securities Litigation*, and *In re Nortel Networks Corp. Securities Litigation*.

26 Milberg LLP currently has 76 attorneys, most of whom represent plaintiffs in complex litigation. With one exception, none of the attorneys are licensed to practice law in Ontario. Milberg LLP has a support staff including investigators, forensic accountants, financial analysts, legal assistants, litigation support analysts, and information technology technicians.

27 Milberg, LLP is a successor firm to *Milberg Weiss Bershad Hynes & Lerach LLP*, which had approximately 250 attorneys. In October 2004, the predecessor firm was indicted in the United States District Court for the Central District of California. Four senior partners pled guilty to criminal charges relating to payments made to class action representative plaintiffs. The law firm was indicted based on its vicarious or derivative liability for the indicted partners' criminal misconduct.

28 In May 2004, Milberg Weiss Bershad Hynes & Lerach LLP split into two new firms. What is now Milberg LLP saw additional departures that reduced its complement to its current 76 attorneys.

29 On June 16, 2008, Milberg LLP and the United States Government entered into a Case Disposition Agreement under which the charges against the firm were dismissed, but the firm agreed to pay a \$75 million fine in installments. The firm also agreed to maintain a Best Practices Program to be overseen by a Compliance Monitor, which program is still in place. In his statement to U.S. District Judge, John F. Walker, made when the United States Attorney sought approval of the dismissal of the charges against the firm, the United States Attorney stated that: "no attorney currently a partner or associate with Milberg LLP is criminally culpable with respect to the" subject conduct. The United States Attorney also stated (with my emphasis added):

Your Honor, from our perspective we had a very strong case against the firm, there's no question. But, here was the situation we faced. We had reached a point where all the individual attorneys at the firm for whom we had solid evidence of being participants in the conspiracy had ceased being a part of the firm. They were no longer part of the firm management. They were no longer part of the control of the firm. And we had the remaining partners come to us and implore us, I don't think is too strong a term — and implore us to reach an agreement with the firm that would enable them — people who had not been implicated in the scheme — to carry on the firm's nationwide practice, which involves representation of thousands and thousands of members in class actions around the country.

They implored us to give them the opportunity to carry on the work of the firm by the people who had not been charged in this case or otherwise indicated to be culpable in a substantial way, coupled with implementing a best practices program that appeared to us to be very robust and to protect against many of the concerns that the government had about the firm's past conduct, plus they were willing to pay a very substantial monetary penalty. Clearly short of the amount we could have sought based on our forfeiture charges if we went to trial, but not — but we took into account what the firm's financial condition is.

30 Following these remarks, the following exchange took place between the United States Attorney and Judge Walker (with my emphasis added):

Mr. Robinson [United States Attorney]: They were gone. They were no longer controlling the firm, and we were left with an organization that was not being dominated by culpable targets.

The Court [The Honourable U.S. District Judge, John F. Walker]: Which has many, many fine lawyers and many, many fine men and women who work in nonlawyer capacity to the firm. And I commend the government for its - for its approach to allowing those good people who didn't have any involvement in the conspiracy to continue to earn a living, because they shouldn't - it's - it's harsh enough that they're going to have to bear the results of this conduct by paying \$75 million penalty. ... But I commend the government in its use of its discretion in that regard.

31 In March 2006, *Michael C. Spence*, a partner of Milberg LLP, who is untainted by the wrongdoing that had occurred at his firm, met Mr. Kim when they were both panellists at a continuing legal education conference in Toronto. Mr. Spence also met Ms. Paris. In the years that followed, Mr. Spence and Mr. Kim have met from time to time to discuss the prospect of working together on a securities class action asserting a claim under Part XXIII.1 of the *Ontario Securities Act*. Mr. Spence swore an affidavit in support of Kim Orr's motion for carriage.

32 Kim Orr and Milberg LLP have agreed to co-operate in the prosecution of the claim against Timminco. The participants from Milberg LLP will include Mr. Spence and Professor *Arthur Miller*, who is special counsel and head of the firm's appellate practice group. Professor Miller is a professor at New York University School of Law and formerly was the Bruce Bromley Professor of Law at Harvard Law School. He is a renowned civil procedure scholar.

33 In her affidavit, Ms. Paris deposed:

[Kim Orr's] relationship with Milberg LLP will greatly benefit the class. In our experience, large class actions tend to be lengthy and bitterly fought and Canadian plaintiff firms have generally been unable to match the extensive resources that defendants can deploy against them. Defendants know this and will simply try to outlast plaintiff's firms by engaging in protracted litigation involving extensive documentary disclosure and procedural motions. As a result, many cases that are resolved typically settle for a fraction of their potential value. We believe Milberg's experience and resources will greatly enhance our ability to prosecute this case.

34 *Ravinder Sharma* is the proposed representative plaintiff in the action brought by Kim Orr. He is a principal of a technology company, has over a decade of experience in the investment banking industry, and since February, 2009, is a member of the Ontario Judicial Council. Mr. Sharma, however, recently indicated that he wishes to withdraw as representative plaintiff because of a concern that his work on the Judicial Council would interfere with his ability to serve as an adequate representative plaintiff.

35 Kim Orr proposes to substitute *St. Clair Pennyfeather* as representative plaintiff in the place of Mr. Sharma. Mr. Pennyfeather is a University of Toronto student who purchased shares of Timminco during the proposed class period. On June 17, 2009, Mr. Pennyfeather signed a retainer agreement with Kim Orr.

36 *Timminco* is a corporation incorporated under the *Canada Business Corporations Act*, R.S., 1985, c. C-44 with its head office in Toronto, Ontario. Its shares trade on the TSX under the symbol "TIM." As of September 17, 2009, Timminco's market capitalization was approximately \$149 million. Timminco's net losses for the first two quarters of 2009 exceeded \$46 million. There is a belief shared by Kim Orr and Siskinds that Timminco may not survive.

37 *AMG Advanced Metallurgical Group N.V.*, a specialty metals company, is Timminco's parent corporation. It is incorporated pursuant to the laws of the Netherlands, with offices in the State of Pennsylvania, United States of America. Its shares are listed on the NYSE Euronext and the Amsterdam Stock Exchange under the symbol "AMG". It conducts business in Canada. As at September 14, 2009, AMG's market capitalization was approximately \$470 million.

38 At the relevant time, *Dr. Heinz Schimmelbusch* was the CEO of both Timminco and AMG, and he was Chairman of Timminco's Board of Directors and of AMG's Management Board. *Robert Dietrich* was Timminco's CFO, and *René Boisvert* was President and CEO of Timminco's wholly owned subsidiary, Becancour Silicon Inc., which was the silicon manufacturer. *Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yakisch and John P. Walsh* (the "Outside Directors") are or were directors of Timminco.

39 The Timminco directors carry insurance policies that may be available to partially compensate class members if the litigation is resolved in their favour.

40 *Photon Consulting LLC* and *Rogol Energy Consulting LLC* are consulting firms based in Boston, Massachusetts. *Michael Rogol*, an individual residing in Boston, is associated with both firms. Photon Consulting and Rogol Energy may be experts within the meaning of s. 138.1 of the *Ontario Securities Act* and their activities are connected to the alleged false information disseminated about Timminco's silicon production capabilities.

The Claim and Proceedings Against Timminco

41 In 2007, Timminco announced that it had developed a technological process that would purify low grade silicon into an upgraded metallurgical grade silicon known as "UMG-Si". The process would enable Timminco to manufacture UMG-Si much cheaper than its competitors.

42 Between 2007 and June 2008, after announcing a series of contracts to sell UMG-Si, Timminco saw its \$0.30 share price climb skyward, eventually peaking at \$34.50 on June 6, 2008.

43 On March 17, 2008, Timminco issued a press release announcing its year-end results and characterizing itself as a "low-cost producer of solar grade silicon." On March 28, 2008, Timminco released its 2007 Management Discussion and Analysis and Annual Information Form, which contained statements about Timminco's ability to produce solar grade silicon on a commercial scale acceptable to existing customers.

44 In April, 2008, there were news reports that raised questions about the production claims of Timminco. Noting the news, Kim Orr, on its own behalf - and without any client, began an investigation to determine whether a claim could be brought against Timminco under Part XXIII.1 of the *Ontario Securities Act*. At the time when Kim Orr's investigation began, Timminco's shares were trading at around \$23.00 per share.

45 Subject to obtaining the leave of the court to bring the action, s. 138.3 (1) of the *Ontario Securities Act* creates a statutory cause of action against both the "responsible issuer" and every director of the responsible issuer at the time a misrepresentation was made and against "influential persons" who knowingly influenced the company to release a misrepresentation. Under s. 138 (3), an influential person can also incur liability in respect of documents released by the influential person that relate to the responsible issuer and that contain a misrepresentation. Section 138.3 (1) (e) also creates a cause of action against experts if an expert report contains a misrepresentation, or if the company's document quotes from the expert's opinion or report.

46 As part of its ongoing investigation, Kim Orr reviewed Timminco's public statement on the System for Electronic Document Analysis and Retrieval (SEDAR) and the System for Electronic Disclosure for Insiders (SEDI), and it contacted Mr. Ravi Sood, the CEO of Lawrence Asset Management. At this time, Timminco was suing Mr. Sood for defamation. Mr. Sood had publicly expressed doubts about Timminco's production process. During the summer and fall of 2008, Kim Orr watched for developments at Timminco.

47 On May 8, 2008, Timminco issued a press release announcing that it had commissioned a report by Photon Consulting (the "Photon Report") on the company's UMG-Si process. The press release quoted Michael Rogol, the Managing Director of Photon Consulting, who indicated that Timminco's "[o]perations and processes have potential for massive growth and, possibly, for reshaping the silicon industry" and that Timminco's "equipment is very impressive, very low-cost." Timminco placed the Photon Report on its website.

48 In August 2008, an investigator provided Siskinds with non-public information regarding Timminco process for producing solar grade silicon. The investigator also provided Siskinds with non-public information regarding Timminco's Becancour facility where it was producing the silicon. So apprised, Siskinds, on its own behalf - and without any client, began an investigation to determine whether a claim could be brought against Timminco pursuant to Part XXIII.1 of the *Ontario Securities Act* and under the common law. Siskinds commissioned the investigator to continue its work, including identifying potential witnesses. When Siskinds' investigation began, Timminco's shares were trading at around \$23.00 per share.

49 On November 11, 2008, Timminco released its quarterly results, and it also announced that it was removing the Photon Report from its website as "some of the material factors or assumptions originally used to develop the forward-looking information in the Photon Report including in respect of revenues, production volumes and costs, may no longer be valid." Over the next ten trading days, Timminco's share price dropped from \$7.93 to \$3.10.

50 Timminco's announcement of November 11, 2008 led Kim Orr to conclude that it had found the Part XXIII.1 of the *Ontario Securities Act* claim that it had been waiting for. It updated its research, began to draft a statement of claim, began to look for a representative plaintiff, continued to look for evidence and experts, and had discussions with Milberg LLP about working together on the case.

51 Although the timing is unclear, it would appear that around this time Siskinds also decided to move forward in preparing proceedings against Timminco and others.

52 By the end of November, 2008, Milberg LLP agreed to assist Kim Orr with an action against Timminco, and Kim Orr continued its search for a representative plaintiff.

53 In December 2008, Mr. Gowan, who had heard of Siskinds as a result of the settlement of the Southwestern Resources class action (a securities action), discussed a possible class action against Timminco. Mr. Gowan and the firm discussed this possibility again in April 2009.

54 In May of 2009, Mr. Kim and Ms. Paris of Kim Orr met Ravinder Sharma, a Timminco shareholder. Mr. Sharma agreed to be the representative plaintiff that the firm had been looking for. On May 14, 2009, Mr. Sharma signed a retainer agreement. During the month of May 2009, Kim Orr was also contacted by St Clair Pennyfeather, another shareholder, who expressed an interest in being involved in an action against Timminco.

55 By May 14, 2009, Timminco's shares were trading at \$1.55 per share, and on that day Kim Orr, on behalf of Ravinder Sharma, commenced a proposed class action against Timminco, Dr. Heinz Schimmelbusch, Robert Deitrich, René Boisvert, Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol, Arthur R. Spector, Jack L. Messman, John C. Fox, Michael D. Winfield, Mickey M. Yaksich, and John P. Walsh. The Sharma statement of claim pleads negligence, negligent misrepresentation, and seeks leave to assert a claim under Part XXIII.1 of the *Ontario Securities Act*.

56 Notably absent from the defendants is AMG Advanced Metallurgical Group N.V., but Kim Orr says at the time the claim was issued, it did not have sufficient evidence to establish that AMG knowingly influenced the release of the Timminco statements and it says that including AMG as a defendant could result in a potential jurisdictional battle that would add unnecessary expense and delay to the litigation with little corresponding benefit. (I will say more about the scope of the rival actions below.)

57 By the time it issued the statement of claim, Kim Orr had spent approximately \$400,000 in expenses and lawyers' fees. After the issuance of the claim, it incurred an additional \$75,000 in expenses and lawyers' fees before it became aware that Siskinds had issued a second claim against Timminco.

58 On June 11, 2009, when Timminco's shares were trading at \$1.58 per share, on behalf of Robert Gowan, Siskinds commenced a second proposed class action against Timminco Limited, Dr. Heinz Schimmelbusch, Robert Deitrich, René Boisvert, and AMG Advanced Metallurgical Group N.V. The statement of claim pleads negligence, negligent misrepresentation, and Mr. Gowan will seek leave to assert a claim pursuant to Part XXIII.1 of the *Ontario Securities Act*. The statement of claim alleges that, at various points during the class period, AMG incorporated into its own press releases certain of the misrepresentations alleged to have been made by Timminco.

59 Notably absent from the claim brought by Siskinds are the defendants Photon Consulting LLC, Rogol Energy Consulting LLC, Michael Rogol and the Timminco Outside Directors. However, Siskinds always planned to add these defendants once the leave of the court to bring an action under Part XXIII.1 had been obtained.

60 Before their respective carriage motions, there were discussions between Kim Orr and Siskinds about jointly prosecuting the class action. In mid-June, 2009, Mr. Orr, Mr. Kim and Ms. Paris met with Mr. Lascaris to discuss the possibility of working together. Those discussions were not successful, and for the purposes of this motion nothing turns on how or why the negotiations failed.

Tale of the Tape

61 I will have much more to say about the two rival statements of claim below, but the following chart compares and contrasts some of the core elements of the rival proposed class proceedings:

Class Counsel

Kim, Orr Barristers P.C. An 8-member class action boutique law firm. The firm includes:— James C. Orr

Siskinds LLP— A 15-member class action department in a firm of 70+ lawyers. The department includes:

	(1983 call) Won J. Kim (1992 call) Megan McPhee (2003 call) Victoria Paris (2002 call) (The firm will be assisted by Milberg LLP.)	— C. Scott Ritchie, Q.C. (1967 call) — Michael A. Eizenga (1991 call) — Michael J. Peerless (1993 call) — Charles M. Wright (1995 call)— Dimitri Lascaris (2004 call)
Plaintiff	Ravinder Kumar Sharma to be replaced by— St. Clair Pennyfeather	Robert Gowan
Background of the Plaintiff	Mr. Pennyfeather is a 26-year old student at the University of Toronto. \$1,066— (57 shares at \$20 per share, worth \$1.28 per share)	Mr. Gowan is a retiree residing in Manitouwadge, Ontario. \$3,258— (150 shares at \$23 per share, worth \$1.28 per share)
Plaintiff's Loss	Timminco Limited— Dr. Heinz Schimmelbusch Robert Deitrich— René Boisvert— Photon Consulting LLC Rogol Energy Consulting LLC— Michael Rogol Arthur R. Spector Jack L. Messman John C. Fox Michael D. Winfield Mickey M. Yaksich John P. Walsh	Timminco Limited— Dr. Heinz Schimmelbusch Robert Deitrich — René Boisvert AMG Advanced Metallurgical Group N.V
Defendants	AMG Advanced Metallurgical Group N.V	
Other Possible Defendants		Photon Consulting LLC Rogol Energy Consulting LLC— Michael Rogol Arthur R. Spector Jack L. Messman John C. Fox Michael D. Winfield Mickey M. Yaksich John P. Walsh
Commencement Date	May 14, 2009	June 11, 2009
Nature of Claim	Negligence and negligent misrepresentation and liability under Part XXIII.1 of <i>Ontario's Securities Act</i> \$540 million plus \$20 million punitive damages	negligence and negligent misrepresentation and liability under Part XXIII.1 of <i>Ontario's Securities Act</i> \$700 million
Quantum		
Class Period	March 17, 2008 to November 11, 2008.	December 19, 2007 to April 20, 2009
Class Definition	All persons, other than the Excluded Persons, who acquired securities of Timminco during the Class Period	All persons, other than the Excluded Persons, who acquired securities of Timminco during the Class Period

The Nature of the Rival Causes of Action and the Theories of the Claims

62 From my reading the statement of claim and from the argument during the hearing of the motion, I understand the Kim Orr theory of the case to be as follows:

- Between March 17, 2008 and November 11, 2008 (the "Class Period), class members purchased shares in Timminco, and during this approximately 8-month period, the defendants made misrepresentations.
- The defendants legally responsible for the misrepresentations were: Timminco, a "responsible issuer" under s. 138.1 of the *Ontario Securities Act*; Schimmelbusch, the CEO of Timminco; Deitrich the CFO of Timminco; Boisvert, the CEO of the production subsidiary; Spector, Messman, Fox, Winfield, Yaksich, Walsh (the outside directors of Timminco); and Photon Consulting, Rogol Energy and Rogol, "experts" within the meaning of s. 138.1 of the *Ontario Securities Act*.
- The misrepresentations were about the revenues, production volume, margins, profits of Timminco and were to the affect that Timminco had a competitive advantage in the production of solar-grade silicon. These misrepresentations affected the market price of Timminco shares.
- The misrepresentations consisted of: (1) The March 17, 2008 Press Release; (2) The March 17, 2008 Conference Call with Schimmelbusch; (3) The 2007 Annual Information Form published on March 28, 2008; (4) The 2007 MD&A filings on

SEDAR, which were certified by Schimmelbusch and Dietrich published on March 28, 2008; (5) The 2007 Annual Report published on March 31, 2008, which was approved by the board of directors and certified by Schimmelbusch and Dietrich; (6) The Photon Report dated May 8, 2008; (7) 2008 First Quarter Results dated May 8, 2008, which was approved by the board of directors and certified by Schimmelbusch and Dietrich; (8) The May 8, 2008 Conference Call with Schimmelbusch and Boisvert; (9) The MD&A Q1 2008 published on May 13, 2008 which was certified by Schimmelbusch and Dietrich; (10) The May 13, 2008 Conference Call with Schimmelbusch and Rogol; and (11) The May 29, 2008 Conference Call with Schimmelbusch and Dietrich.

- On August 11, 2008 in a press release and a press conference with Schimmelbusch and Deitrich, Timminco partially corrected the misrepresentations, which caused a next day drop in its share price from \$19.97 to \$12.25.
- On November 11, 2008, when its shares were trading at \$7.93, Timminco removed the Photon Report from its website and made a corrective statement. By November 19, 2008, the share price had dropped to \$3.37. The share price continued to decline thereafter.
- Timminco and the other defendants breached their duty of care to the class members who purchased shares during the class period and are liable for negligence and negligent misrepresentation having caused the class members damages and loss.
- The plaintiff and the class will seek leave to assert the statutory causes of action under Part XXIII.1 of the *Ontario Securities Act*.

63 From my reading the statement of claim and from my hearing the argument during the hearing of the motion, I understand the Siskinds theory of the case to be as follows:

- Between December 19, 2007 and April 20, 2009, (the "Class Period), class members purchased shares in Timminco and during this approximately 16-month period, defendants associated with Timminco made misrepresentations giving rise to causes of action in negligence and negligent misrepresentation against them and during this period, AMG Advanced Metallurgical Group N.V also made misrepresentations giving rise to a distinct common law cause of action against it.
- The defendants legally responsible for the misrepresentations were: Timminco; Schimmelbusch, the CEO of Timminco; Deitrich, the CFO of Timminco; Boisvert, the CEO of the production subsidiary, and AMG Advanced Metallurgical Group N.V.
- The misrepresentations were about the cost, reliability, and efficacy of Timminco's process for producing solar grade silicon. Many other misrepresentations are alleged with respect to such statements as: whether Timminco had created a paradigm shift in the solar grade silicon market; whether Timminco was a specialist in the production of solar grade silicon; whether Timminco had the technological expertise to transition its business to capitalize on demand for solar grade silicon; whether Timminco's process was a breakthrough innovation; whether Timminco had resolved its production challenges in 2008 Q2; and whether Timminco had a prospect of becoming a leading supplier.
- The misrepresentations by Timminco that affected the price of Timminco shares during the class period consisted of: (1) The December 19, 2007 Press Releases; (2) the February 22, 2008 Press Release; (3) the March 17, 2008 Press Release; (4) the March 18, 2008 Earnings Conference Call with Schimmelbusch; (5) the March 26, 2008 Press Release; (6) the 2007 AIF filed with SEDAR on March 28, 2008; (7) The Fiscal 2007 Annual Report and MD&A 2007 Q4 filed with SEDAR on March 28, 2008; (8) the Form 52-109F1 Filings filed on March 28, 2008 certified by Schimmelbusch and Dietrich; (9) the May 8, 2008 Press Releases filed with SEDAR; (10) the May 8, 2008 Conference Call with Schimmelbusch; (11) the May 13, MD&A 2008 Q1 filed with SEDAR and certified by Schimmelbusch and Dietrich; (12) the May 14, 2008 Conference Call with Schimmelbusch, Dietrich, Boisvert and Rogol and the posting of the Photon Report on the Timminco website; (13) the MD&A 2008 Q2 filed on August 12, 2008; (14) the Investor Presentations of September 2008; (15) the November 11, 2008 Conference Call with Schimmelbusch; (16) the November 11, 2008 Press Release and withdrawal of the Photon Report; (17) The Quarterly Report 2008 Q2 filed on December 4, 2008; (18) the 2008 Q2 Form 52-109F2 Filings certified by Schimmelbusch and Dietrich on December 4, 2008; (19) the February 3, 2009 Offering Memorandum; (20) the March

17, 2009 Press Releases; (21) the March 27, 2009 Annual Report and AIF 2008; (22) the Form 52-109F1 Filings of March 27, 2009 certified by Schimmelbusch and Deitrich; and (23) the April 20, 2009 Press Release.

- During the class period, to attract investment in Timminco, AMG Advanced Metallurgical Group N.V, the parent company of Timminco, issued press releases containing misrepresentations.
- During the class period, AMG's misrepresentations that affected the price of Timminco shares consisted of: (1) the December 19, 2007 Press Release; (2) the February 22, 2008 Press Release; (3) the March 26, 2008 Press Release; (4) the May 8, 2008 Press Releases; and (5) the March 17, 2009 Press Releases.
- On August 11, 2008, Timminco disclosed flaws in its process for producing solar grade silicon and its share price fell from \$19.97 on August 11, 2008 to \$15.10 on August 14, 2009 (the next trading day).
- On November 11, 2008, Timminco removed the Photon Report from its website. Over the next 10 trading days the price of Timminco's shares fell from \$7.93 to \$3.10.
- On April 20, 2009, Timminco disclosed that certain customers had terminated their contracts due to non-compliance.
- Timminco, AMG Advanced Metallurgical Group N.V and the individual defendants are liable for negligence and negligent misrepresentation for having caused damage and loss to the class members.
- The plaintiff and the class will seek leave to assert the statutory causes of action under Part XXIII.1 of the *Ontario Securities Act*. If leave is granted actions will be brought against Spector, Messman, Fox, Winfield, Yaksich, Walsh (outside directors of Timminco); and Photon Consulting, Rogol Energy and Rogol, "experts" within the meaning of s. 138.1 of the *Ontario Securities Act*

64 Generally speaking, the Siskind statement of claim pleads both: (a) causes of action of joint liability against tortfeasors who are alleged to have made a diverse set of misrepresentations about Timminco and also (b) a distinct cause of action against AMG for similar misrepresentations although made on fewer occasions. The Siskind statement of claim starts the class period earlier and extends its longer. The Siskind theory seems to favour comprehensiveness over cohesiveness.

65 In its factum, Siskinds criticizes Kim Orr for its failure to join AMG and says that such a claim could succeed irrespective of whether AMG knowingly influenced the making of alleged misrepresentations by Timminco because AMG incorporated certain of the alleged misrepresentations into its own press releases.

66 In contrast, generally speaking, the Kim Orr statement of claim pleads causes of action of joint liability against tortfeasors who are alleged to have made a more discrete set of misrepresentations about Timminco. The Kim Orr theory of the case starts the class period later and ends it sooner. It is half as long as the Siskinds' class period. The Kim Orr theory seems to favour cohesiveness over comprehensiveness.

Analysis and Discussion - The Non-Critical or Neutral Factors

67 As mentioned above, the primary responsibility of the court on a carriage motion is to make a choice that is in the best interests of all class members, fair to the defendants, and consistent with the policy objectives of the *Class Proceedings Act, 1992*, and in making this choice, the court has developed a set of factors, not meant to be comprehensive, that will help it decide.

68 Also as mentioned above, in the particular circumstances of this case, there are several factors that I do not find helpful in coming to a decision. In the next parts of these Reasons, I will first discuss the factors that were not critical to this carriage motion and then turn to the two critical factors; namely: (1) the nature and scope of the causes of action advanced; (2) the theories advanced by counsel as being supportive of the claims advanced.

69 I begin the discussion of the non-critical factors by noting that neither firm has a disqualifying conflict of interest.

70 Next, given that both actions are very much the invention or discovery of the law firms, the number, size, and extent of involvement of the proposed representative plaintiffs (whom each firm enlisted after the idea of a class proceeding was developed) is not a meaningful factor.

71 Similarly, the relative priority of commencing the class actions does not influence my decision, because neither firm can be accused of expropriating the creativity or initiative of the other. Kim Orr was just a little faster out of the starting blocks.

72 In arriving at my decision, I regard the proposed involvement of Milberg LLP as a neutral or sterile factor. I begin discussing this point by saying that Milberg LLP does not bear the mark of Cain. A review of the transcript of the hearing for court approval of the Case Disposition Agreement reveals that Judge Walker grilled the United States Attorney about the propriety of the agreement but ultimately was satisfied that the attorneys who did not have any involvement in the criminal conduct should be allowed to continue to earn a living and serve the firm's class action clients. Mr. Spence and Professor Miller were not parties to any wrongdoing and have fine reputations and excellent credentials, and thus no more needs to be said about this aspect of the matter.

73 The involvement of Milberg LLP, however, does involve other issues, but, in my opinion, ultimately in the competition between Kim Orr and Siskinds for carriage, this involvement neither adds nor detracts in the court's decision calculus. Putting this point somewhat differently, in the case at bar, I regard Milberg LLP's involvement as not a reason to qualify Kim Orr to be class counsel and it is not a reason to disqualify Kim Orr.

74 What is significant is not that an American law firm would be involved in an Ontario class action but how that American law firm would be involved. While one can posit examples where the involvement of an American law firm would be grounds for disqualifying an Ontario firm seeking carriage of a proposed class proceeding, in my opinion, the case at bar is not one of those cases.

75 In my opinion, it would be grounds for disqualification of an Ontario law firm seeking carriage of an Ontario class proceeding if the Ontario firm entered into an arrangement where an American law firm, or any foreign law firm for that matter, assumed *de jure* or *de facto* the role of the lawyer of record for the representative plaintiff, unless the foreign law firm obtained permission to practice law in Ontario with a right of audience before the court. Further, it would be grounds for disqualification of the Ontario firm, if a foreign law firm in any other way usurped the role of the Ontario lawyer of record as the lawyer for the representative plaintiff and the class or if the foreign firm had a proprietary interest in the claims of the representative plaintiff and the class.

76 However, in the case at bar, I do not understand Milberg LLP's proposed involvement as usurping the role of Kim Orr, as negating the court's ability to manage and adjudicate the proceedings, or as asserting a propriety interest in the client's litigation.

77 I understand Ms Paris' evidence about the role of Milberg LLP as going no further than that Milberg LLP would provide Kim Orr with investigative services, document management service, and strategic advice based on Milberg LLP's experience in comparable American class actions. As I see it, the fact that Kim Orr will have these services available from an American law firm is not a reason to disqualify Kim Orr. It is also not a reason to choose Kim Orr as potential class counsel.

78 In my opinion, it would be grounds to disqualify an Ontario firm seeking carriage if it purported to partner with an American law firm so that the American firm had a proprietary interest in the Ontario law suit, because this would take the foreign firm's involvement into the territory of champerty and maintenance and impermissible fee splitting, but I do not understand this to be the case at bar.

79 At this juncture, it would appear that some of Milberg LLP's services might be chargeable as disbursements to be paid by the representative plaintiff and some of its services might be chargeable exclusively to Kim Orr, which would not be able to pass on the charges to the representative plaintiff no more than it could charge the class members for attendances at continuing legal education conferences.

80 During argument, Mr. Orr for Kim Orr pointed out that American law firms are frequently the instructing solicitors for the Canadian lawyers who are on the record for defendants in class proceedings and that the American firms provide services for the Canadian defendants that are similar to the services proposed to be provided by Milberg LLP to the plaintiffs in this class action. This may be true, but the situations are not comparable because the Canadian defendants have a pre-existing lawyer and client relationship with their American lawyers and there are no comparable problems of unauthorized practice of law in Ontario, of chumperty and maintenance, or of fee-splitting. That said, there is nothing inherently wrong with Ontario class counsel who are acting for plaintiffs in obtaining services from foreign law firms so long as there is no interference with or usurpation of the lawyer and client relationship between the Ontario lawyer of record and his or her clients.

81 Thus, based on my understanding of it, I regard Milberg LLP's involvement to be a neutral factor. Kim Orr's relationship with Milberg LLP does not give it a competitive advantage and tip the scale in a carriage dispute. Kim Orr's relationship with Milberg LLP does not tip the scale the other way either.

82 I also regard the retainer agreements in the case as a neutral factor. I have reviewed the agreements, and both firms have entered into contingency fee agreements. The financial terms of the Siskinds' agreement are more favourable to the class, but ultimately, it will be for the court to determine whether the fees charged by class counsel are fair and reasonable to the class. See *Lawrence v. Sutts, Strosberg LLP*, [2009] O.J. No. 4067 (Ont. C.A.), aff'g 2009 CanLII 55128 [2009 CarswellOnt 6172 (Ont. S.C.J.)].

83 In the circumstances of the case at bar, the resources and experience of counsel are also a neutral factor. To assist the court in making its choice, both Kim Orr and also Siskinds have put on a beauty pageant of evidence parading their past and present accomplishments in class action litigation. They both have considerable experience. They both have fine reputations. They both have been pioneers in the class action field. They both have produced authors and lecturers. They both have lawyers who have had admirable careers with notable cases. They both made admirable presentations during the argument of the carriage motion. They both are ambitious and energetic. Both firms have had successes, and based on the material presented to the court, apparently both have no reason to be humble.

84 From this understandably self-serving evidence, the most that I can conclude is that the best interests of the class members could be satisfied by choosing either firm to be class counsel. While Siskinds has more experience in the emerging area of Part XXIII.1 of the *Ontario Securities Act*, it does not have a monopoly, patent, or trade secret, and it appears that Kim Orr is up to speed and capable of providing a similar quality of service to the class.

85 In the circumstances of the case at bar, the state of each class action including preparation is another neutral factor. From the evidentiary record, it appears that both law firms began preparing and they undertook exploratory work when a class proceeding was just in their mind's eye. Both firms continued their work up until it was interrupted by this carriage dispute.

86 Because it was less guarded about revealing some of its work product to the court- and the defendants - Kim Orr presented this factor better, but I am not in a position to grade the quality of either firm's preparatory work, which will be better tested in the crucible of battle with the defendants. It does appear that both actions are ready to proceed and both are well advanced in their preparation.

87 This completes my discussion of the non-critical factors, and I turn now to the factors that will decide this carriage motion.

Analysis and Discussion - The Critical Factors

88 The determinative factors in this case are: (1) the nature and scope of the causes of action advanced; and (2) the theories advanced by counsel as being supportive of the claims advanced. These factors are connected and can be discussed together.

89 My discussion of these factors, however, must necessarily be circumspect and qualified. Nothing I say about the causes of action and the theories supporting them should be taken as affecting the rights of the defendants, whose lawyers, it may be noted, have a watching brief on these carriage motions and were in attendance.

90 On this motion, both law firms raised issues about the comparative merits and demerits of the pleadings, legal theories, and strategic battle plans of their rival. I am not to be taken as scolding them for this approach, but such an approach to a carriage motion puts the court in a difficult position because at this point in the respective proceedings, without hearing from the defendants, it is inappropriate and, practically speaking, not possible to say much about: (a) the substantive merits of the competing theories and their chances of success; (b) substantive legal weaknesses in the causes of action and theories advanced; (c) whether the court would certify either action as a class proceeding; and (d) whether the court would grant leave to bring actions under Part XXIII.1 of the *Ontario Securities Act*.

91 With these reservations and qualifications and strictly for the purposes of deciding this carriage motion, some opinion can nevertheless be expressed about the causes of action and supporting theories developed by the rival law firms. By way of overview, my opinion is that without prejudice to what the defendants may be able to demonstrate, both sides have shown tenable causes of action for negligence and negligent misrepresentation and the difference between the causes of action is that Siskinds develops a more comprehensive and more complex theory than the cohesive and more straightforward theory developed by Kim Orr.

92 My opinion is also that the joinder of AMG Advanced Metallurgical Group N.V. by Siskinds and the non-joinder of AMG by Kim Orr is not a reason to favour Siskinds' statement of claim and theory. Kim Orr was of the view that it was improper to join a person in order to probe for a sustainable cause of action against a party with deeper financial pockets. Siskinds was of the view that there was at the outset a sustainable cause of action in common law negligence against AMG. All I can say at this point is that they are both entitled to their opinions, and I cannot say at this point who is correct. In any event, I do not regard the non-joinder of AMG as a mistake, and if it is, then it may be a correctable one.

93 Moving on to more substantive matters, my opinion is that Siskinds' theory and the nature and scope of the causes of action it develops sets a higher and more challenging legal bar for the representative plaintiff and for the class to vault over. In my opinion, Siskinds' theory is more problematic than the Kim Orr theory with respect to such matters as class definition, commonality, and preferable procedure. I, however, do not say Siskinds' theory is wrong or not capable of success.

94 Siskinds' theory, with its substantially longer class period and broader class definition confronts challenges that do not confront the Kim Orr theory of the case. There are challenges with the front end of the extension of the class period, but the challenges are perhaps more profound in the extension of the class period to include purchasers of shares after Timminco made public announcements to correct the alleged misrepresentations. This extension of class membership differentiates class members between those who purchased their shares without any corrective information and those who purchased shares after Timminco had made public announcements withdrawing its mis-statements and this, in turn, creates difficult factual issues about the efficacy of the corrective announcement or announcements, which may further divide the class, and about the legal interpretation of certain sections of Part XXIII.1 of the *Ontario Securities Act*. Notwithstanding Siskinds' arguments to the contrary, I do not see these extensions as being helpful to the case to be made for the class members who purchased shares before corrective announcements were made.

95 Siskinds submits that its approach to the class action is preferable because with a larger class definition more purchasers of Timminco will have access to justice. Speaking generally, this type of argument may not be helpful for resolving a carriage motion. If class actions are the mass transit to access to justice, sometimes it is not doing justice to push more passengers onboard the subway train. I wish to be clear, I am not saying that Siskinds' class definition is wrong, nor am I saying that Kim Orr's definition is correct in that it is neither over nor under-inclusive. All I am saying is that an argument about potential class size may not be helpful to resolve a carriage dispute, and I do not find the argument helpful in the case at bar.

96 Noting that it was a very tough decision to make, my overall conclusion is that having regard to: (a) the factors of the nature and scope of the causes of action advanced; (b) the theories advanced in support of those causes of action; (c) the best interests of all class members; (d) to what is fair to the defendants, and (e) what is consistent with the policy objectives of the *Class Proceedings Act, 1992*, Kim Orr should be granted carriage.

Conclusion

97 Accordingly, I dismiss the Siskinds carriage motion and I stay the *Gowan* action. I order that no other actions may be commenced in respect of Timminco securities purchased during the class period proposed in the *Sharma* action.

98 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Kim Orr within 20 days of the release of these Reasons for Decision to be followed by Siskinds within a further 20 days.

TAB 27

2012 ONSC 5288
Ontario Superior Court of Justice

Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.

2012 CarswellOnt 11520, 2012 ONSC 5288, [2012] O.J. No. 4389,
112 O.R. (3d) 569, 220 A.C.W.S. (3d) 275, 41 C.P.C. (7th) 375

The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund and Brent Gray, Plaintiffs and SNC-Lavalin Group Inc., Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, Lawrence N. Stevenson, Gilles Laramée, Michael Novak, Pierre Duhaime, Riadh Ben Aissa and Stéphane Roy, Defendants

Perell J.

Heard: September 19, 2012
Judgment: September 19, 2012
Docket: CV-12-453236-00CP

Counsel: Joel Rochon, Peter Jervis, John Archibald, for Brent Gray

A. Dimitri Lascaris, Charles M. Wright, for The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund

Steven Sofer, for Pierre Duhaime

Patricia D.S. Jackson, Andrew Finkelstein, for Michael Novak

Clifford C. Lax, Paul Fruitman, for Gilles Laramée

James Hodgson, Steve Tenai, for SNC-Lavalin Group Inc., Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, Lawrence N. Stevenson, and Pierre Duhaime

Subject: Corporate and Commercial; Securities; Civil Practice and Procedure

MOTION by plaintiffs for leave to bring action under Part XXIII.1 of Ontario *Securities Act*, for approval of discontinuance of their other claims, and for certification as class proceeding.

Perell J.:

A. Introduction

1 This is a proposed class action under the *Class Proceedings Act*, 1992, S.O. 1992, c. C.6 for damages for alleged misrepresentations that affected the market value of the shares of SNC-Lavalin Group Inc. ("SNC"), which shares were traded on the Toronto Stock Exchange, among other exchanges. The Plaintiffs are Brent Gray and The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (the "Trustees"). The Plaintiffs advance a common law negligent misrepresentation claim, an oppression remedy claim, and, most importantly, a claim under Part XXIII.1 of the Ontario *Securities Act*, R.S.O. 1990, c S.5, (and the analogous provisions of the securities legislation of the other Canadian provinces and territories) for breach of the continuous disclosure provisions of the Act.

2 The Defendants are SNC, Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, Lawrence N. Stevenson, Gilles Laramée, Michael Novak, Pierre Duhaime, Riadh Ben Aïssa, and Stéphane Roy.

3 The motion now before the court is an unopposed motion for: (1) leave under Part XXIII.1 of the Ontario *Securities Act*; (2) approval of the discontinuance of the Plaintiffs' common law negligence and oppression claims; and (3) certification of the action as a class proceeding.

4 In order for leave to be granted under Part XXIII.1, the Plaintiffs must demonstrate that the action is brought in good faith and that there is a reasonable possibility that the action will be resolved at trial in their favour: *Silver v. Imax Corp.*, [2009] O.J. No. 5573 (Ont. S.C.J.); *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932 (Ont. S.C.J.); *Green v. Canadian Imperial Bank of Commerce*, [2012] O.J. No. 3072 (Ont. S.C.J.).

5 In order for the court to approve the discontinuance of the Plaintiffs' common law negligence and oppression claims, the Plaintiffs must demonstrate that the interests of the class will not be prejudiced: *Durling v. Sunrise Propane Energy Group Inc.*, [2009] O.J. No. 5969 (Ont. S.C.J.) at paras. 14-29; *Sollen v. Pfizer Canada Inc.*, [2008] O.J. No. 4787 (Ont. C.A.), aff'd [2008] O.J. No. 866 (Ont. S.C.J.); *Coleman v. Bayer Inc.*, [2004] O.J. No. 1974 (Ont. S.C.J.) at paras. 30-39; *Coleman v. Bayer Inc.*, [2004] O.J. No. 2775 (Ont. S.C.J.); *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (Ont. S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (Ont. C.A.).

6 In order for the court to certify the action as a class proceeding, the Plaintiffs must satisfy the criterion for certification set out in s. 5 (1) of the *Class Proceedings Act, 1992*.

B. Factual Background

7 The following findings of fact are made only for the purposes of the motions before the court and not meant to raise issue estoppels. The genuine merits of the Plaintiffs' claims and the respective Defendants' defences remain to be determined.

8 Brent Gray, is a resident of British Columbia. He purchased 600 shares of SNC between November 6, 2009 and February 27, 2012. Mr. Gray purchased those shares through 0793094 B.C. Ltd., a British Columbia corporation he owns with his wife. It is proposed that Mr. Gray will be removed and replaced by 0793094 B.C. Ltd. as a representative plaintiff.

9 The Drywall Acoustic Lathing and Insulation Local 675 Pension Fund is a multi-employer pension plan with 4,236 active members, 7,781 inactive members, 1,132 pensioners and 42 deferred members. The Trustees purchased 17,350 shares of SNC between November 6, 2009 and February 27, 2012 on the Toronto Stock Exchange and continued to hold some of those shares on February 27, 2012.

10 SNC is a Canadian-based engineering and construction company with global operations. It is organized and continued under the *Canada Business Corporations Act*, R.S.C. 1985, c C-44. SNC is a "reporting issuer" in Ontario and in all other provinces of Canada. Its shares trade on the Toronto Stock Exchange among other exchanges. SNC is a reporting issuer in Ontario, and it is required to make disclosure in accordance with the Continuous Disclosure Obligations of the Ontario *Securities Act*.

11 Ian A. Bourne, David Goldman, Patricia A. Hammick, Pierre H. Lessard, Edythe A. Marcoux, Lorna R. Marsden, Claude Mongeau, Gwyn Morgan, Michael D. Parker, Hugh D. Segal, and Lawrence N. Stevenson were directors of SNC between November 6, 2009 and February 27, 2012.

12 Gilles Laramée is, and was between November 6, 2009 and February 27, 2012, an Executive Vice-President and the Chief Financial Officer of SNC.

13 Michael Novak is, and was between November 6, 2009 and February 27, 2012, an Executive Vice-President of SNC, and the Chairman of SNC-Lavalin International Inc., a wholly-owned subsidiary of SNC.

14 Pierre Duhaime was between November 6, 2009 and February 27, 2012, the Chief Executive Officer and a director of SNC. He resigned from those positions effective March 26, 2012.

15 Mr. Ben Aïssa was between November 6, 2009 and February 27, 2012 and until February 9, 2012, an Executive Vice-President of SNC. During that time, he was a members of SNC's "Office of the President", which SNC described as its "senior decision-making management group".

16 Stéphane Roy was between November 6, 2009 and February 27, 2012 and until February 9, 2012, a Vice-President Controller of SNC. He resigned from SNC on February 9, 2012.

17 On February 9, 2012, SNC announced that Mr. Ben Aïssa and Mr. Roy were no longer employees of SNC.

18 On February 28, 2012, SNC announced that its Audit Committee was investigating \$35 million of payments made on certain construction projects.

19 One month later, the Audit Committee reported that between November 6, 2009 and February 27, 2012, SNC had paid "agents" US\$56 million. The payments violated SNC's internal policies, including its Policy on Commercial Agents/ Representatives and Code of Ethics and Business Conduct. The Audit Committee concluded that there had been numerous breaches of the Agents Policy, which sets out the rules governing the hiring and remuneration of commercial agents or representatives by SNC, and the Code, which is designed to ensure that SNC's business is conducted in an ethical and lawful manner. The report of the SNC Audit Committee indicated that Messrs. Laramée, Duhaime, Ben Aïssa, and Roy had direct knowledge of, or involvement in the matters investigated

20 The Interim CEO and the CFO concluded that the Company's disclosure controls and procedures, as at December 31, 2011, were not effective to provide reasonable assurance that the CEO and CFO were advised about material information, particularly during the preparation of Company's filings under securities legislation. The Interim CEO and CFO also concluded that the controls over compliance with the Code of Ethics and the Agents Policy were ineffective. And they concluded that the Company's internal control over financial reporting, as at December 31, 2011, was not effective to provide reasonable assurance regarding the reliability of the Company's financial reporting and the preparation of its financial statements for external purposes in accordance with applicable accounting principles.

21 As a result of the improper payments that were uncovered in the course of the Audit Committee investigation, SNC recognized a net loss of \$35 million in the fourth quarter of 2011 related to payments made in that quarter, and SNC's 2010 results were adjusted by reducing net income by \$17.9 million to reflect the impact of payments of \$20 million made in 2010.

22 On March 1, 2012, a proposed class action was commenced in the Québec Superior Court against all of the Defendants except Novak.

23 On May 9, 2012, Mr. Gray, commenced a proposed class action in Toronto. The same day, the Trustees commenced a proposed class action in Brampton. The Plaintiffs agreed to cooperate and bring a single action. Their proposed class in the Ontario proceeding carves out the proposed class of the Québec Action.

24 In their proposed class action, the Plaintiffs allege that disclosure documents issued by SNC between November 6, 2009 and February 27, 2012 contained misrepresentations relating to, among other things: (a) the adequacy of SNC's internal controls; (b) the compliance of certain of SNC's financial statements with generally accepted accounting principles; and (c) the compliance of members of SNC's management with the Code. The Plaintiffs allege that, during the Class Period, SNC released annual and interim financial statements and accompanying MD&A, AIFs and management information circulars (all of which are "core documents" under Part XXIII.1 of the Ontario *Securities Act*) that contained misrepresentations.

25 In particular, it is alleged that: (a) SNC's representation that it had ICFR and DC&P that were properly designed and/or operating effectively was materially false and/or misleading; (b) SNC's representation that its business was conducted in compliance with the Code was materially false and/or misleading; (c) SNC's representation that its "controls, policies and practices are designed to ensure internal and external compliance with" anti-bribery laws was materially false and/or misleading; (d) SNC's representation that it was a "responsible global citizen" and a "socially responsible company" was materially false

and/or misleading; and (e) SNC's 2010 annual and interim financial statements and 2011 interim financial statements were materially false and/or misleading in that they did not comply with GAAP and were materially misstated due to the failure to disclose SNC's illegal acts.

26 The Plaintiffs allege that these practices and activities were systemic at SNC and were carried out with the full knowledge of senior management, including members of the Office of the President, as well as SNC's inside directors.

27 With respect to Messrs. Laramée and Duhaime, the Plaintiffs allege that certifications given during the Class Period by them of SNC's annual and quarterly MD&As and financial statements and AIFs, including that such documents did not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, themselves contained misrepresentations.

28 The Plaintiffs allege that the truth was revealed on February 28, 2012, when SNC announced the Audit Committee investigation into the improper contracts, which resulted in the market price of SNC's shares collapsing from \$48.37 to \$37.40 on the TSX (or approximately 23%) during trading on February 28 and 29, 2012.

29 The Plaintiffs allege that there was a further decline in the market value of SNC's securities during trading on June 25, 2012 as a result of the release of further corrective information that two former employees of SNC had been charged with criminal offences under the *Corruption of Foreign Public Officials Act*, SC 1998, c 34 relating to activities in Bangladesh. As a result, the market price of SNC's on the TSX fell from \$38.56 to \$37.48 during trading on June 25, 2012.

30 The Plaintiffs seek damages of \$1 billion on behalf of the class. On the issue of damages, Professor Douglas Cumming estimates that the aggregate damages of the class are in the range of \$700 million to \$1.1 billion as a result of the misrepresentations.

31 In June 2012, the Plaintiffs served a motion for leave and for certification.

32 The Defendants, Ben Aïssa and Roy, have ignored the proceeding to date. On June 25, 2012 [*Gray v. SNC-Lavalin Group Inc.*, 2012 CarswellOnt 8056 (Ont. S.C.J.)], I granted an Order for substituted service on them of the pleadings and any motion materials through lawyers retained by them in respect of criminal and employment matters. The pleadings and all materials in respect of this motion for leave and certification have been served on them in accordance with this Court's substituted service Order. The motion is proceeding against them as an unopposed motion for leave and certification.

33 As a result of arm's length, adversarial negotiations between counsel for the Plaintiffs and all of the Defendants, except Mr. Ben Aïssa and Mr. Roy, an agreement was reached to resolve the leave motion on terms that: (1) the Defendants will not oppose leave being granted under Part XXIII.1 of the Ontario *Securities Act*; (2) the Plaintiffs will discontinue, with prejudice, the common law and oppression claims; and (3) Defendants will not oppose certification of the action as a class proceeding. The same agreement was reached with respect to the Québec Action.

34 As part of the agreement as to the resolution of the leave and certification motions, the Defendants, except Mr. Ben Aïssa and Mr. Roy, have agreed to pay the costs associated with disseminating the notice of certification and receiving any opt outs from class members, which are estimated to be approximately \$150,000.

35 The Defendants, except Mr. Ben Aïssa and Mr. Roy, have also agreed to pay to the Plaintiffs the sum of \$98,348.89 by way of reimbursement for the fees paid to Ken Froese and Professor Douglas Cumming, who swore affidavits in support of the Plaintiffs' leave and certification motions.

36 In support of their motion for leave and for certification, the Plaintiffs rely in part upon the published findings and conclusions of SNC's Audit Committee, as described above. The Plaintiffs have also filed the opinions of Mr. Froese, an accounting expert, and Professor Douglas Cumming, a financial economist, who offered an opinion as to market efficiency, inflation and class damages.

37 In their affidavit evidence, the Plaintiffs stated that they commenced this action to recover compensation in relation to their purchases of SNC shares during the Class Period, as well as to ensure that the Defendants are held accountable for their behaviour and to deter similar conduct by others. They also stated in their evidence that they have no ulterior motive, nor any improper or collateral purpose in commencing this action.

38 The evidence of Mr. Froese is that: (a) SNC's alleged illegal acts were material to SNC's financial statements for the year ended December 31, 2010, such that SNC's financial statements for the year ended December 31, 2010 did not comply with GAAP and were materially misstated; (b) SNC's quarterly financial statements for the applicable quarters in 2010 did not comply with GAAP and were materially misstated due to the failure to disclose the alleged illegal acts; (c) SNC's alleged illegal acts were material to SNC's financial statements in each of the first three quarters in 2011, such that SNC's financial statements for the quarters ended March 31, June 30 and September 30, 2011 did not comply with GAAP and were materially misstated due to the failure to disclose the alleged illegal acts; (d) it is reasonable to conclude that the material weaknesses in ICFR disclosed by SNC in March 2012 were present throughout the period from November 2009 to February 27, 2012; (e) it is reasonable to conclude that weaknesses in SNC's DC&P present in fiscal 2011 were present throughout the period from November 2009 to February 27, 2012; (f) Mr. Laramée had professional responsibilities as a Chartered Accountant that included advising SNC's external auditors and/or Audit Committee or Board of Directors of the presumed agency transactions when he became aware of them and prior to issuing quarterly and annual financial statements in 2010 and 2011 containing the presumed agency transactions; and (g) it is likely that Messrs. Ben Aïssa, Novak, and Roy played a role in the certifications related to the compilation of SNC's financial statements, MD&As and/ or AIFs issued during the Class Period.

39 If leave and certification are granted, it is proposed that a single notice, approved by both this Court and the Québec Superior Court, will be issued to notify class members of the granting of leave and certification in the Ontario proceeding, and the granting of leave and authorization in the Québec proceeding, among other matters.

C. Discussion

Leave under Part XXIII.1 of the Ontario Securities Act

40 With respect to the test for leave to assert an action under Part XXIII.1 of the *Ontario, Securities Act*, in order to demonstrate good faith, the Plaintiffs must "establish that they are bringing their action in the honest belief that they have an arguable claim, and for reasons that are consistent with the purpose of the statutory cause of action and not for an oblique or collateral purpose." Based on the above evidence, I am satisfied that the Plaintiffs bring their action in good faith.

41 With respect to the test for leave, the questions with respect to the Impugned Documents are: (a) whether there is "something more than a *de minimis* possibility or chance" that the Plaintiffs will show, at trial, that SNC "release[d] a document that contains a misrepresentation"; (b) that the directors, Bourne, Goldman, Hammick, Lessard, Marcoux, Marsden, Mongeau, Morgan, Parker, Segal, Stevenson and Duhaime, were directors when such documents were released; and (c) that the officers, Laramée, Novak, Ben Aïssa and Roy, "authorized, permitted or acquiesced in the release of the document".

42 The Defendants have tendered no evidence that could establish the due diligence defence under Part XXIII.1, which requires a defendant to "prove" that they "conducted or caused to be conducted a reasonable investigation" and that they "had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation."

43 Based on the above facts, I am satisfied that the Plaintiffs have satisfied the test for leave under Part XXIII.1 of the *Ontario Securities Act*.

D. Discontinuance

44 As noted above, the Plaintiffs propose to discontinue their claims for an oppression remedy and for damages for common law negligence.

45 Under s. 29 of the *Class Proceedings Act, 1992*, a plaintiff may not discontinue a claim in a proposed class action without leave of the court. The main question for the court in granting or refusing leave is whether the class members would be prejudiced by the discontinuance.

46 Plaintiffs' Counsel consider that it is in the best interests of the putative class members to agree to unopposed leave and certification of the Part XXIII.1 for the following reasons: (a) the certainty of leave and certification; (b) the expediting of the litigation, which enhances the Plaintiffs' ability to litigate the case while the relevant evidence is relatively fresh, and which will hasten the recovery of compensation by the class members; (c) concerns about the ability of SNC to pay damages in the amount specified by Professor Cumming, especially if SNC's financial situation worsens as a result of issues related or unrelated to this litigation; (d) the potential issues with the recovery of damages in respect of the oppression and common law claims; and (e) certainty in resolving any limitations issues.

47 Plaintiffs' Counsel have considered whether the proposed agreement for an unopposed granting of leave and certification of the statutory claim is in the best interests of class members, notwithstanding that this could potentially limit class members' recovery. They submit that the agreed framework for the resolution of leave and certification is in the best interests of the proposed class. Class counsel recommend the agreed framework for approval. The Plaintiffs believe that the agreement is in the interests of all putative class members.

48 In my opinion, from the perspective of establishing liability, there is no particular prejudice to the Plaintiffs in abandoning the oppression remedy and the common law negligence claim. Practically speaking, the common law negligence claim and the oppression remedy claims present disadvantages or more difficulties to the Plaintiffs than do the statutory claims under Part XXIII.1 of the Ontario *Securities Act*. For example, reliance is an element of the common law negligence claim and this element may make it more difficult to have the claim certified as a class action. Reliance is not an element of the statutory claim.

49 The main disadvantage of the claim under Part XXIII.1 of the Ontario *Securities Act* is that the damages may be limited or capped below what might be available under the common law. Section 138.7 of the *OSA* states:

- (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,
 - (a) the aggregate damages assessed against the person or company in the action; and
 - (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.
- (2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

Thus, the Part XXIII.1 liability limit always applies to the issuer, even in cases of fraud, whereas the liability limit of the issuer's directors and officers does not apply if they knew that the impugned disclosure document contained a misrepresentation.

50 It is unclear, however, if the class members would be giving up much in the way of recoverable damages by forgoing their common law claims. Although the aggregate damages estimated by Professor Cumming might exceed liability limits, there is uncertainty as to whether damages in that higher amount could be proven if the Plaintiffs asserted common law and oppression claims. Put simply, the calculation of damages caused by misrepresentations that influence the value of shares trading in a public market is highly contentious. Moreover, for the common law claims, if class members are required to show individual

reliance, aggregate damages would be reduced to the extent that class members failed to proffer sufficient evidence of their detrimental reliance.

51 With respect to the oppression claim, the jurisprudence is undeveloped and there is uncertainty as to whether or not the court would certify an oppression claim in these circumstances. With respect to the common law negligent misrepresentation claim, the jurisprudence is divided on whether this claim is amenable to certification. Given the state of the relevant jurisprudence, there is little question that any decision certifying these claims would be appealed.

52 In the case at bar, the Plaintiffs submit that the class members would not be prejudiced by the abandonment of the uncapped common law and oppression remedy claims and it is in the class member's best interest to pursue the statutory claim in circumstances where the Defendants have agreed not to oppose leave and not to oppose certification of the action under the *Class Proceedings Act, 1992*.

53 Speaking metaphorically, I agree that in the circumstances of this case, a cause of action in the hand is worth far more than two appealable causes of action in the bush. Accordingly, I grant leave to discontinue.

E. Certification

54 Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

55 The only claim asserted by the Plaintiffs is a statutory claim under Part XXIII.1 of the Ontario *Securities Act* and, if necessary, the equivalent provisions of the securities legislation of the other Canadian provinces and territories. The Plaintiffs have properly pleaded a cause of action under those statutory provisions.

56 There is an identifiable class, all of whose members have an interest in the resolution of the proposed common issues. The proposed class is defined as:

all persons, wherever they may reside or be domiciled, who acquired securities of SNC during the Class Period, except for: (1) the Excluded Persons; and (2) those persons resident or domiciled in the Province of Québec at the time they acquired SNC securities during the Class Period, and who are not precluded from participating in a class action by virtue of Article 999 of the Québec *Code of Civil Procedure*, RSQ, c C-25.

57 Other than the exclusion of Québec residents, the proposed class has no territorial limitation. The Plaintiffs seek to certify a "global class". Global classes that include all persons no matter where they live that otherwise meet the class definition have been certified in similar situations. See: *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (Ont. S.C.J.) at paras. 129 and 164; *Pysznyj v. Orsu Metals Corp.*, [2010] O.J. No. 1994 (Ont. S.C.J.) at paras. 4 and 13-19; *Dobbie v. Arctic Glacier Income Fund*, [2011] O.J. No. 932 (Ont. S.C.J.) at paras 198-208.

58 In this case, approximately 67% of the trading volume in SNC shares during the Class Period was over the Toronto Stock Exchange, which is located in Ontario, and approximately 99.5% of the trading volume during the Class Period was over the Toronto Stock Exchange and other Ontario-based alternative trading platforms. In light of the very high proportion of trading that occurred over Ontario-based trading venues, and the fact that SNC is a reporting issuer in Ontario and, as such, filed the Impugned Documents with the Ontario Securities Commission, it is appropriate to certify a global class in this case.

59 The proposed common issues are as follows:

Statutory Secondary Market Liability — Impugned Documents

- (a) Did the Impugned Documents contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?
- (b) If the answer to (a) is yes, then when and by what means were the misrepresentations contained in the Impugned Documents publicly corrected?
- (c) If the answer to (a) is yes:
 - (i) did the defendants Gilles Laramée ("Laramée"), Michael Novak ("Novak"), Pierre Duhaime ("Duhaime"), Riadh Ben Aïssa ("Ben Aïssa") and Stéphane Roy ("Roy"), or any of them, authorize, permit or acquiesce in the release of the Impugned Documents which contained one or more misrepresentations?
 - (ii) did Duhaime, Laramée, Ben Aïssa and Roy actually know that the Impugned Documents contained misrepresentations at the time such documents were released?
 - (iii) if any of Duhaime, Laramée, Ben Aïssa and Roy did not actually know that the Impugned Documents contained misrepresentations at the time such documents were released, then does recklessness or willful blindness with respect to the misrepresentations suffice for purposes of the knowledge requirement of s. 138.7(2) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?
 - (iv) if the answer to clause (iii) above is yes, were Duhaime, Laramée, Ben Aïssa and Roy, or any of them, reckless or wilfully blind as to the existence of the misrepresentations in the Impugned Documents at the time such documents were released?

Statutory Secondary Market Liability — Certifications

- (d) Did the Certifications contain a misrepresentation within the meaning of the OSA (or the relevant provisions of the securities legislation of each other Canadian province or territory) as pleaded in the Fresh as Amended Consolidated Statement of Claim?
- (e) If the answer to d) is yes, then when and by what means was the misrepresentation contained in the Certifications publicly corrected?
- (f) If the answer to (d) is yes:
 - (i) did Duhaime and Laramée, or either of them, authorize, permit or acquiesce in the release of the Certifications which contained a misrepresentation?
 - (ii) if the answer to clause (i) above is yes, with respect to Duhaime and Laramée:
 - (1) did they actually know that the Certifications contained the misrepresentation at the time such documents were released?
 - (2) at or before the time the Certifications were released, did they deliberately avoid acquiring knowledge that the Certifications contained the misrepresentation? or
 - (3) were they, through action or failure to act, guilty of gross misconduct in connection with the release of the Certifications?
 - (iii) if the answer to clause (i) above is yes, and if either of Duhaime or Laramée did not actually know that the Certifications contained the misrepresentation at the time such documents were released, then does recklessness or

willful blindness with respect to the misrepresentation suffice for purposes of the knowledge requirement of s. 138.7(2) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(iv) if the answer to clauses (i) and (iii) above is yes, was either of Duhaime or Laramée reckless or wilfully blind as to the existence of the misrepresentation in the Certifications at the time such documents were released?

Due Diligence

(g) If the answer to (a) or (d) is yes:

(i) before the release of the Impugned Documents and Certifications, as the case may be, did the applicable Defendant conduct or cause to be conducted a "reasonable investigation" in accordance with s. 138.4(6) of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

(ii) at the time of the release of the Impugned Documents and Certifications, as the case may be, did the applicable Defendant have no reasonable grounds to believe that the documents contained the misrepresentations?

Assessment of Damages

(h) If the answer to (a) or (d) is yes, did the Class Members suffer damages caused by the misrepresentations and, if so, on what basis are the damages suffered by Class Members to be determined?

(i) For purposes of s. 138.5 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory), what amount, if any, of the change in the market price of SNC's securities after the corrective disclosure and during the 10 trading days thereafter was unrelated to the alleged misrepresentations?

(j) What are the applicable limits on damages, if any, for each Defendant under s. 138.7 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

Proportionate Liability

(k) If the answer to (a) or (d) is yes, for each applicable Defendant found liable, what is that defendant's respective responsibility for assessed damages pursuant to s. 138.6 of the OSA (and the relevant provisions of the securities legislation of each other Canadian province or territory)?

Administration Costs

(l) Should the Defendants pay any of the costs of administering and distributing the recovery? If so, which Defendants should pay, and how much should each such Defendant pay?

60 I am satisfied that the common issues, preferable procedure, and representative plaintiff criteria are satisfied in the circumstances of this case.

61 In my opinion, the requirements of the *Class Proceedings Act, 1992* have been met.

62 Accordingly, I grant the Plaintiffs' motion.

Motion granted.

TAB 28

2003 SCC 63
Supreme Court of Canada

Toronto (City) v. C.U.P.E., Local 79

2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 SCC 63, [2003] 3 S.C.R. 77, [2003] S.C.J. No. 64, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 31 C.C.E.L. (3d) 216, 59 W.C.B. (2d) 334, 9 Admin. L.R. (4th) 161, J.E. 2003-2108, REJB 2003-49439

Canadian Union of Public Employees, Local 79, Appellant v. City of Toronto and Douglas C. Stanley, Respondents and Attorney General of Ontario, Intervener

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: February 13, 2003
Judgment: November 6, 2003 *
Docket: 28840

Proceedings: affirming (2001), 45 C.R. (5th) 354, 37 Admin. L.R. (3d) 40 (Ont. C.A.); affirming (2000), 23 Admin. L.R. (3d) 72 (Ont. Div. Ct.)

Counsel: Douglas J. Wray and Harold F. Caley for appellant
Jason Hanson, Mahmud Jamal and Kari M. Abrams for respondent City of Toronto
No one for respondent Douglas C. Stanley
Sean Kearney, Mary Gersh and Meredith Brown for intervener Attorney General of Ontario

Subject: Labour; Criminal; Civil Practice and Procedure; Public; Evidence

APPEAL by union from judgment reported at 2001 CarswellOnt 2760, 45 C.R. (5th) 354, (sub nom. *Toronto (City) v. Canadian Union of Public Employees, Local 79*) 55 O.R. (3d) 541, 149 O.A.C. 213, 205 D.L.R. (4th) 280, (sub nom. *City of Toronto v. Canadian Union of Public Employees, Local 79*) 2002 C.L.L.C. 220-014, 37 Admin. L.R. (3d) 40 (Ont. C.A.), dismissing union's appeal from judgment granting employer's application for judicial review of decision of labour arbitrator, reported at 2000 CarswellOnt 1477, [2000] O.J. No. 1570, 2000 C.L.L.C. 220-038, 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72, 134 O.A.C. 48 (Ont. Div. Ct.).

POURVOI du syndicat à l'encontre de l'arrêt publié à 2001 CarswellOnt 2760, 45 C.R. (5th) 354, (sub nom. *Toronto (City) v. Canadian Union of Public Employees, Local 79*) 55 O.R. (3d) 541, 149 O.A.C. 213, 205 D.L.R. (4th) 280, (sub nom. *City of Toronto v. Canadian Union of Public Employees, Local 79*) 2002 C.L.L.C. 220-014, 37 Admin. L.R. (3d) 40 (Ont. C.A.), qui a rejeté son pourvoi à l'encontre du jugement ayant accueilli la demande de contrôle judiciaire présentée par l'employeur contre la décision rendue par l'arbitre de grief, publié à 2000 CarswellOnt 1477, [2000] O.J. No. 1570, 2000 C.L.L.C. 220-038, 187 D.L.R. (4th) 323, 23 Admin. L.R. (3d) 72, 134 O.A.C. 48 (Ont. Div. Ct.).

Arbour J. (McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie JJ. concurring):

I. Introduction

1 Can a person convicted of sexual assault, and dismissed from his employment as a result, be reinstated by a labour arbitrator who concludes, on the evidence before him, that the sexual assault did not take place? This is essentially the issue raised in this appeal.

2 Like the Court of Appeal for Ontario and the Divisional Court, I have come to the conclusion that the arbitrator may not revisit the criminal conviction. Although my reasons differ somewhat from those of the courts below, I would dismiss the appeal.

II. Facts

3 Glenn Oliver worked as a recreation instructor for the respondent City of Toronto. He was charged with sexually assaulting a boy under his supervision. He pleaded not guilty. At trial before a judge alone, he testified and was cross-examined. He called several defence witnesses, including character witnesses. The trial judge found that the complainant was credible and that Oliver was not. He entered a conviction, which was later affirmed on appeal. He sentenced Oliver to 15 months in jail, followed by one year of probation.

4 The respondent City of Toronto fired Oliver a few days after his conviction, and Oliver grieved his dismissal. At the hearing, the City of Toronto submitted the boy's testimony from the criminal trial and the notes of Oliver's supervisor, who had spoken to the boy at the time. The City did not call the boy to testify. Oliver again testified on his own behalf and claimed that he had never sexually assaulted the boy.

5 The arbitrator ruled that the criminal conviction was admissible as *prima facie*, but not conclusive, evidence that Oliver had sexually assaulted the boy. No evidence of fraud nor any fresh evidence unavailable at trial was introduced in the arbitration. The arbitrator held that the presumption raised by the criminal conviction had been rebutted and that Oliver had been dismissed without just cause.

III. Procedural History

A. Superior Court of Justice (Divisional Court) (2000), 187 D.L.R. (4th) 323

6 At Divisional Court the application for judicial review was granted and the decision of the arbitrator was quashed. The Divisional Court heard this case and *Ontario v. O.P.S.E.U.* at the same time. (*Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), is being released concurrently by this Court.) O'Driscoll J. found that while s. 22.1 of the *Evidence Act*, R.S.O. 1990, c. E.23, applied to all the arbitrations, relitigation of the cases was barred by the doctrines of collateral attack, issue estoppel and abuse of process. The court noted that criminal convictions are valid judgments that cannot be collaterally attacked at a later arbitration (paras. 74-79). With respect to issue estoppel, under which an issue decided against a party is protected from collateral attack barring decisive new evidence or a showing of fraud, the court found that relitigation was also prevented, rejecting the appellants' argument that there had been no privity because the union, and not the grievor, had filed the grievance. The court also held that the doctrine of abuse of process, which denies a collateral attack upon a final decision of another court where the party had "a full opportunity of contesting the decision," applied (paras. 81 and 90). Finally, O'Driscoll J. found that whether the standard of review was correctness or patent unreasonableness in each case, the standard for judicial review had been met (para. 86).

B. Court of Appeal for Ontario (2001), 55 O.R. (3d) 541

7 Doherty J.A., for the court, held that because the crux of the issue was whether the Canadian Union of Public Employees (CUPE or the union) was permitted to relitigate the issue decided in the criminal trial, and because this analysis "turned on [the arbitrator's] understanding of the common law rules and principles governing relitigation of issues finally decided in a previous judicial proceeding," the appropriate standard of review was correctness (paras. 22 and 38).

8 Doherty J.A. concluded that issue estoppel did not apply. Even if the union was the employee's privy, the respondent City of Toronto had played no role in the criminal proceeding and had no relationship to the Crown. He also found that describing the appellant union's attempt to relitigate the employee's culpability as a collateral attack on the order of the court did not assist in determining whether relitigation could be permitted. Commenting that the phrase "abuse of process" was perhaps best limited to describe those cases where the plaintiff has instigated litigation for some improper purpose, Doherty J.A. went on to consider what he called "the finality principle" in considerable depth.

9 Doherty J.A. dismissed the appeal on the basis of this principle. He held that the *res judicata* jurisprudence required a court to balance the importance of finality, which reduces uncertainty and inconsistency in results and which serves to conserve the resources of both the parties and the judiciary, with the "search for justice in each individual case" (para. 94). Doherty J.A. held that the following approach should be taken when weighing finality claims against an individual litigant's claim to access to justice:

- Does the *res judicata* doctrine apply?
- If the doctrine applies, can the party against whom it applies demonstrate that the justice of the individual case should trump finality concerns?
- If the doctrine does not apply, can the party seeking to preclude relitigation demonstrate that finality concerns should be given paramountcy over the claim that justice requires relitigation?

10 Ultimately, Doherty J.A. dismissed the appeal, concluding that "finality concerns must be given paramountcy over CUPE's claim to an entitlement to relitigate Oliver's culpability" (para. 102). He so concluded because there was no suggestion of fraud at the criminal trial, because the underlying charges were serious enough that the employee was likely to have litigated them to the fullest and because there was no new evidence presented at arbitration (paras. 103-108).

IV. Relevant Statutory Provisions

11 *Evidence Act*, R.S.O. 1990, c. E.23

22.1(1) Proof that a person has been convicted or discharged anywhere in Canada of a crime is proof, in the absence of evidence to the contrary, that the crime was committed by the person, if,

- (a) no appeal of the conviction or discharge was taken and the time for an appeal has expired; or
- (b) an appeal of the conviction or discharge was taken but was dismissed or abandoned and no further appeal is available.

(2) Subsection (1) applies whether or not the convicted or discharged person is a party to the proceeding.

(3) For the purposes of subsection (1), a certificate containing the substance and effect only, omitting the formal part, of the charge and of the conviction or discharge, purporting to be signed by the officer having the custody of the records of the court at which the offender was convicted or discharged, or by the deputy of the officer, is, on proof of the identity of the person named as convicted or discharged person in the certificate, sufficient evidence of the conviction or discharge of that person, without proof of the signature or of the official character of the person appearing to have signed the certificate.

Labour Relations Act, 1995, S.O. 1995, c. 1, Sched. A

48.(1) Every collective agreement shall provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.

V. Analysis

A. Standard of Review

12 My colleague LeBel J. discusses at length our jurisprudence on standards of review. He reviews concerns and criticisms about the three standard system of judicial review. Given that these issues were not argued before us in this case, and without the benefit of a full adversarial debate, I would not wish to comment on the desirability of a departure from our recently affirmed framework for standards of review analysis. (See this Court's unanimous decisions of *Q. v. College of Physicians & Surgeons*

(*British Columbia*), [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), and *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.).)

13 The Court of Appeal properly applied the functional and pragmatic approach as delineated in *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.) (see also *Q.*, *supra*), to determine the extent to which the legislature intended that courts should review the tribunals' decisions.

14 Doherty J.A. was correct to acknowledge patent unreasonableness as the general standard of review of an arbitrator's decision as to whether just cause has been established in the discharge of an employee. However, and as he noted, the same standard of review does not necessarily apply to every ruling made by the arbitrator in the course of the arbitration. This follows the distinction drawn by Cory J. for the majority in *Toronto (City) Board of Education v. O.S.S.T.F. District 15*, [1997] 1 S.C.R. 487 (S.C.C.), where he said, at para. 39:

It has been held on several occasions that the expert skill and knowledge which an arbitration board exercises in interpreting a collective agreement does not usually extend to the interpretation of "outside" legislation. *The findings of a board pertaining to the interpretation of a statute or the common law are generally reviewable on a correctness standard An exception to this rule may occur where the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result.* [Emphasis added.]

15 In this case, the reasonableness of the arbitrator's decision to reinstate the grievor is predicated on the correctness of his assumption that he was not bound by the criminal conviction. That assumption rested on his analysis of complex common law rules and of conflicting jurisprudence. The body of law dealing with the relitigation of issues finally decided in previous judicial proceedings is not only complex, it is also at the heart of the administration of justice. Properly understood and applied, the doctrines of *res judicata* and abuse of process govern the interplay between different judicial decision makers. These rules and principles call for a judicial balance between finality, fairness, efficiency and authority of judicial decisions. The application of these rules, doctrines and principles is clearly outside the sphere of expertise of a labour arbitrator who may be called to have recourse to them. In such a case, he or she must correctly answer the question of law raised. An incorrect approach may be sufficient to lead to a patently unreasonable outcome. This was reiterated recently by Iacobucci J. in *Parry Sound (District) Welfare Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 (S.C.C.), at para. 21.

16 Therefore, I agree with the Court of Appeal that the arbitrator had to decide correctly whether CUPE was entitled, either at common law or under a statute, to relitigate the issue decided against the grievor in the criminal proceedings.

B. Section 22.1 of Ontario's Evidence Act

17 Section 22.1 of the Ontario *Evidence Act* is of limited assistance to the disposition of this appeal. It provides that proof that a person has been convicted of a crime is proof, "in the absence of evidence to the contrary," that the crime was committed by that person.

18 As Doherty J.A. correctly pointed out, at para. 42, s. 22.1 contemplates that the validity of a conviction may be challenged in a subsequent proceeding, but the section says nothing about the circumstances in which such challenge is or is not permissible. That issue is determined by the application of such common law doctrines as *res judicata*, issue estoppel, collateral attack and abuse of process. Section 22.1 speaks of the admissibility of the fact of the conviction as proof of the truth of its content and speaks of its conclusive effect if unchallenged. As a rule of evidence, the section addresses in part the hearsay rule, by making the conviction - the finding of another court - admissible for the truth of its content, as an exception to the inadmissibility of hearsay (David M. Paciocco and Lee Stuesser, *The Law of Evidence*, 3rd ed. (Toronto: Irwin Law, 2002), at p. 120; M.N. Howard, Peter Crane and Daniel A. Hochberg, *Phipson on Evidence*, 14th ed. (London: Sweet & Maxwell, 1990), at pp. 33-94 to 33-95).

19 Here, however, the admissibility of the conviction is not in issue. Section 22.1 renders the proof of the conviction admissible. The question is whether it can be rebutted by "evidence to the contrary." There are circumstances in which evidence will be admissible to rebut the presumption that the person convicted committed the crime, in particular, where the conviction in issue is that of a non-party. There are also circumstances in which no such evidence may be tendered. If either issue estoppel or

abuse of process bars the relitigation of the facts essential to the conviction, then no "evidence to the contrary" may be tendered to displace the effect of the conviction. In such a case, the conviction is conclusive that the person convicted committed the crime.

20 This interpretation is consistent with the rule of interpretation that legislation is presumed not to depart from general principles of law without an express indication to that effect. This presumption was reviewed and applied by Iacobucci J. in *Parry Sound, supra*, at para. 39. Section 22.1 reflected the law established in the leading Canadian case of *Demeter v. British Pacific Life Insurance Co.* (1983), 150 D.L.R. (3d) 249 (Ont. H.C.), at p. 264, affirmed (1984), 48 O.R. (2d) 266 (Ont. C.A.), wherein after a thorough review of Canadian and English jurisprudence, Osler J. held that a criminal conviction is admissible in subsequent civil litigation as *prima facie* proof that the convicted individual committed the alleged act, "subject to rebuttal by the plaintiff on the merits." However, the common law also recognized that the presumption of guilt established by a conviction is rebuttable only where the rebuttal does not constitute an abuse of the process of the court (*Demeter* (H.C.), *supra*, at p. 265; *McIlkenny v. Chief Constable of the West Midlands* (1981), [1982] A.C. 529 (U.K. H.L.), at p. 541; see also *Del Core v. College of Pharmacists (Ontario)* (1985), 51 O.R. (2d) 1 (Ont. C.A.), at p. 22, *per* Blair J.A.). Section 22.1 does not change this; the legislature has not explicitly displaced the common law doctrines and the rebuttal is consequently subject to them.

21 The question, therefore, is whether any doctrine precludes in this case the relitigation of the facts upon which the conviction rests.

C. The Common Law Doctrines

22 Much consideration was given in the decisions below to the three related common law doctrines of issue estoppel, abuse of process and collateral attack. Each of these doctrines was considered as a possible means of preventing the union from relitigating the criminal conviction of the grievor before the arbitrator. Although both the Divisional Court and the Court of Appeal concluded that the union could not relitigate the guilt of the grievor as reflected in his criminal conviction, they took different views of the applicability of the different doctrines advanced in support of that conclusion. While the Divisional Court concluded that relitigation was barred by the collateral attack rule, issue estoppel and abuse of process, the Court of Appeal was of the view that none of these doctrines as they presently stand applied to bar the rebuttal. Rather, it relied on a self-standing "finality principle." I think it is useful to disentangle these various rules and doctrines before turning to the applicable one here. I stress at the outset that these common law doctrines are interrelated and in many cases more than one doctrine may support a particular outcome. Even though both issue estoppel and collateral attacks may properly be viewed as particular applications of a broader doctrine of abuse of process, the three are not always entirely interchangeable.

(1) Issue Estoppel

23 Issue estoppel is a branch of *res judicata* (the other branch being *cause of action* estoppel) which precludes the relitigation of issues previously decided in court in another proceeding. For issue estoppel to be successfully invoked, three preconditions must be met: (1) the issue must be the same as the one decided in the prior decision, (2) the prior judicial decision must have been final, and (3) the parties to both proceedings must be the same, or their privies (*Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, 2001 SCC 44 (S.C.C.), at para. 25, *per* Binnie J.). The final requirement, known as "mutuality," has been largely abandoned in the United States and has been the subject of much academic and judicial debate there, as well as in the United Kingdom and, to some extent, in this country (See Garry D. Watson, "Duplicative Litigation: Issue Estoppel, Abuse of Process and the Death of Mutuality" (1990), 69 *Can. Bar Rev.* 623, at pp. 648-651). In light of the different conclusions reached by the courts below on the applicability of issue estoppel, I think it is useful to examine that debate more closely.

24 The first two requirements of issue estoppel are met in this case. The final requirement of mutuality of parties has not been met. In the original criminal case, the *lis* was between Her Majesty the Queen in right of Canada and Glenn Oliver. In the arbitration, the parties were CUPE and the City of Toronto, Oliver's employer. It is unnecessary to decide whether Oliver and CUPE should reasonably be viewed as privies for the purpose of the application of the mutuality requirement since it is clear that the Crown, acting as prosecutor in the criminal case, is not privy with the City of Toronto, nor would it be with a provincial, rather than a municipal, employer (as in the *Ontario v. O.P.S.E.U.* case, released concurrently).

25 There has been much academic criticism of the mutuality requirement of the doctrine of issue estoppel. In his article, Prof. Watson, *supra*, argues that explicitly abolishing the mutuality requirement, as has been done in the United States, would both reduce confusion in the law and remove the possibility that a strict application of issue estoppel may work an injustice. The arguments made by him and others (see also Donald J. Lange, *The Doctrine of Res Judicata in Canada* (Toronto: Butterworths, 2000)), urging Canadian courts to abandon the mutuality requirement have been helpful in articulating a principled approach to the bar against relitigation. In my view, however, appropriate guidance is available in our law without the modification to the mutuality requirement that this case would necessitate.

26 In his very useful review of the abandonment of the mutuality requirement in the United States, Prof. Watson, at p. 631, points out that mutuality was first relaxed when issue estoppel was used defensively:

The defensive use of non-mutual issue estoppel is straight forward. If P, having litigated an issue with D1 and lost, subsequently sues D2 raising the same issue, D2 can rely defensively on the issue estoppel arising from the former action, unless the first action did not provide a full and fair opportunity to litigate or other factors make it unfair or unwise to permit preclusion. The rationale is that P should not be allowed to relitigate an issue already lost by simply changing defendants . . .

27 Professor Watson then exposes the additional difficulties that arise if the mutuality requirement is removed when issue estoppel is raised offensively, as was done by the United States Supreme Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (U.S.S.C. 1979). He describes the offensive use of non-mutual issue estoppel as follows (at p. 631):

The power of this offensive non-mutual issue estoppel doctrine is illustrated by single event disaster cases, such as an airline crash. Assume P1 sues Airline for negligence in the operation of the aircraft and in that action Airline is found to have been negligent. Offensive non-mutual issue estoppel permits P2 through P20, etc., now to sue Airline and successfully plead issue estoppel on the question of the airline's negligence. The rationale is that if Airline fully and fairly litigated the issue of its negligence in action #1 it has had its day in court; it has had due process and it should not be permitted to re-litigate the negligence issue. However, the court in *Parklane* realized that in order to ensure fairness in the operation of offensive non-mutual issue estoppel the doctrine has to be subject to qualifications.

28 Properly understood, our case could be viewed as falling under this second category - what would be described in U.S. law as "non-mutual offensive preclusion." Although, technically speaking, the City of Toronto is not the "plaintiff" in the arbitration proceedings, the City wishes to take advantage of the conviction obtained by the Crown against Oliver in a different, prior proceeding to which the City was not a party. It wishes to preclude Oliver from relitigating an issue that he fought and lost in the criminal forum. U.S. law acknowledges the peculiar difficulties with offensive use of non-mutual estoppel. Professor Watson explains, at pp. 632-633:

First, the court acknowledged that the effects of non-mutuality differ depending on whether issue estoppel is used offensively or defensively. While defensive preclusion helps to reduce litigation offensive preclusion, by contrast, encourages potential plaintiffs not to join in the first action. "Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment". Thus, without some limit, non-mutual offensive preclusion would increase rather than decrease the total amount of litigation. To meet this problem the *Parklane* court held that preclusion should be denied in action #2 "where a plaintiff could easily have joined in the earlier action".

Second, the court recognized that in some circumstances to permit non-mutual preclusion "would be unfair to the defendant" and the court referred to specific situations of unfairness: (a) the defendant may have had little incentive to defend vigorously the first action, that is, if she was sued for small or nominal damages, particularly if future suits were not foreseeable; (b) offensive preclusion may be unfair if the judgment relied upon as a basis for estoppel is itself inconsistent with one or more previous judgments in favour of the defendant; or (c) the second action affords to the defendant procedural

opportunities unavailable in the first action that could readily result in a different outcome, that is, where the defendant in the first action was forced to defend in an inconvenient forum and was unable to call witnesses, or where in the first action much more limited discovery was available to the defendant than in the second action.

In the final analysis the court declared that the general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed or for other reasons, the application of offensive estoppel would be unfair to the defendant, a trial judge should not allow the use of offensive collateral estoppel.

29 It is clear from the above that American non-mutual issue estoppel is not a mechanical, self-applying rule as evidenced by the discretionary elements which may militate against granting the estoppel. What emerges from the American experience with the abandonment of mutuality is a twofold concern: (1) the application of the estoppel must be sufficiently principled and predictable to promote efficiency and (2) it must contain sufficient flexibility to prevent unfairness. In my view, this is what the doctrine of abuse of process offers, particularly, as here, where the issue involves a conviction in a criminal court for a serious crime. In a case such as this one, the true concerns are not primarily related to mutuality. The true concerns, well reflected in the reasons of the Court of Appeal, are with the integrity and the coherence of the administration of justice. This will often be the case when the estoppel originates from a finding made in a criminal case where many of the traditional concerns related to mutuality lose their significance.

30 For example, there is little relevance to the concern about the "wait and see" plaintiff, the "free rider" who will deliberately avoid the risk of joining the original litigation, but will later come forward to reap the benefits of the victory obtained by the party who should have been his co-plaintiff. No such concern can ever arise when the original action is in a criminal prosecution. Victims cannot, even if they wanted to, "join in" the prosecution so as to have their civil claim against the accused disposed of in a single trial. Nor can employers "join in" the criminal prosecution to have their employee dismissed for cause.

31 On the other hand, even though no one can join the prosecution, the prosecutor as a party represents the public interest. He or she represents a collective interest in the just and correct outcome of the case. The prosecutor is said to be a minister of justice who has nothing to win or lose from the outcome of the case but who must ensure that a just and true verdict is rendered. (See Commentary R. 4.01(3) of the *Rules of Professional Conduct*, Law Society of Upper Canada (Toronto: Law Society of Upper Canada, 2002), at pp. 58 and 61; *R. v. Regan*, [2002] 1 S.C.R. 297, 2002 SCC 12 (S.C.C.); *R. v. Lemay* (1951), [1952] 1 S.C.R. 232 (S.C.C.), at pp. 256-257, *per* Cartwright J.; and *R. v. Banks*, [1916] 2 K.B. 621, at p. 623.) The mutuality requirement of the doctrine of issue estoppel, which insists that only the Crown and its privies be precluded from relitigating the guilt of the accused, is hardly reflective of the true role of the prosecutor.

32 As the present case illustrates, the primary concerns here are about the integrity of the criminal process and the increased authority of a criminal verdict, rather than some of the more traditional issue estoppel concerns that focus on the interests of the parties, such as costs and multiple "vexation." For these reasons, I see no need to reverse or relax the long-standing application of the mutuality requirement in this case and I would conclude that issue estoppel has no application. I now turn to the question of whether the decision of the arbitrator amounted to a collateral attack on the verdict of the criminal court.

(2) Collateral Attack

33 The rule against collateral attack bars actions to overturn convictions when those actions take place in the wrong forum. As stated in *R. v. Wilson*, [1983] 2 S.C.R. 594 (S.C.C.), at p. 599, the rule against collateral attack

has long been a fundamental rule that a court order, made by a court having jurisdiction to make it, stands and is binding and conclusive unless it is set aside on appeal or lawfully quashed. It is also well settled in the authorities that such an order may not be attacked collaterally - and a collateral attack may be described as an attack made in proceedings other than those whose specific object is the reversal, variation, or nullification of the order or judgment.

Thus, in *Wilson, supra*, the Court held that an inferior court judge was without jurisdiction to pass on the validity of a wiretap authorized by a superior court. Other cases that form the basis for this rule similarly involve attempts to overturn decisions in other fora, and not simply to relitigate their facts. In *R. v. Sarson*, [1996] 2 S.C.R. 223 (S.C.C.), at para. 35, this Court held that

a prisoner's *habeas corpus* attack on a conviction under a law later declared unconstitutional must fail under the rule against collateral attack because the prisoner was no longer "in the system" and because he was "in custody pursuant to the judgment of a court of competent jurisdiction." Similarly, in *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706 (S.C.C.), this Court held that a mine owner who had chosen to ignore an administrative appeals process for a pollution fine was barred from contesting the validity of that fine in court because the legislation directed appeals to an appellate administrative body, not to the courts. Binnie J. described the rule against collateral attack in *Danyluk, supra*, at para. 20, as follows: "that a *judicial order* pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (emphasis added).

34 Each of these cases concerns the appropriate forum for collateral attacks upon the judgment itself. However, in the case at bar, the union does not seek to overturn the sexual abuse conviction itself, but simply contest, for the purposes of a different claim with different legal consequences, whether the conviction was correct. It is an implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as clearly it does. Prohibited "collateral attacks" are abuses of the court's process. However, in light of the focus of the collateral attack rule on attacking the order itself and its legal effect, I believe that the better approach here is to go directly to the doctrine of abuse of process.

(3) Abuse of Process

35 Judges have an inherent and residual discretion to prevent an abuse of the court's process. This concept of abuse of process was described at common law as proceedings "unfair to the point that they are contrary to the interest of justice" (*R. v. Power*, [1994] 1 S.C.R. 601 (S.C.C.), at p. 616), and as "oppressive treatment" (*R. v. Conway*, [1989] 1 S.C.R. 1659 (S.C.C.), at p. 1667). McLachlin J. (as she then was) expressed it this way in *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at p. 1007:

. . . abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice.

36 The doctrine of abuse of process is used in a variety of legal contexts. The unfair or oppressive treatment of an accused may disentitle the Crown to carry on with the prosecution of a charge: *Conway, supra*, at p. 1667. In *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44 (S.C.C.), this Court held that unreasonable delay causing serious prejudice could amount to an abuse of process. When the *Canadian Charter of Rights and Freedoms* applies, the common law doctrine of abuse of process is subsumed into the principles of the *Charter* such that there is often overlap between abuse of process and constitutional remedies (*R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.)). The doctrine nonetheless continues to have application as a non-*Charter* remedy: *United States v. Shulman*, [2001] 1 S.C.R. 616, 2001 SCC 21 (S.C.C.), at para. 33.

37 In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (*Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), at para. 55, *per* Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63 (S.C.C.))). Goudge J.A. expanded on that concept in the following terms, at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. *It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel.* See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality

and the integrity of the administration of justice. (See, for example, *F. (K.) v. White* (2001), 53 O.R. (3d) 391 (Ont. C.A.), *Bomac Construction Ltd. v. Stevenson*, [1986] 5 W.W.R. 21 (Sask. C.A.), and *Bjarnarson v. Manitoba* (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), affirmed (1987), 21 C.P.C. (2d) 302 at 312 (Man. C.A.)). This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is, in effect, non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, *supra*, at pp. 624-625).

38 It is true that the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints. It is said to be more of an adjunct doctrine, defined in reaction to the settled rules of issue estoppel and cause of action estoppel, than an independent one (Lange, *supra*, at p. 344). The policy grounds supporting abuse of process by relitigation are the same as the essential policy grounds supporting issue estoppel (Lange, *supra*, at pp. 347-348):

The two policy grounds, namely, that there be an end to litigation and that no one should be twice vexed by the same cause, have been cited as policies in the application of abuse of process by relitigation. Other policy grounds have also been cited, namely, to preserve the courts' and the litigants' resources, to uphold the integrity of the legal system in order to avoid inconsistent results, and to protect the principle of finality so crucial to the proper administration of justice.

39 The *locus classicus* for the modern doctrine of abuse of process and its relationship to *res judicata* is *McIlkenny* [H.L.], *supra*, affirming *McIlkenny v. Chief Constable of the West Midlands*, [1980] Q.B. 283 (Eng. C.A.). The case involved an action for damages for personal injuries brought by the six men convicted of bombing two pubs in Birmingham. They claimed that they had been beaten by the police during their interrogation. The plaintiffs had raised the same issue at their criminal trial, where it was found by both the judge and jury that the confessions were voluntary and that the police had not used violence. At the Court of Appeal, Lord Denning M.R. endorsed non-mutual issue estoppel and held that the question of whether any beatings had taken place was estopped by the earlier determination, although it was raised here against a different opponent. He noted that, in analogous cases, courts had sometimes refused to allow a party to raise an issue for a second time because it was an "abuse of the process of the court," but held that the proper characterization of the matter was through non-mutual issue estoppel.

40 On appeal to the House of Lords, Lord Denning's attempt to reform the law of issue estoppel was overruled, but the higher court reached the same result via the doctrine of abuse of process. Lord Diplock stated, at p. 541:

The abuse of process which the instant case exemplifies is the initiation of proceedings in a court of justice for the purpose of mounting a collateral attack upon a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.

41 It is important to note that a public inquiry after the civil action of the six accused in *McIlkenny* [H.L.], *supra*, resulted in the finding that the confessions of the Birmingham six had been extracted through police brutality (see *R. v. McIlkenny* (1991), 93 Cr. App. R. 287 (Eng. C.A.), at pp. 304 *et seq.* In my view, this does not support a relaxation of the existing procedural mechanisms designed to ensure finality in criminal proceedings. The danger of wrongful convictions has been acknowledged by this Court and other courts (see *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7 (S.C.C.), at para. 1; and *R. v. Bromley* (2001), 151 C.C.C. (3d) 480 (Nfld. C.A.), at pp. 517-518). Although safeguards must be put in place for the protection of the innocent and, more generally, to ensure the trustworthiness of court findings, continuous relitigation is not a guarantee of factual accuracy.

42 The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of *res judicata* while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process. (See Doherty J.A.'s reasons, at para. 65; see also *Demeter* (H.C.), *supra*, at p. 264, and *McIlkenny* [H.L.], *supra*, at p. 536.)

43 Critics of that approach have argued that when abuse of process is used as a proxy for issue estoppel, it obscures the true question while adding nothing but a vague sense of discretion. I disagree. At least in the context before us, namely, an attempt

to relitigate a criminal conviction, I believe that abuse of process is a doctrine much more responsive to the real concerns at play. In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of courts. Whether it serves to disentitle the Crown from proceeding because of undue delays (see *Blencoe, supra*), or whether it prevents a civil party from using the courts for an improper purpose (see *McIlkenny* [H.L.], *supra*, and *Demeter, supra*) the focus is less on the interest of parties and more on the integrity of judicial decision making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party being called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

44 The adjudicative process and the importance of preserving its integrity were well described by Doherty J.A. He said, at para. 74:

The adjudicative process in its various manifestations strives to do justice. By the adjudicative process, I mean the various courts and tribunals to which individuals must resort to settle legal disputes. Where the same issues arise in various forums, the quality of justice delivered by the adjudicative process is measured not by reference to the isolated result in each forum, but by the end result produced by the various processes that address the issue. By justice, I refer to procedural fairness, the achieving of the correct result in individual cases and the broader perception that the process as a whole achieves results which are consistent, fair and accurate.

45 When asked to decide whether a criminal conviction, *prima facie* admissible in a proceeding under s. 22.1 of the OEA, ought to be rebutted or taken as conclusive, courts will turn to the doctrine of abuse of process to ascertain whether relitigation would be detrimental to the adjudicative process as defined above. When the focus is thus properly on the integrity of the adjudicative process, the motive of the party who seeks to relitigate, or whether he or she wishes to do so as a defendant rather than as a plaintiff, cannot be decisive factors in the application of the bar against relitigation.

46 Thus, in the case at bar, it matters little whether Oliver's motive for relitigation was primarily to secure re-employment, rather than to challenge his criminal conviction in an attempt to undermine its validity. Reliance on *McIlkenny* [H.L.], *supra*, and on *Demeter* (H.C.), *supra*, for the purpose of enhancing the importance of motive is misplaced. It is true that in both cases the parties wishing to relitigate had made it clear that they were seeking to impeach their earlier convictions. But this is of little significance in the application of the doctrine of abuse of process. A desire to attack a judicial finding is not, in itself, an improper purpose. The law permits that objective to be pursued through various reviewing mechanisms, such as appeals or judicial review. Indeed, reviewability is an important aspect of finality. A decision is final and binding on the parties only when all available reviews have been exhausted or abandoned. What is improper is to attempt to impeach a judicial finding by the impermissible route of relitigation in a different forum. Therefore, motive is of little or no import.

47 There is also no reason to constrain the doctrine of abuse of process only to those cases where the plaintiff has initiated the relitigation. The designation of the parties to the second litigation may mask the reality of the situation. In the present case, for instance, aside from the technical mechanism of the grievance procedures, who should be viewed as the initiator of the employment litigation between the grievor, Oliver, and his union on the one hand, and the City of Toronto on the other? Technically, the union is the "plaintiff" in the arbitration procedure. But the City of Toronto used Oliver's criminal conviction as a basis for his dismissal. I cannot see what difference it makes, again from the point of view of the integrity of the adjudicative process, whether Oliver is labelled a plaintiff or a defendant when it comes to relitigating his criminal conviction.

48 The appellant relies on *Del Core, supra*, to suggest that the abuse of process doctrine only applies to plaintiffs. *Del Core*, however, provided no majority opinion as to whether and when public policy would preclude relitigation of issues determined in a criminal proceeding. For one, Blair J.A. did not limit the circumstances in which relitigation would amount to an abuse of process to those cases in which a person convicted sought to relitigate the validity of his conviction in subsequent proceedings which he himself had instituted:

The right to challenge a conviction is subject to an important qualification. *A convicted person cannot attempt to prove that the conviction was wrong in circumstances where it would constitute an abuse of process to do so.* Courts have rejected

attempts to relitigate the very issues dealt with at a criminal trial where the civil proceedings were perceived to be a collateral attack on the criminal conviction. *The ambit of this qualification remains to be determined . . .* [Emphasis added.]

(*Del Core, supra*, at p. 22, *per* Blair J.A.)

49 While the authorities most often cited in support of a court's power to prevent relitigation of decided issues in circumstances where issue estoppel does not apply are cases where a convicted person commenced a civil proceeding for the purpose of attacking a finding made in a criminal proceeding against that person (namely, *Demeter* (H.C.), *supra*, and *McIlkenny* [H.L.], *supra*; see also *Q. v. Minto Management Ltd.* (1984), 46 O.R. (2d) 756 (Ont. H.C.), *F. (K.)*, *supra*, at paras. 29-31), there is no reason in principle why these rules should be limited to such specific circumstances. Several cases have applied the doctrine of abuse of process to preclude defendants from relitigating issues decided against them in a prior proceeding. See, for example, *Nigro v. Agnew-Surpass Shoe Stores Ltd.* (1977), 18 O.R. (2d) 215 (Ont. H.C.) at p. 218, affirmed without reference to this point (1978), 18 O.R. (2d) 714n (Ont. H.C.); *Bomac*, *supra*, at pp. 26-27; *Bjarnarson*, *supra*, at p. 39; *Germscheid v. Valois* (1989), 68 O.R. (2d) 670 (Ont. H.C.); *Simpson v. Geswein* (1995), 25 C.C.L.T. (2d) 49 (Man. Q.B.), at p. 61; *Roenisch v. Roenisch* (1991), 85 D.L.R. (4th) 540 (Alta. Q.B.), at p. 546; *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988), 47 D.L.R. (4th) 431 (B.C. S.C.), at p. 438; *Canadian Tire Corp. v. Summers* (1995), 23 O.R. (3d) 106 (Ont. Gen. Div.), at p. 115; see also, Paul Perell, "Res Judicata and Abuse of Process" (2001), 24 *Advocates' Q.* 189, at pp. 196-197; and Watson, *supra*, at pp. 648-651.

50 It has been argued that it is difficult to see how mounting a defence can be an abuse of process (see Martin Teplitsky, "Prior Criminal Convictions: Are They Conclusive Proof? An Arbitrator's Perspective," in K. Whitaker et al., eds., *Labour Arbitration Yearbook 2001-2002*, vol. 1 (Toronto: Lancaster House, 2002), 279. A common justification for the doctrine of *res judicata* is that a party should not be twice vexed in the same cause, that is, the party should not be burdened with having to relitigate the same issue (Watson, *supra*, at p. 633). Of course, a defendant may be quite pleased to have another opportunity to litigate an issue originally decided against him. A proper focus on the process, rather than on the interests of a party, will reveal why relitigation should not be permitted in such a case.

51 Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.

52 In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that, from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results, or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, *supra*, at para. 80.

53 The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, *supra*, at para. 51; *F. (K.)*, *supra*, at para. 55).

54 These considerations are particularly apposite when the attempt is to relitigate a criminal conviction. Casting doubt over the validity of a criminal conviction is a very serious matter. Inevitably, in a case such as this one, the conclusion of the arbitrator has precisely that effect, whether this was intended or not. The administration of justice must equip itself with all legitimate means to prevent wrongful convictions and to address any real possibility of such an occurrence after the fact. Collateral attacks and relitigation, however, are not, in my view, appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result.

55 In light of the above, it is apparent that the common law doctrines of issue estoppel, collateral attack and abuse of process adequately capture the concerns that arise when finality in litigation must be balanced against fairness to a particular litigant. There is therefore no need to endorse, as the Court of Appeal did, a self-standing and independent "finality principle" either as a separate doctrine or as an independent test to preclude relitigation.

D. Application of Abuse of Process to Facts of the Appeal

56 I am of the view that the facts in this appeal point to the blatant abuse of process that results when relitigation of this sort is permitted. The grievor was convicted in a criminal court and he exhausted all his avenues of appeal. In law, his conviction must stand, with all its consequent legal effects. Yet, as pointed out by Doherty J.A. (at para. 84):

Despite the arbitrator's insistence that he was not passing on the correctness of the decision made by Ferguson J., that is exactly what he did. One cannot read the arbitrator's reasons without coming to the conclusion that he was convinced that the criminal proceedings were badly flawed and that Oliver was wrongly convicted. This conclusion, reached in proceedings to which the prosecution was not even a party, could only undermine the integrity of the criminal justice system. The reasonable observer would wonder how Oliver could be found guilty beyond a reasonable doubt in one proceeding and after the Court of Appeal had affirmed that finding, be found in a separate proceeding not to have committed the very same assault. That reasonable observer would also not understand how Oliver could be found to be properly convicted of sexually assaulting the complainant and deserving of 15 months in jail and yet also be found in a separate proceeding not to have committed that sexual assault and to be deserving of reinstatement in a job which would place young persons like the complainant under his charge.

57 As a result of the conflicting decisions, the City of Toronto would find itself in the inevitable position of having a convicted sex offender reinstated to an employment position where he would work with the very vulnerable young people he was convicted of assaulting. An educated and reasonable public would presumably have to assess the likely correctness of one or the other of the adjudicative findings regarding the guilt of the convicted grievor. The authority and finality of judicial decisions are designed precisely to eliminate the need for such an exercise.

58 In addition, the arbitrator is considerably less well equipped than a judge presiding over a criminal court - or the jury -, guided by rules of evidence that are sensitive to a fair search for the truth, an exacting standard of proof and expertise with the very questions in issue, to come to a correct disposition of the matter. Yet the arbitrator's conclusions, if challenged, may give rise to a less searching standard of review than that of the criminal court judge. In short, there is nothing in a case like the present one that militates against the application of the doctrine of abuse of process to bar the relitigation of the grievor's criminal conviction. The arbitrator was required as a matter of law to give full effect to the conviction. As a result of that error of law, the arbitrator reached a patently unreasonable conclusion. Properly understood in the light of correct legal principles, the evidence before the arbitrator could only lead him to conclude that the City of Toronto had established just cause for Oliver's dismissal.

VI. Disposition

59 For these reasons, I would dismiss the appeal with costs.

LeBel J. (concurring) (Deschamps J. concurring):

I. Introduction

60 I have had the benefit of reading Arbour J.'s reasons and I concur with her disposition of the case. I agree that this case is appropriately decided on the basis of the doctrine of abuse of process, rather than the narrower and more technical doctrines of either collateral attack or issue estoppel. I also agree that the appropriate standard of review for the question of whether a criminal conviction may be relitigated in a grievance proceeding is correctness. This is a question of law requiring an arbitrator to interpret not only the *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sched. A, but also the *Evidence Act*, R.S.O. 1990, c. E.23, as well as to rule on the applicability of a number of common law doctrines dealing with relitigation, an issue that is, as Arbour J. notes, at the heart of the administration of justice. Finally, I agree that the arbitrator's determination in this case that Glenn Oliver's criminal conviction could indeed be relitigated during the grievance proceeding was incorrect. As a matter of law, the arbitrator was required to give full effect to Oliver's conviction. His failure to do so was sufficient to render his ultimate decision that Oliver had been dismissed without just cause - a decision squarely within the arbitrator's area of specialized expertise and thus reviewable on a deferential standard - patently unreasonable, according to the jurisprudence of our Court.

61 While I agree with Arbour J.'s disposition of the appeal, I am of the view that the administrative law aspects of this case require further discussion. In my concurring reasons in *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710, 2002 SCC 86 (S.C.C.), I raised concerns about the appropriateness of treating the pragmatic and functional methodology as an overarching analytical framework for substantive judicial review that must be applied, without variation, in *all* administrative law contexts, including those involving non-adjudicative decision makers. In certain circumstances, such as those at issue in *Chamberlain* itself, applying this methodological approach in order to determine the appropriate standard of review may, in fact, obscure the real issue before the reviewing court.

62 In the instant appeal and the appeal in *Ontario v. O.P.S.E.U.*, 2003 SCC 64 (S.C.C.), released concurrently, both of which involve judicial review of adjudicative decision makers, my concern is not with the applicability of the pragmatic and functional approach itself. Having said this, I would note that, in a case such as this one, where the question at issue is so clearly a question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise, it is unnecessary for the reviewing court to perform a detailed pragmatic and functional analysis in order to reach a standard of review of correctness. Indeed, in such circumstances reviewing courts should avoid adopting a mechanistic approach to the determination of the appropriate standard of review, which risks reducing the pragmatic and functional analysis from a contextual, flexible framework to little more than a *pro forma* application of a checklist of factors (see *C.U.P.E. v. Ontario (Minister of Labour)*, [2003] 1 S.C.R. 539, 2003 SCC 29 (S.C.C.), at para. 149; *Q. v. College of Physicians & Surgeons (British Columbia)*, [2003] 1 S.C.R. 226, 2003 SCC 19 (S.C.C.), at para. 26; *Chamberlain*, *supra*, at para. 195, *per* LeBel J.).

63 The more particular concern that emerges out of this case and *Ontario v. O.P.S.E.U.* relates to what, in my view, is growing criticism with the ways in which the standards of review currently available within the pragmatic and functional framework are conceived of and applied. Academic commentators and practitioners have raised some serious questions as to whether the conceptual basis for each of the existing standards has been delineated with sufficient clarity by this Court, with much of the criticism directed at what has been described as "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* (see, for example, David J. Mullan, "Recent Developments in Standard of Review," in Canadian Bar Association (Ontario), *Taking the Tribunal to Court: A Practical Guide for Administrative Law Practitioners* (October 20, 2000), at p. 26; Jeff G. Cowan, "The Standard of Review: The Common Sense Evolution?" (2003), paper presented to the Administrative Law Section Meeting, Ontario Bar Association, January 21, 2003, at p. 28; Frank A.V. Falzon, "Standard of Review on Judicial Review or Appeal," in *Administrative Justice Review Background Papers: Background Papers Prepared by Administrative Justice Project for the Attorney General of British Columbia* (June 2002), at pp. 32-33). Reviewing courts too have occasionally expressed frustration over a perceived lack of clarity in this area, as the comments of Barry J. in *Miller v. Newfoundland (Workers' Compensation Commission)* (1997), 154 Nfld. & P.E.I.R. 52 (Nfld. T.D.), at para. 27, illustrate:

In attempting to follow the court's distinctions between "patently unreasonable", "reasonable" and "correct", one feels at times as though one is watching a juggler juggle three transparent objects. Depending on the way the light falls, sometimes one thinks one can see the objects. Other times one cannot and, indeed, wonders whether there are really three distinct objects there at all.

64 The Court cannot remain unresponsive to sustained concerns or criticism coming from the legal community in relation to the state of Canadian jurisprudence in this important part of the law. It is true that the parties to this appeal made no submissions putting into question the standards of review jurisprudence. Nevertheless, at times, an in-depth discussion or review of the state of the law may become necessary despite the absence of particular representations in a specific case. Given its broad application, the law governing the standards of review must be predictable, workable and coherent. Parties to litigation often have no personal stake in assuring the coherence of our standards of review jurisprudence as a whole and the consistency of their application. Their purpose, understandably, is to show how the positions they advance conform with the law as it stands, rather than to suggest improvements of that law for the benefit of the common good. The task of maintaining a predictable, workable and coherent jurisprudence falls primarily on the judiciary, preferably with, but exceptionally without, the benefit of counsel. I would add that, although the parties made no submissions on the analysis that I propose to undertake in these reasons, they will not be prejudiced by it.

65 In this context, this case provides an opportunity to reevaluate the contours of the various standards of review, a process that in my view is particularly important with respect to patent unreasonableness. To this end, I review below:

- the interplay between correctness and patent unreasonableness both in the instant case and, more broadly, in the context of judicial review of adjudicative decision makers generally, with a view to elucidating the conflicted relationship between these two standards; and
- the distinction between patent unreasonableness and reasonableness *simpliciter*, which, despite a number of attempts at clarification, remains a nebulous one.

66 As the analysis that follows indicates, the patent unreasonableness standard does not currently provide sufficiently clear parameters for reviewing courts to apply in assessing the decisions of administrative adjudicators. From the beginning, patent unreasonableness at times shaded uncomfortably into what should presumably be its antithesis, the correctness review. Moreover, it is increasingly difficult to distinguish from what is ostensibly its less deferential counterpart, reasonableness *simpliciter*. It remains to be seen how these difficulties can be addressed.

II. Analysis

A. The Two Standards of Review Applicable in this Case

67 Two standards of review are at issue in this case, and the use of correctness here requires some preliminary discussion. As I noted in brief above, certain fundamental legal questions - for instance, constitutional and human rights questions and those involving civil liberties, as well as other questions that are of central importance to the legal system as a whole, such as the issue of relitigation - typically fall to be decided on a correctness standard. Indeed, in my view, it will rarely be necessary for reviewing courts to embark on a comprehensive application of the pragmatic and functional approach in order to reach this conclusion. I would not, however, want either my comments in this regard or the majority reasons in this case to be taken as authority for the proposition that correctness is the appropriate standard whenever arbitrators or other specialized administrative adjudicators are required to interpret and apply general common law or civil law rules. Such an approach would constitute a broad expansion of judicial review under a standard of correctness and would significantly impede the ability of administrative adjudicators, particularly in complex and highly specialized fields such as labour law, to develop original solutions to legal problems, uniquely suited to the context in which they operate. In my opinion, in many instances the appropriate standard of review in respect of the application of general common or civil law rules by specialized adjudicators should not be one of correctness, but rather of reasonableness. I now turn to a brief discussion of the rationale behind this view.

(1) The Correctness Standard of Review

68 This Court has repeatedly stressed the importance of judicial deference in the context of labour law. Labour relations statutes typically bestow broad powers on arbitrators and labour boards to resolve the wide range of problems that may arise in this field and protect the decisions of these adjudicators by privative clauses. Such legislative choices reflect the fact that, as

Cory J. noted in *Toronto (City) Board of Education v. O.S.S.T.F. District 15*, [1997] 1 S.C.R. 487 (S.C.C.), at para. 35, the field of labour relations is "sensitive and volatile" and "[i]t is essential that there be a means of providing speedy decisions by experts in the field who are sensitive to the situation, and which can be considered by both sides to be final and binding" (see also *Canada (Attorney General) v. P.S.A.C.*, [1993] 1 S.C.R. 941 (S.C.C.) ("P.S.A.C."), at pp. 960-961; and *Ivanhoe inc. c. Travailleurs & travailleuses unis de l'alimentation & du commerce, section 500*, [2001] 2 S.C.R. 565, 2001 SCC 47 (S.C.C.), at para. 32). The application of a standard of review of correctness in the context of judicial review of labour adjudication is thus rare.

69 While in this case and in *Ontario v. O.P.S.E.U.* I agree that correctness is the appropriate standard of review for the arbitrator's decision on the relitigation question, I think it necessary to sound a number of notes of caution in this regard. It is important to stress, first, that while the arbitrator was required to be correct on this question of law, this did not open his decision as a whole to review on a correctness standard (see *A.C.T.R.A. v. Canadian Broadcasting Corp.*, [1995] 1 S.C.R. 157 (S.C.C.), at para. 48). The arbitrator was entitled to deference in the determination of whether Oliver was dismissed without just cause. To say that, in the circumstances of this case, the arbitrator's incorrect decision on the question of law affected the overall reasonableness of his decision, is very different from saying that the arbitrator's finding on the ultimate question of just cause had to be correct. To fail to make this distinction would be to risk "substantially expand[ing] the scope of reviewability of administrative decisions, and unjustifiably so" (see *Canadian Broadcasting Corp.*, *supra*, at para. 48).

70 Second, it bears repeating that the application of correctness here is very much a product of the nature of *this particular legal question*: determining whether relitigating an employee's criminal conviction is permissible in an arbitration proceeding is a question of law involving the interpretation of the arbitrator's constitutive statute, an external statute, and a complex body of common law rules and conflicting jurisprudence. More than this, it is a question of fundamental importance and broad applicability, with serious implications for the administration of justice as a whole. It is, in other words, a question that engages the expertise and essential role of the courts. It is not a question on which arbitrators may be said to enjoy any degree of relative institutional competence or expertise. As a result, it is a question on which the arbitrator must be correct.

71 This Court has been very careful to note, however, that not all questions of law must be reviewed under a standard of correctness. As a prefatory matter, as the Court has observed, in many cases it will be difficult to draw a clear line between questions of fact, mixed fact and law, and law; in reality, such questions are often inextricably intertwined (see *Pushpanathan v. Canada (Minister of Employment & Immigration)*, [1998] 1 S.C.R. 982 (S.C.C.), at para. 37; *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 37). More to the point, as Bastarache J. stated in *Pushpanathan*, *supra*, "even pure questions of law may be granted a wide degree of deference where other factors of the pragmatic and functional analysis suggest that such deference is the legislative intention" (at para. 37). The critical factor in this respect is expertise.

72 As Bastarache J. noted in *Pushpanathan*, *supra*, at para. 34, once a "broad relative expertise has been established," this Court has been prepared to show "considerable deference even in cases of highly generalized statutory interpretation where the instrument being interpreted is the tribunal's constituent legislation": see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.), and *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324 (S.C.C.). This Court has also held that, while administrative adjudicators' interpretations of external statutes "are generally reviewable on a correctness standard," an exception to this general rule may occur, and deference may be appropriate, where "the external statute is intimately connected with the mandate of the tribunal and is encountered frequently as a result": see *Toronto (City) Board of Education*, *supra*, at para. 39; *Canadian Broadcasting Corp.*, *supra*, at para. 48. And, perhaps most importantly in light of the issues raised by this case, the Court has held that deference may be warranted where an administrative adjudicator has acquired expertise through its experience in the application of a general common or civil law rule in its specialized statutory context: see *Ivanhoe*, *supra*, at para. 26; L'Heureux-Dubé J. (dissenting) in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 (S.C.C.), at pp. 599-600, endorsed in *Pushpanathan*, *supra*, at para. 37.

73 In the field of labour relations, general common and civil law questions are often closely intertwined with the more specific questions of labour law. Resolving general legal questions may thus be an important component of the work of some administrative adjudicators in this field. To subject all such decisions to correctness review would be to expand the scope of

judicial review considerably beyond what the legislature intended, fundamentally undermining the ability of labour adjudicators to develop a body of jurisprudence that is tailored to the specialized context in which they operate.

74 Where an administrative adjudicator must decide a general question of law in the course of exercising its statutory mandate, that determination will typically be entitled to deference (particularly if the adjudicator's decisions are protected by a privative clause), inasmuch as the general question of law is closely connected to the adjudicator's core area of expertise. This was essentially the holding of this Court in *Ivanhoe, supra*. In *Ivanhoe*, after noting the presence of a privative clause, Arbour J. held that, while the question at issue involved both civil and labour law, the labour commissioners and the Labour Court were entitled to deference because "they have developed special expertise in this regard which is adapted to the specific context of labour relations and which is not shared by the courts" (para. 26; see also *Pasiechny v. Saskatchewan (Workers' Compensation Board)*, [1997] 2 S.C.R. 890 (S.C.C.)). This appeal does not represent a departure from this general principle.

75 The final note of caution that I think must be sounded here relates to the application of two standards of review in this case. This Court has recognized on a number of occasions that it may, in certain circumstances, be appropriate to apply different standards of deference to different decisions taken by an administrative adjudicator in a single case (see *Pushpanathan, supra*, at para. 49; *MacDonell c. Québec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71 (S.C.C.), at para. 58, *per* Bastarache and LeBel JJ., dissenting). This case provides an example of one type of situation where this may be the proper approach. It involves a fundamental legal question falling outside the arbitrator's area of expertise. This legal question, though foundational to the decision as a whole, is easily differentiated from a second question on which the arbitrator was entitled to deference: the determination of whether there was just cause for Oliver's dismissal.

76 However, as I have noted above, the fact that the question adjudicated by the arbitrator in this case can be separated into two distinct issues, one of which is reviewable on a correctness standard, should not be taken to mean that this will often be the case. Such cases are rare; the various strands that go into a decision are more likely to be inextricably intertwined, particularly in a complex field such as labour relations, such that the reviewing court should view the adjudicator's decision as an integrated whole.

(2) The Patent Unreasonableness Standard of Review

77 In these reasons, I explore the way in which patent unreasonableness is currently functioning, having regard to the relationships between this standard and both correctness and reasonableness *simpliciter*. My comments in this respect are intended to have application in the context of judicial review of adjudicative administrative decision making.

(a) The Definitions of Patent Unreasonableness

78 This Court has set out a number of definitions of "patent unreasonableness," each of which is intended to indicate the high degree of deference inherent in this standard of review. There is some overlap between the definitions and they are often used in combination. I would characterize the two main definitional strands as, first, those that emphasize the magnitude of the defect necessary to render a decision patently unreasonable and, second, those that focus on the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it.

79 In considering the leading definitions, I would place in the first category Dickson J.'s (as he then was) statement in *C.U.P.E., Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (S.C.C.) ("C.U.P.E."), that a decision will only be patently unreasonable if it "cannot be rationally supported by the relevant legislation" (at p. 237). Cory J.'s characterization in *P.S.A.C., supra*, of patent unreasonableness as a "very strict test," which will only be met where a decision is "clearly irrational, that is to say evidently not in accordance with reason" (pp. 963-964), would also fit into this category (though it could, depending on how it is read, be placed in the second category as well).

80 In the second category, I would place Iacobucci J.'s description in *Southam, supra*, of a patently unreasonable decision as one marred by a defect that is characterized by its "immediacy or obviousness": "If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57).

81 More recently, in *Ryan v. Law Society (New Brunswick)*, [2003] 1 S.C.R. 247, 2003 SCC 20 (S.C.C.), Iacobucci J. characterized a patently unreasonable decision as one that is "so flawed that no amount of curial deference can justify letting it stand," drawing on both of the definitional strands that I have identified in formulating this definition. He wrote, at para. 52:

In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective. A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941 at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84 at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand.

82 Similarly, in *C.U.P.E. v. Ontario, supra*, Binnie J. yoked together the two definitional strands, describing a patently unreasonable decision as "one whose defect is 'immedia[te] and obviou[s]' (*Southam, supra*, at para. 57), and so flawed in terms of implementing the legislative intent that no amount of curial deference can properly justify letting it stand (*Ryan, supra*, at para. 52)" (para. 165 (emphasis added)).

83 It has been suggested that the Court's various formulations of the test for patent unreasonableness are "not independent, alternative tests. They are simply ways of getting at the single question: What makes something patently unreasonable?" (*C.U.P.E. v. Ontario, supra*, at para. 20, *per* Bastarache J., dissenting). While this may indeed be the case, I nonetheless think it important to recognize that, because of what are in some ways subtle but nonetheless quite significant differences between the Court's various answers to this question, the parameters of "patent unreasonableness" are not as clear as they could be. This has contributed to the growing difficulties in the application of this standard that I discuss below.

(b) The Interplay between the Patent Unreasonableness and Correctness Standards

84 As I observed in *Chamberlain, supra*, the difference between review on a standard of correctness and review on a standard of patent unreasonableness is "intuitive and relatively easy to observe" (*Chamberlain, supra*, at para. 204, *per* LeBel J.). These standards fall on opposite sides of the existing spectrum of curial deference, with correctness entailing an exacting review and patent unreasonableness leaving the issue in question to the near exclusive determination of the decision maker (see *Q., supra*, at para. 22). Despite the clear conceptual boundary between these two standards, however, the distinction between them is not always as readily discernable in practice as one would expect.

(i) Patent Unreasonableness and Correctness in Theory

85 In terms of understanding the interplay between patent unreasonableness and correctness, it is of interest that, from the beginning, there seems to have been at least some conceptual uncertainty as to the proper breadth of patent unreasonableness review. In *C.U.P.E., supra*, Dickson J. offered two characterizations of patent unreasonableness that tend to pull in opposite directions (see David J. Mullan, *Administrative Law* (Toronto: Irwin Law, 2001), at p. 69; see also H. Wade MacLauchlan, "Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada" (2001), 80 *Can. Bar Rev.* 281, at pp. 285-286).

86 Professor Mullan explains that, on the one hand, Dickson J. rooted review for patent unreasonableness in the recognition that statutory provisions are often ambiguous and thus may allow for multiple interpretations; the question for the reviewing court is whether the adjudicator's interpretation is one that can be "rationally supported by the relevant legislation" (*C.U.P.E., supra*, at p. 237). On the other hand, Dickson J. also invoked an idea of patent unreasonableness as a threshold defined by certain nullifying errors, such as those he had previously enumerated in *S.E.I.U., Local 333 v. Nipawin District Staff Nurses Assn.* (1973), [1975] 1 S.C.R. 382 (S.C.C.) ("Nipawin"), at p. 389, and in *C.U.P.E., supra*, at p. 237:

. . . acting in bad faith, basing the decision on extraneous matters, failing to take relevant factors into account, breaching the provisions of natural justice or misinterpreting provisions of the Act so as to embark on an inquiry or answer a question not remitted to it.

87 Curiously, as Mullan notes, this list "repeats the list of 'nullifying' errors that Lord Reid laid out in the landmark House of Lords' judgment in *Anisminic Ltd. v. Foreign Compensation Commission* (1968), [1969] 2 A.C. 147 (U.K. H.L.). *Anisminic* "is usually treated as the foundation case in establishing in English law the reviewability of all issues of law on a *correctness* basis" (emphasis added), and, indeed, the Court "had cited with approval this portion of Lord Reid's judgment and deployed it to justify judicial intervention in a case described as the 'high water mark of activist' review in Canada: *Metropolitan Life Insurance Co. v. I.U.O.E., Local 796*," [1970] S.C.R. 425 (S.C.C.) (see Mullan, *Administrative Law, supra*, at pp. 69-70; see also *National Corn Growers Assn., supra*, at p. 1335, *per* Wilson J.).

88 In characterizing patent unreasonableness in *C.U.P.E.*, then, Dickson J. simultaneously invoked a highly deferential standard (choice among a range of reasonable alternatives) and a historically interventionist one (based on the presence of nullifying errors). For this reason, as Mullan acknowledges, "it is easy to see why Dickson J.'s use of [the quotation from *Anisminic*] is problematic" (Mullan, *Administrative Law, supra*, at p. 70).

89 If Dickson J.'s reference to *Anisminic* in *C.U.P.E., supra*, suggests some ambiguity as to the intended scope of "patent unreasonableness" review, later judgments also evidence a somewhat unclear relationship between patent unreasonableness and correctness in terms of establishing and, particularly, applying the methodology for review under the patent unreasonableness standard. The tension in this respect is rooted, in part, in differing views of the premise from which patent unreasonableness review should begin. A useful example is provided by *C.A.I.M.A.W., Local 14 v. Canadian Kenworth Co.*, [1989] 2 S.C.R. 983 (S.C.C.) ("*C.A.I.M.A.W.*").

90 In *C.A.I.M.A.W.*, Sopinka J. (Lamer J. (as he then was) concurring) described the proper approach under the patent unreasonableness standard as one in which the reviewing court first queries whether the administrative adjudicator's decision is correct: "curial deference does not enter the picture until the court finds itself in disagreement with the tribunal. Only then is it necessary to consider whether the error (so found) is within or outside the boundaries of reasonableness" (p. 1018). As Mullan has observed, this approach to patent unreasonableness raises concerns in that it not only conflicts "with the whole notion espoused by Dickson J. in [*C.U.P.E., supra*] of there often being no single correct answer to statutory interpretation problems but it also assumes the primacy of the reviewing court over the agency or tribunal in the delineation of the meaning of the relevant statute" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20).

91 In my view, this approach presents additional problems as well. Reviewing courts may have difficulty ruling that "an error has been committed but . . . then do[ing] nothing to correct that error on the basis that it was not as big an error as it could or might have been" (see Mullan, "Recent Developments in Standard of Review," *supra*, at p. 20; see also David J. Mullan, "Of Chaff Midst the Corn: American Farm Bureau Federation v. Canada (Canadian Import Tribunal) and Patent Unreasonableness Review" (1991), 45 Admin. L.R. 264, at pp. 269-270). Furthermore, starting from a finding that the adjudicator's decision is incorrect may colour the reviewing court's subsequent assessment of the reasonableness of competing interpretations (see Margaret Allars, "On Deference to Tribunals, With Deference to Dworkin" (1994), 20 Queen's L.J. 163, at p. 187). The result is that the critical distinction between that which is, in the court's eyes, "incorrect" and that which is "not rationally supportable" is undermined.

92 The alternative approach is to leave the "correctness" of the adjudicator's decision undecided (see Allars, *supra*, at p. 197). This is essentially the approach that La Forest J. (Dickson C.J. concurring) took to patent unreasonableness in *C.A.I.M.A.W., supra*. He wrote, at pp. 1004 and 1005:

The courts must be careful to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it.

. . . .

I do not find it necessary to conclusively determine whether the decision of the Labour Relations Board is "correct" in the sense that it is the decision I would have reached had the proceedings been before this Court on their merits. It is sufficient to say that the result arrived at by the Board is not patently unreasonable.

93 It is this theoretical view that has, at least for the most part, prevailed. As L'Heureux-Dubé J. observed in *S.C.F.P., Local 301 c. Québec (Conseil des services essentiels)*, [1997] 1 S.C.R. 793 (S.C.C.) ("C.U.P.E., Local 301"), "this Court has stated repeatedly, in assessing whether administrative action is patently unreasonable, the goal is not to review the decision or action on its merits but rather to determine whether it is patently unreasonable, given the statutory provisions governing the particular body and the evidence before it" (para. 53). Patent unreasonableness review, in other words, should not "become an avenue for the court's substitution of its own view" (*C.U.P.E., Local 301, supra*, at para. 59; see also *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756 (S.C.C.), at pp. 771 and 774-775).

94 This view was recently forcefully rearticulated in *Ryan, supra*. Iacobucci J. wrote, at paras. 50-51:

[W]hen deciding whether an administrative action was unreasonable, a court should not at any point ask itself what the correct decision would have been The standard of reasonableness does not imply that a decision maker is merely afforded a "margin of error" around what the court believes is the correct result.

. . . Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

Though Iacobucci J.'s comments here were made in relation to reasonableness *simpliciter*, they are also applicable to the more deferential standard of patent unreasonableness.

95 I think it important to emphasize that neither the case at bar nor the companion case of *O.P.S.E.U.*, should be misinterpreted as a retreat from the position that, in reviewing a decision under the existing standard of patent unreasonableness, the court's role is not to identify the "correct" result. In each of these cases, there were *two* standards of review in play: there was a fundamental legal question on which the adjudicators were subject to a standard of correctness - whether the employees' criminal convictions could be relitigated - and there was a question at the core of the adjudicators' expertise on which they were subject to a standard of patent unreasonableness - whether the employees had been dismissed for just cause. As Arbour J. has outlined, the adjudicators' failure to decide the fundamental relitigation question correctly was sufficient to lead to a patently unreasonable outcome. Indeed, in circumstances such as those at issue in the case at bar, this cannot but be the case: the adjudicators' incorrect decisions on the fundamental legal question provided the entire foundation on which their legal analyses, and their conclusions as to whether the employees were dismissed with just cause, were based. To pass a review for patent unreasonableness, a decision must be one that can be "*rationally supported*"; this standard cannot be met where, as here, what supports the adjudicator's decision - indeed, what that decision is wholly premised on - is a legal determination that the adjudicator was required, but failed, to decide correctly. To say, however, that in such circumstances a decision will be patently unreasonable - a conclusion that flows from the applicability of *two separate* standards of review - is very different from suggesting that a reviewing court, before applying the standard of patent unreasonableness, must first determine whether the adjudicator's decision is (in)correct or that in applying patent unreasonableness the court should ask itself at any point in the analysis what the correct decision would be. In other words, the application of patent unreasonableness itself is not, and should not be, understood to be predicated on a finding of incorrectness, for the reasons that I discussed above.

(ii) Patent Unreasonableness and Correctness in Practice

96 While the Court now tends toward the view that La Forest J. articulated in *C.A.I.M.A.W.*, at p. 1004 - "courts must be careful [under a standard of patent unreasonableness] to focus their inquiry on the existence of a rational basis for the decision of the tribunal, and not on their agreement with it" - the tension between patent unreasonableness and correctness has not been completely resolved. Slippage between the two standards is still evident at times in the way in which patent unreasonableness is applied.

97 In analyzing a number of recent cases, commentators have pointed to both the intensity and the underlying character of the review in questioning whether the Court is applying patent unreasonableness in a manner that is in fact deferential. In this regard, the comments of Professor Lorne Sossin on the application of patent unreasonableness in *Canada Safeway Ltd. v. R.W.D.S.U., Local 454*, [1998] 1 S.C.R. 1079 (S.C.C.), are illustrative:

Having established that deference was owed to the statutory interpretation of the Board, the Court proceeded to dissect its interpretation. The majority was of the view that the Board had misconstrued the term "constructive lay-off" and had failed to place sufficient emphasis on the terms of the collective agreement. The majority reasons convey clearly why the Court would adopt a different approach to the Board. They are less clear as to why the Board's approach lacked a rational foundation. Indeed, there is very little evidence of the Court according deference to the Board's interpretation of its own statute, or to its choice as to how much weight to place on the terms of the collective agreement. *Canada Safeway* raises the familiar question of how a court should demonstrate its deference, particularly in the labour relations context.

(Lorne Sossin, "Developments in Administrative Law: The 1997-98 and 1998-99 Terms" (2000), 11 *S.C.L.R.* (2d) 37, at p. 49)

98 Professor Ian Holloway makes a similar observation with regard to *W.W. Lester (1978) Ltd. v. U.A., Local 740*, [1990] 3 S.C.R. 644 (S.C.C.):

In her judgment, [McLachlin J. (as she then was)] quoted from the familiar passages of *CUPE*, yet she . . . reached her decision on the basis of a review of the case law. She did not ask whether, despite the fact that it differed from holdings in other jurisdictions, the conclusion of the Newfoundland Labour Relations Board could be "rationally supported" on the basis of the wording of the successorship provisions of the *Labour Relations Act*. Instead, she looked at whether the Board had reached the correct legal interpretation of the Act in the same manner that a court of appeal would determine whether a trial judge had made a correct interpretation of the law. In other words, she effectively *equated patent unreasonability with correctness at law*.

(Ian Holloway, "'A Sacred Right': Judicial Review of Administrative Action as a Cultural Phenomenon" (1993), 22 *Man. L.J.* 28, at pp. 64-65; see also Allars, *supra*, at p. 178.)

99 At times the Court's application of the standard of patent unreasonableness may leave it vulnerable to criticism that it may in fact be doing implicitly what it has rejected explicitly: intervening in decisions that are, in its view, incorrect, rather than limiting any intervention to those decisions that lack a rational foundation. In the process, what should be an indelible line between correctness, on the one hand, and patent unreasonableness, on the other, becomes blurred. It may very well be that review under any standard of reasonableness, given the nature of the intellectual process it involves, entails such a risk. Nevertheless, the existence of two standards of reasonableness appears to have magnified the underlying tension between the two standards of reasonableness and correctness.

(c) The Relationship between the Patent Unreasonableness and Reasonableness Simpliciter Standards

100 While the conceptual difference between review on a correctness standard and review on a patent unreasonableness standard may be intuitive and relatively easy to observe (though in practice elements of correctness at times encroach uncomfortably into patent unreasonableness review), the boundaries between patent unreasonableness and reasonableness *simpliciter* are far less clear, even at the theoretical level.

(i) The Theoretical Foundation for Patent Unreasonableness and Reasonableness Simpliciter

101 The lack of sufficiently clear boundaries between patent unreasonableness and reasonableness *simpliciter* has its origins in the fact that patent unreasonableness was developed prior to the birth of the pragmatic and functional approach (see *C.U.P.E. v. Ontario, supra*, at para. 161) and, more particularly, prior to (rather than in conjunction with) the formulation of reasonableness *simpliciter* in *Southam, supra*. Because patent unreasonableness, as a posture of curial deference, was conceived in opposition only to a correctness standard of review, it was sufficient for the Court to emphasize in defining its scope the principle that

there will often be no one interpretation that can be said to be correct in interpreting a statute or otherwise resolving a legal dispute and that specialized administrative adjudicators may, in many circumstances, be better equipped than courts to choose between the possible interpretations. Where this is the case, provided that the adjudicator's decision is one that can be "rationally supported on a construction which the relevant legislation may reasonably be considered to bear," the reviewing court should not intervene (*Nipawin, supra*, at p. 389).

102 Upon the advent of reasonableness *simpliciter*, however, the validity of multiple interpretations became the underlying premise for this new variant of reasonableness review as well. Consider, for instance, the discussion of reasonableness *simpliciter* in *Ryan, supra*, that I cited above:

Unlike a review for correctness, there will often be no single right answer to the questions that are under review against the standard of reasonableness . . . Even if there could be, notionally, a single best answer, it is not the court's role to seek this out when deciding if the decision was unreasonable.

(*Ryan, supra*, at para. 51; see also para. 55.)

It is difficult to distinguish this language from that used to describe patent unreasonableness not only in the foundational judgments establishing that standard, such as *Nipawin, supra*, and *C.U.P.E., supra*, but also in this Court's more contemporary jurisprudence applying it. In *Ivanhoe, supra*, for instance, Arbour J. stated that "the recognition by the legislature and the courts that there are many potential solutions to a dispute is the very essence of the patent unreasonableness standard of review, which would be meaningless if it was found that there is only one acceptable solution" (at para. 116).

103 Because patent unreasonableness and reasonableness *simpliciter* are both rooted in this guiding principle, it has been difficult to frame the standards as analytically, rather than merely semantically, distinct. The efforts to sustain a workable distinction between them have taken, in the main, two forms, which mirror the two definitional strands of patent unreasonableness that I identified above. One of these forms distinguishes between patent unreasonableness and reasonableness *simpliciter* on the basis of the relative magnitude of the defect. The other looks to the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it. Both approaches raise their own problems.

(ii) The Magnitude of the Defect

104 In *P.S.A.C., supra*, at pp. 963-964, Cory J. described a patently unreasonable decision in these terms:

In the Shorter Oxford English Dictionary "patently", an adverb, is defined as "openly, evidently, clearly". "Unreasonable" is defined as "[n]ot having the faculty of reason; irrational . . . Not acting in accordance with reason or good sense". Thus, based on the dictionary definition of the words "patently unreasonable", it is apparent that if the decision the Board reached, acting within its jurisdiction, is not clearly irrational, that is to say evidently not in accordance with reason, then it cannot be said that there was a loss of jurisdiction.

While this definition may not be inherently problematic, it has become so with the emergence of reasonableness *simpliciter*, in part because of what commentators have described as the "tautological difficulty of distinguishing standards of rationality on the basis of the term 'clearly'" (see Cowan, *supra*, at pp. 27-2; see also Gabrielle Perreault, *Le contrôle judiciaire des décisions de l'administration: de l'erreur juridictionnelle à la norme de contrôle* (Montreal: Wilson & Lafleur, 2002), at p. 116; Suzanne Comtois, *Vers la primauté de l'approche pragmatique et fonctionnelle: Précis du contrôle judiciaire des décisions de fond rendues par les organismes administratifs* (Montreal: Yvon Blais, 2003), at pp. 34-35; P. Garant, *Droit administratif*, 4^e éd., vol. 2 (Montreal: Yvon Blais, 1996), at p. 193).

105 Mullan alludes to both the practical and the theoretical difficulties of maintaining a distinction based on the magnitude of the defect, i.e., the degree of irrationality, that characterizes a decision:

. . . admittedly in his judgment in *PSAC*, Cory J. did attach the epithet "clearly" to the word "irrational" in delineating a particular species of patent unreasonableness. However, I would be most surprised if, in so doing, he was using the term

"clearly" for other than rhetorical effect. Indeed, I want to suggest . . . that to maintain a position that it is only the "clearly irrational" that will cross the threshold of patent unreasonableness while irrationality *simpliciter* will not is to make a nonsense of the law. Attaching the adjective "clearly" to irrational is surely a tautology. Like "uniqueness", irrationality either exists or it does not. There cannot be shades of irrationality. In other words, I defy any judge or lawyer to provide a concrete example of the difference between the merely irrational and the clearly irrational! In any event, there have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny.

(Mullan, "Recent Developments in Standard of Review," *supra*, at pp. 24-25)

Also relevant in this respect are the comments of Reed J. in *Hao v. Canada (Minister of Citizenship & Immigration)* (2000), 184 F.T.R. 246 (Fed. T.D.), at para. 9:

I note that I have never been convinced that "patently unreasonable" differs in a significant way from "unreasonable". The word "patently" means clearly or obviously. If the unreasonableness of a decision is not clear or obvious, I do not see how that decision can be said to be unreasonable.

106 Even a brief review of this Court's descriptions of the defining characteristics of patently unreasonable and unreasonable decisions demonstrates that it is difficult to sustain a meaningful distinction between two forms of reasonableness on the basis of the magnitude of the defect and the extent of the decision's resulting deviation from the realm of the reasonable. Under both standards, the reviewing court's inquiry is focused on "the existence of a rational basis for the [adjudicator's] decision" (see, for example, *C.A.I.M.A.W.*, *supra*, at p. 1004, *per* La Forest J.; *Ryan*, *supra*, at paras. 55-56). A patently unreasonable decision has been described as one that "cannot be sustained on any reasonable interpretation of the facts or of the law" (*National Corn Growers*, *supra*, at pp. 1369-1370, *per* Gonthier J., or "rationally supported on a construction which the relevant legislation may reasonably be considered to bear" (*Nipawin*, *supra*, at p. 389). An unreasonable decision has been described as one for which there are "no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did" (*Ryan*, *supra*, at para. 53).

107 Under both patent unreasonableness and reasonableness *simpliciter*, mere disagreement with the adjudicator's decision is insufficient to warrant intervention (see, for example, *C.A.I.M.A.W.*, *supra*, at pp. 1003-1004, *per* La Forest J., and *Chamberlain*, *supra*, at para. 15, *per* McLachlin C.J.). Applying the patent unreasonableness standard, "the court will defer even if the interpretation given by the tribunal . . . is not the 'right' interpretation in the court's view nor even the 'best' of two possible interpretations, so long as it is an interpretation reasonably attributable to the words of the agreement" (*C.J.A., Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (S.C.C.), at p. 341). In the case of reasonableness *simpliciter*, "a decision may satisfy the . . . standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling" (*Ryan*, *supra*, at para. 55). There seems to me to be no qualitative basis on which to differentiate effectively between these various characterizations of a rationality analysis; how, for instance, would a decision that is not "tenably supported" (and is thus "merely" unreasonable) differ from a decision that is not "rationally supported" (and is thus patently unreasonable)?

108 In the end, the essential question remains the same under both standards: Was the decision of the adjudicator taken in accordance with reason? Where the answer is no, for instance, because the legislation in question cannot rationally support the adjudicator's interpretation, the error will invalidate the decision, regardless of whether the standard applied is reasonableness *simpliciter* or patent unreasonableness (see Deborah K. Lovett, "That Curious Curial Deference Just Gets Curiouser and Curiouser - *Canada (Director of Investigation and Research) v. Southam Inc.*" (1997), 55 *Advocate* (B.C.) 541, at p. 545). Because the two variants of reasonableness are united at their theoretical source, the imperative for the reviewing court to intervene will turn on the conclusion that the adjudicator's decision deviates from what falls within the ambit of the reasonable, not on "fine distinctions" between the test for patent unreasonableness and reasonableness *simpliciter* (see Flazon, *supra*, at p. 33).

109 The existence of these two variants of reasonableness review forces reviewing courts to continue to grapple with the significant practical problems inherent in distinguishing meaningfully between the two standards. To the extent that a distinction

is advanced on the basis of the relative severity of the defect, this poses not only practical difficulties but also difficulties in principle, as this approach implies that patent unreasonableness, in requiring "clear" rather than "mere" irrationality, allows for a margin of appreciation for decisions that are not in accordance with reason. In this respect, I would echo Mullan's comments that there would "have to be concerns with a regime of judicial review which would allow any irrational decision to escape rebuke even under the most deferential standard of scrutiny" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 25).

(iii) The "Immediacy or Obviousness" of the Defect

110 There is a second approach to distinguishing between patent unreasonableness and reasonableness *simpliciter* that requires discussion. *Southam, supra*, at para. 57, emphasized the "immediacy or obviousness" of the defect:

The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable.

111 In my view, two lines of difficulty have emerged from emphasizing the "immediacy or obviousness" of the defect, and thus the relative invasiveness of the review necessary to find it, as a means of distinguishing between patent unreasonableness and reasonableness *simpliciter*. The first is the difficulty of determining how invasive a review is invasive enough, but not too invasive, in each case. The second is the difficulty that flows from ambiguity as to the intended meaning of "immediacy or obviousness" in this context: is it the obviousness of the defect in the sense of its transparency on the face of the decision that is the defining characteristic of patent unreasonableness review (see James L.H. Sprague, "Another View of *Baker*" (1999), 7 *Reid's Administrative Law* 163, at pp. 163 and 165, note 5), or is it rather the obviousness of the defect in terms of the ease with which, once found, it can be identified as severe? The latter interpretation may bring with it difficulties of the sort I referred to above - *i.e.*, attempting to qualify degrees of irrationality. The former interpretation, it seems to me, presents problems of its own, which I discuss below.

112 Turning first to the difficulty of actually applying a distinction based on the "immediacy or obviousness" of the defect, we are confronted with the criticism that the "somewhat probing examination" criterion (see *Southam, supra*, at para. 56) is not clear enough (see David W. Elliott, "*Suresh* and the Common Borders of Administrative Law: Time for the Tailor?" (2002), 65 *Sask. L. Rev.* 469, at pp. 486-487). As Elliott notes: "[t]he distinction between a 'somewhat probing examination' and those which are simply probing, or are less than probing, is a fine one. It is too fine to permit courts to differentiate clearly among the three standards" (Elliott, *supra*, at pp. 486-487).

113 This Court has itself experienced some difficulty in consistently performing patent unreasonableness review in a way that is less probing than the "somewhat probing" analysis that is the hallmark of reasonableness *simpliciter*. Despite the fact that a less invasive review has been described as a defining characteristic of the standard of patent unreasonableness, in a number of the Court's recent decisions, including *Toronto (City) Board of Education, supra*, and *Ivanhoe, supra*, one could fairly characterize the Court's analysis under this standard as at least "somewhat" probing in nature.

114 Even prior to *Southam* and the development of reasonableness *simpliciter*, there was some uncertainty as to how intensely patent unreasonableness review is to be performed. This is particularly evident in *National Corn Growers, supra* (see generally Mullan, "Of Chaff Midst the Corn," *supra*; Mullan, *Administrative Law*, *supra*, at pp. 72-73). In that case, while Wilson J. counselled restraint on the basis of her reading of C.U.P.E., *supra*, Gonthier J., for the majority, performed quite a searching review of the decision of the Canadian Import Tribunal. He reasoned, at p. 1370, that "[i]n some cases, the unreasonableness of a decision may be apparent without detailed examination of the record. In others, it may be no less unreasonable but this can only be understood upon an in-depth analysis."

115 *Southam* itself did not definitively resolve the question of how invasively review for patent unreasonableness should be performed. An intense review would seem to be precluded by the statement that, "if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable" (para. 57). The possibility that, in certain circumstances, quite a thorough review for patent unreasonableness will be appropriate, however, is left open: "[i]f the

decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem" (para. 57).

116 This brings me to the second problem: In what sense is the defect immediate or obvious? *Southam* left some ambiguity on this point. As I have outlined, on the one hand, a patently unreasonable decision is understood as one that is flawed by a defect that is evident on the face of the decision, while an unreasonable decision is one that is marred by a defect that it takes significant searching or testing to find. In other places, however, *Southam* suggests that the "immediacy or obviousness" of a patently unreasonable defect refers not to the ease of its detection, but rather to the ease with which, once detected, it can be identified as severe. Particularly relevant in this respect is the statement that "once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident" (para. 57). It is the (admittedly sometimes only tacit) recognition that what must in fact be evident - *i.e.*, clear, obvious, or immediate - is the defect's magnitude upon detection that allows for the possibility that in certain circumstances "it will simply not be possible to understand and respond to a patent unreasonableness argument without a thorough examination and appreciation of the tribunal's record and reasoning process" (see Mullan, *Administrative Law, supra*, at p. 72; see also *Ivanhoe, supra*, at para. 34).

117 Our recent decision in *Ryan* has brought more clarity to *Southam*, but still reflects a degree of ambiguity on this issue. In *Ryan*, at para. 52, the Court held:

In *Southam, supra*, at para. 57, the Court described the difference between an unreasonable decision and a patently unreasonable one as rooted "in the immediacy or obviousness of the defect". *Another way to say this is that a patently unreasonable defect, once identified, can be explained simply and easily, leaving no real possibility of doubting that the decision is defective.* A patently unreasonable decision has been described as "clearly irrational" or "evidently not in accordance with reason" (*Canada (Attorney General) v. Public Service Alliance of Canada*, [1993] 1 S.C.R. 941, at pp. 963-64, *per* Cory J.; *Centre communautaire juridique de l'Estrie v. Sherbrooke (City)*, [1996] 3 S.C.R. 84, at paras. 9-12, *per* Gonthier J.). A decision that is patently unreasonable is so flawed that no amount of curial deference can justify letting it stand. [Emphasis added.]

This passage moves the focus away from the obviousness of the defect in the sense of its transparency "on the face of the decision" to the obviousness of its magnitude once it has been identified. At other points, however, the relative invasiveness of the review required to identify the defect is emphasized as the means of distinguishing between patent unreasonableness and reasonableness *simpliciter*:

A decision may be unreasonable without being patently unreasonable when the defect in the decision is less obvious and might only be discovered after "significant searching or testing" (*Southam, supra*, at para. 57). Explaining the defect may require a detailed exposition to show that there are no lines of reasoning supporting the decision which could reasonably lead that tribunal to reach the decision it did (*Ryan, supra*, at para. 53).

118 Such ambiguity led commentators such as David Phillip Jones to continue to question in light of *Ryan* whether

... whatever it is that makes the decision "patently unreasonable" [must] appear on the face of the record? . . . Or can one go beyond the record to demonstrate - "identify" - why the decision is patently unreasonable? Is it the "immediacy and obviousness of the defect" which makes it patently unreasonable, or does patently unreasonable require outrageousness so that the decision is so flawed that no amount of curial deference can justify letting it stand?

(David Phillip Jones, "Notes on *Dr. Q* and *Ryan*: Two More Decisions by the Supreme Court of Canada on the Standard of Review in Administrative Law," paper originally presented at the Canadian Institute for the Administration of Justice, Western Roundtable, Edmonton, April 25, 2003, at p. 10)

119 As we have seen, the answers to such questions are far from self-evident, even at the level of theoretical abstraction. How much more difficult must they be for reviewing courts and counsel struggling to apply not only patent unreasonableness, but also reasonableness *simpliciter*? (See in this regard, the comments of Mullan in "Recent Developments in Standard of Review," *supra*, at p. 4.)

120 Absent reform in this area or a further clarification of the standards, the "epistemological" confusion over the relationship between patent unreasonableness and reasonableness *simpliciter* will continue. As a result, both the types of errors that the two variants of reasonableness are likely to catch - *i.e.*, interpretations that fall outside the range of those that can be "reasonably," "rationally" or "tenably" supported by the statutory language - and the way in which the two standards are applied will in practice, if not necessarily in theory, be much the same.

121 There is no easy way out of this conundrum. Whatever attempts are made to clarify the contours of, or the relationship between, the existing definitional strands of patent unreasonableness, this standard and reasonableness *simpliciter* will continue to be rooted in a shared rationale: statutory language is often ambiguous and "admits of more than one possible meaning," provided that the expert administrative adjudicator's interpretation "does not move outside the bounds of reasonably permissible visions of the appropriate interpretation, there is no justification for court intervention" (Mullan, "Recent Developments in Standard of Review," *supra*, at p. 18). It will thus remain difficult to keep these standards conceptually distinct, and I query whether, in the end, the theoretical efforts necessary to do so are productive. Obviously, any decision that fails the test of patent unreasonableness must also fall on a standard of reasonableness *simpliciter*, but it seems hard to imagine situations where the converse is not also true: if a decision is not supported by a tenable explanation (and is thus unreasonable) (*Ryan, supra*, at para. 55), how likely is it that it could be sustained on "any reasonable interpretation of the facts or of the law" (and thus not be patently unreasonable) (*National Corn Growers, supra*, at pp. 1369-1370, *per* Gonthier J.)?

122 Thus, both patent unreasonableness and reasonableness *simpliciter* require that reviewing courts pay "respectful attention" to the reasons of adjudicators in assessing the rationality of administrative decisions (see *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 65, *per* L'Heureux-Dubé J., citing David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy," in Michael Taggart, ed., *The Province of Administrative Law* (Oxford: Hart Publishing, 1997), 279, at p. 286, and *Ryan, supra*, at para. 49).

123 Attempting to differentiate between these two variants of curial deference by classifying one as "somewhat more probing" in its attentiveness than the other is unlikely to prove any more successful in practice than it has proven in the past. Basing the distinction on the relative ease with which a defect may be detected also raises a more theoretical quandary: the difficulty of articulating why a defect that is obvious on the face of a decision should present more of an imperative for court intervention than a latent defect. While a defect may be readily apparent because it is severe, a severe defect will not necessarily be readily apparent; by the same token, a flaw in a decision may be immediately evident, or obvious, but relatively inconsequential in nature.

124 On the other hand, the effect of clarifying that the language of "immediacy or obviousness" goes not to ease of detection, but rather to the ease with which, once detected (on either a superficial or a probing review), a defect may be identified as severe might well be to increase the regularity with which reviewing courts subject decisions to as intense a review on a standard of patent unreasonableness as on a standard of reasonableness *simpliciter*, thereby further eliding any difference between the two.

125 An additional effect of clarifying that the "immediacy or obviousness" of the defect refers not to its transparency on the face of the decision but rather to its magnitude upon detection is to suggest that it is feasible and appropriate for reviewing courts to attempt to qualify degrees of irrationality in assessing the decisions of administrative adjudicators: *i.e.*, this decision is irrational enough to be unreasonable, but not so irrational as to be overturned on a standard of patent unreasonableness. Such an outcome raises questions as to whether the legislative intent could ever be to let irrational decisions stand. In any event, such an approach would seem difficult to reconcile with the rule of law.

126 I acknowledge that there are certain advantages to the framework to which this Court has adhered since its adoption in *Southam, supra*, of a third standard of review. The inclusion of an intermediate standard does appear to provide reviewing courts with an enhanced ability to tailor the degree of deference to the particular situation. In my view, however, the lesson to be drawn from our experience since then is that those advantages appear to be outweighed by the current framework's drawbacks, which include the conceptual and practical difficulties that flow from the overlap between patent unreasonableness and reasonableness *simpliciter*, and the difficulty caused at times by the interplay between patent unreasonableness and correctness.

127 In particular, the inability to sustain a viable analytical distinction between the two variants of reasonableness has impeded their application in practice in a way that fulfils the theoretical promise of a more precise reflection of the legislature's intent. In the end, attempting to distinguish between the unreasonable and the patently unreasonable may be as unproductive as attempting to differentiate between the "illegible" and the "patently illegible." While it may be possible to posit, in the abstract, some kind of conceptual distinction, the functional reality is that once a text is illegible - whether its illegibility is evident on a cursory glance or only after a close examination - the result is the same. There is little to be gained from debating as to whether the text is illegible *simpliciter* or patently illegible; in either case, it cannot be read.

128 It is also necessary to keep in mind the theoretical foundations for judicial review and its ultimate purpose. The purpose of judicial review is to uphold the normative legal order by ensuring that the decisions of administrative decision makers are both procedurally sound and substantively defensible. As McLachlin C.J. explained in *Q., supra*, at para. 21, the two touchstones of judicial review are legislative intent and the rule of law:

[In *Pushpanathan*,] Bastarache J. affirmed that "[t]he central inquiry in determining the standard of review exercisable by a court of law is the legislative intent of the statute creating the tribunal whose decision is being reviewed" (para. 26). However, this approach also gives due regard to "the consequences that flow from a grant of powers" (*Bibeault, supra*, at p. 1089) and, while safeguarding "[t]he role of the superior courts in maintaining the rule of law" (p. 1090), reinforces that this reviewing power should not be employed unnecessarily. In this way, the pragmatic and functional approach inquires into legislative intent, but does so against the backdrop of the courts' constitutional duty to protect the rule of law.

In short, the role of a court in determining the standard of review is to be faithful to the intent of the legislature that empowered the administrative adjudicator to make the decision, as well as to the animating principle that, in a society governed by the rule of law, power is not to be exercised arbitrarily or capriciously.

129 As this Court has observed, the rule of law is a "highly textured expression, importing many things which are beyond the need of these reasons to explore but conveying, for example, a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority" (*Reference re Amendment to the Constitution of Canada*, [1981] 1 S.C.R. 753 (S.C.C.), at pp. 805-806). As the Court elaborated in *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (S.C.C.), at para. 71:

In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order" . . . A third aspect of the rule of law is . . . that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.

"At its most basic level," as the Court affirmed, at para. 70, "the rule of law vouchsafes to the citizens and residents of the country a stable, predictable and ordered society in which to conduct their affairs. It provides a shield for individuals from arbitrary state action."

130 Because arbitrary state action is not permissible, the exercise of power must be justifiable. As the Chief Justice has noted, . . . societies governed by the Rule of Law are marked by a certain *ethos of justification*. In a democratic society, this may well be the general characteristic of the Rule of Law within which the more specific ideals . . . are subsumed. Where a society is marked by a culture of justification, an exercise of public power is only appropriate where it can be justified to citizens in terms of *rationality and fairness*.

(See the Honourable Madam Justice Beverley McLachlin, "The Roles of Administrative Tribunals and Courts in Maintaining the Rule of Law" (1998-1999), 12 *C.J.A.L.P.* 171, at p. 174, *italics in original*; see also MacLauchlan, *supra* at pp. 289-291.)

Judicial review on substantive grounds ensures that the decisions of administrative adjudicators are capable of rational justification; review on procedural grounds (*i.e.*, does the decision meet the requirements of procedural fairness?) ensures that they are fair.

131 In recent years, this Court has recognized that both courts and administrative adjudicators have an important role to play in upholding and applying the rule of law. As Wilson J. outlined in *National Corn Growers, supra*, courts have come to accept that "statutory provisions often do not yield a single, uniquely correct interpretation" and that an expert administrative adjudicator may be "better equipped than a reviewing court to resolve the ambiguities and fill the voids in the statutory language" in a way that makes sense in the specialized context in which that adjudicator operates (p. 1336, citing J.M. Evans et al., *Administrative Law*, 3rd ed. (Toronto: Emond Montgomery, 1989), at p. 414). The interpretation and application of the law is thus no longer seen as exclusively the province of the courts. Administrative adjudicators play a vital and increasing role. As McLachlin J. helpfully put it in a recent speech on the roles of courts and administrative tribunals in maintaining the rule of law: "A culture of justification shifts the analysis from the institutions themselves to, more subtly, what those institutions are capable of doing for the rational advancement of civil society. The Rule of Law, in short, can speak in several voices so long as the resulting chorus echoes its underlying values of fairness and rationality" (McLachlin, *supra*, at p. 175).

132 In affirming the place for administrative adjudicators in the interpretation and application of the law, however, there is an important distinction that must be maintained: to say that the administrative state is a legitimate player in resolving legal disputes is properly to say that administrative adjudicators are capable (and perhaps *more* capable) of choosing among reasonable decisions. It is *not* to say that unreasonable decision making is a legitimate presence in the legal system. Is this not the effect of a standard of patent unreasonableness informed by an intermediate standard of reasonableness *simpliciter*?

133 On the assumption that we can distinguish effectively between an unreasonable and a patently unreasonable decision, there are situations where an unreasonable (*i.e.*, irrational) decision must be allowed to stand. This would be the case where the standard of review is patent unreasonableness and the decision under review is unreasonable, but not patently so. As I have noted, I doubt that such an outcome could be reconciled with the intent of the legislature which, in theory, the pragmatic and functional analysis aims to reflect as faithfully as possible. As a matter of statutory interpretation, courts should always be very hesitant to impute to the legislature any intent to let irrational administrative acts stand, absent the most unequivocal statement of such an intent (see Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Markham: Butterworths, 2002), at pp. 367-368). As a matter of theory, the constitutional principle of the primacy of the rule of law, which is an ever-present background principle of interpretation in this context, reinforces the point: if a court concludes that the legislature intended that there be no recourse from an *irrational* decision, it seems highly likely that the court has misconstrued the intent of the legislature.

134 Administrative law has developed considerably over the last 25 years since *C.U.P.E. v. New Brunswick Liquor Corp.* This evolution, which reflects a strong sense of deference to administrative decision makers and an acknowledgment of the importance of their role, has given rise to some problems or concerns. It remains to be seen, in an appropriate case, what should be the solution to these difficulties. Should courts move to a two standard system of judicial review, correctness and a revised unified standard of reasonableness? Should we attempt to more clearly define the nature and scope of each standard or rethink their relationship and application? This is perhaps some of the work which lies ahead for courts, building on the developments of recent years as well as on the legal tradition which created the framework of the present law of judicial review.

III. Disposition

135 Subject to my comments in these reasons, I concur with Arbour J.'s disposition of the appeal.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* On November 13, 2003, the Supreme Court of Canada issued a corrigendum; the changes have been incorporated herein.

TAB 29

2016 ONSC 5015
Ontario Superior Court of Justice

Vaeth v. North American Palladium Ltd.

2016 CarswellOnt 12742, 2016 ONSC 5015, 269 A.C.W.S. (3d) 424

**WOLFGANG VAETH, ANIKA VAETH, ROWITHA VAETH, SASKIA VAETH,
THORSTEN FUERHOLZER, ROSWITHA FUERHOLZER, SABINE FUERHOLZER,
and BURKHARD SCHNEIDER (Plaintiffs) and NORTH AMERICAN PALLADIUM
LTD., PHIL DU TOIT, DAVID LANGILLE, and KPMG LLP (Defendants)**

CRAIG JOHNSON (Plaintiff) and NORTH AMERICAN PALLADIUM
LTD., PHIL DU TOIT, DAVID LANGILLE, and KPMG LLP (Defendants)

Perell J.

Heard: July 22, 2016

Judgment: August 8, 2016

Docket: CV-15-11067-ooCL, CV-16-548624

Counsel: Eli Karp, for Plaintiffs, Wolfgang Vaeth, Anika Vaeth, Saskia Vaeth, Thorsten Fuerholzer, Roswitha Fuerholzer, Sabine, Fuerholzer, Burkhard Schneider, and Craig Johnson

Alan W. D'Silva, Alexandra Urbanski, for Defendants, North American Palladium Ltd., Phil Du Toit, and David Langille
Dana M. Peebles, for Defendant, KPMG LLP

Subject: Civil Practice and Procedure; Contracts; Corporate and Commercial; Public; Securities; Torts

MOTION by defendants to stay class action and individual action temporarily.

Perell J.:

A. INTRODUCTION

1 Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Morganti Legal acts for Craig Johnson in a securities misrepresentation class action, (the "Johnson Class Action") against North American Palladium Ltd. ("Palladium"), Phil Du Toit, David Langille, (collectively, the "Palladium Defendants") and KPMG LLP, which was Palladium's auditor. The class action is about alleged misrepresentations made in Palladium's corporate public disclosure documents between July 30, 2014 and April 14, 2015 inclusive.

2 Morganti Legal also acts for Wolfgang Vaeth, Anika Vaeth, Saskia Vaeth, Thorsten Fuerholzer, Roswitha Fuerholzer, Sabine Fuerholzer and Burkhard Schneider (the "Vaeth Plaintiffs"), in a securities misrepresentation action (the "Vaeth Action") against the Palladium Defendants and KPMG about the same alleged misrepresentations. The plaintiffs in both actions advance common law negligence claims and statutory misrepresentation claims under Ontario's *Securities Act*, R.S.O. 1990, c. S.5.

3 The Defendants in both actions bring a motion to stay both actions temporarily.

4 For the reasons that follow, I shall make an Order that temporarily stays both actions for the purpose of effecting a change of lawyer in one or the other of the actions. The Order is as follows:

1. Subject to the right of the plaintiffs in the Vaeth Action (the Vaeth Plaintiffs) to discontinue their action or to deliver a notice of change of lawyer, it shall be temporarily stayed until the earlier of:

- (a) the certification of the Johnson Class Action and the delivery of opt-out notices by the Vaeth Plaintiffs; or
 - (b) the discontinuance or other termination of the Johnson Class Action.
2. If the Vaeth Action is discontinued, the Vaeth Plaintiffs may participate in the Johnson Class Action as Class Members or as Representative Plaintiffs.
 3. The Johnson Class Action shall be temporarily stayed until the earlier of:
 - (a) the discontinuance of the Vaeth Action;
 - (b) the delivery of a notice of change of lawyer in the Vaeth Action; or
 - (c) the delivery of a notice of change of lawyer in the Johnson Class Action.
 4. If the Vaeth Action is not discontinued or if no notice of change of lawyer is delivered in the Vaeth Action within ninety days and if no notice of change of lawyer is delivered in the Johnson Action within ninety days, then pursuant to s. 29 of the *Class Proceedings Act, 1992*, the Johnson Class Action shall be discontinued.

B. FACTUAL AND PROCEDURAL BACKGROUND

5 Palladium is a publicly traded mining exploration and production company based in Toronto. Mr. Du Toit is its former President and Chief Executive Officer. Mr. Langille is its former Chief Financial Officer. KPMG is a public accounting firm with offices in Toronto and was Palladium's auditor. Mr. Johnson and the Plaintiffs in the Vaeth Action are all investors that purchased Palladium shares in the secondary market.

6 On August 7, 2015, Wolfgang Vaeth, Thorsten Furholzer, and Burkhard Schneider, all represented by Morganti Legal, commenced the Vaeth Action (CV-15-11067-00CL). The Vaeth Action was subsequently amended to add Anika Vaeth, Saskia Vaeth, Roswitha Fuerholzer, and Sabine Fuerholzer. All the Plaintiffs are residents of Germany; they claim damages of approximately \$2 million.

7 A few days later, on August 12, 2015, Mr. Vaeth also commenced action CV-15-11073-00CL (the Vaeth Class Action), a proposed class action.

8 The Statements of Claim in the Vaeth Action and in the Vaeth Class Action plead that that the Defendants are liable for misrepresentations made in Palladium's corporate public disclosure documents between July 30, 2014 and April 14, 2015 inclusive. Both actions seek damages from the same Defendants for the same alleged misrepresentations in public filings over the same time period. Morganti Legal was the lawyer of record in both actions.

9 After the Defendants' counsel communicated their view that there was a conflict of interest in Morganti Legal acting for Mr. Vaeth in both the Vaeth Action and the Vaeth Class Action, Mr. Vaeth discontinued the Vaeth Class Action. After discontinuing the Vaeth Class Action, Mr. Vaeth and his co-plaintiffs undertook to the Defendants not to commence another class action. The Vaeth Action continued with Morganti Legal as lawyer of record.

10 By order dated January 2, 2016, I granted leave for the Vaeth Class Action to be discontinued. Leave is required under s. 29 of the *Class Proceedings Act, 1992*. Notice of the discontinuance was given to putative Class Members. The notice was given to the persons who had contacted Morganti Legal. There was a press release to the investing public. The press release alerted investors that the running of the limitation period for claims against the Defendants would resume with the discontinuance of the Vaeth Class Action, unless another investor chose to commence another class action.

11 On February 19, 2016, the Plaintiffs in the Vaeth Action brought a motion for leave to make a secondary market misrepresentation claim pursuant to s. 138.8 of the Ontario *Securities Act*. The delivery of the motion is required to arrest the running of the limitation period for the statutory claim.

12 The delivery of the notice of motion for leave under Part XXIII.1 of the Ontario *Securities Act* created a civil procedure problem. As explained at length in *Smith v. Sino-Forest Corp.*, 2012 ONSC 1924 (Ont. S.C.J.), an action asserting both a common law negligence cause of action and also a statutory cause of action for which leave is required presents a special or unique civil procedure problem.

13 In a normal action, after a statement of claim is delivered, the defendant is required to deliver its statement of claim, but in an action that combines a common law cause of action with a statutory cause of action under Ontario's *Securities Act*, a "hybrid" action, the defendant can refuse to deliver a statement of defence to the statutory cause of action because that action, technically speaking, does not exist until leave to commence it is granted.

14 The situation of a hybrid action is further complicated because in the motion for leave to commence the statutory cause of action, the defendant may - but under s. 138.2 of the Ontario *Securities Act*, is not obliged to - deliver an affidavit to resist the leave motion: *Ainslie v. CV Technologies Inc.* (2008), 93 O.R. (3d) 200 (S.C.J.) at paras. 14-20, 24-25; *Sharma v. Timminco Ltd.*, 2010 ONSC 790 (Ont. S.C.J.) at para. 32. There are further complications if the hybrid action is also a proposed class action.

15 In *Smith v. Sino-Forest Corp.*, *supra*, I analyze the choices of the defendant in a hybrid action. From that analysis, it follows that the defendant in a hybrid action has three choices: (1) deliver both an affidavit to resist the leave motion under s. 138.8 of the Ontario *Securities Act* and also a statement of defence; (2) voluntarily deliver a statement of defence without delivering an affidavit under s. 138.8; or (3) do not deliver any affidavit or pleading and await the outcome of the leave motion.

16 In the immediate case, the current decision of the Defendants is not to deliver any affidavits or pleadings until it is determined whether leave to commence the statutory claim will be granted. The Defendants, however, complain that they find themselves between a procedural rock and a hard place because they would like the Vaeth Plaintiffs, who are foreign plaintiffs, to post security for costs, but under the *Rules of Civil Procedure*, the Defendants are unable to make this request until after delivering a statement of defence, which they are not prepared to do.

17 Returning to the narrative, on March 14, 2016, Mr. Johnson issued his proposed class action against the Palladium Defendants and KPMG. Morganti Legal was, once again, the lawyer of record. Mr. Johnson and the Class Members sought damages from the same Defendants for the same alleged misrepresentations in public filings over the same time period as in the Vaeth Action and the discontinued Vaeth Class Action.

18 Upon being served with the Johnson Class Action, the Defendants asked Morganti Legal how it proposed to pursue both the Vaeth Action and the Johnson Class Action. The Defendants, once again, communicated their view that there was a conflict of interest in Morganti Legal appearing as lawyer of record in both actions.

19 In response, Morganti Legal indicated that it intended to simultaneously press forward with discovery of the common law misrepresentation claims in the Vaeth Action and to bring a motion for leave to commence an action for secondary market liability pursuant to s. 138.8 of the Ontario *Securities Act* in the Johnson Class Action. Subsequently, Morganti Legal said that it would be prepared to stay the Johnson Class Action while the Vaeth Plaintiffs pursued just their common law claim. Morganti Legal disputed that there was any conflict of interest or problem in its plan to be lawyer of record in both the Vaeth Action and the Johnson Class Action.

20 Without conceding that there was any conflict of interest in the firm acting as lawyer of record in both actions, Morganti Legal submitted that this issue could and should be dealt with at the certification motion. More precisely, it submitted that its qualifications to be Class Counsel would be determined under s. 5(1)(e) of the *Class Proceedings Act, 1992*, which addresses the qualification of the proposed representative plaintiff.

21 Further, the law firm submitted that its clients; i.e., Mr. Johnson and the Vaeth Plaintiffs, had consented to the firm acting in both actions. The law firm submitted that under the Law Society's *Rules of Professional Conduct* there is no requirement that their clients receive independent legal advice in consenting to a joint retainer.

22 I pause here to make three observations.

23 First, Morganti Legal's original plan (discovery of the common law claim in the Vaeth Action followed by the leave motion in the Johnson Class Action) has the procedural difficulty that under Rule 30.1 (Deemed Undertaking), all parties and their lawyers are deemed to undertake not to use evidence or information from documentary discovery (Rule 30) and from examinations for discovery (Rule 31) for any purposes other than those proceedings in which the evidence or information was obtained. The Defendants submitted that Morganti Legal's plan of proceeding with just the common law negligence claim in the Vaeth Action was unfair and improper because it was unavoidable that the deemed undertaking in the Vaeth Action would be violated and Morganti Legal would eventually use evidence or information from the Vaeth Action in the Johnson Class Action. To use the evidence and information from the Vaeth Action in the Johnson Class Action, Morganti Legal and Mr. Johnson would require an order pursuant to rule 30.1.01(8) that the deemed undertaking did not apply. Morganti Legal, however, disputed that the deemed undertaking applied, or it submitted that it would undoubtedly be able to obtain an order under rule 30.1.01(8) to be relieved of the deemed undertaking and thus use the discovery evidence in the Vaeth Action in the Johnson Class Action.

24 The second observation is that Morganti Legal's alternative plan (discovery in the Vaeth Action and a temporary stay of the Johnson Class Action) reveals that the Vaeth Plaintiffs apparently believe that their common law negligence claim will succeed and, therefore, they do not need what the statutory claim under the Ontario *Securities Act* has to offer; namely, a misrepresentation claim without the necessity of establishing that the plaintiff reasonably relied on the misrepresentation.

25 In other words, a common law negligent misrepresentation claim has five elements that the Veath Plaintiffs must prove; namely: (1) a duty of care based on a special relationship between the plaintiff and the defendant; (2) an untrue, inaccurate, or misleading representation; (3) the defendant making the representation negligently; (4) the plaintiff having reasonably relied on the misrepresentation; and, (5) the plaintiff suffering damages as a consequence of relying on the misrepresentation: *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.). In contrast, the statutory claim has fewer constituent elements and the statute deems that investors relied on the public documents that contained the misrepresentations, and the Vaeth Plaintiffs apparently believe that they can succeed without resorting to the statutory cause of action, which also comes with the baggage of some limits on the amount of damages and statutory defences.

26 The third observation, which foreshadows the discussion below, is that the alternative plan demonstrates, in a small way, how Morganti Legal may have a conflict in representing both the Vaeth Plaintiffs and Mr. Johnson because the Johnson Class Action would be delayed to accommodate the Vaeth Plaintiffs who apparently believe that they do not need the fallback of the statutory claim under the Ontario *Securities Act*.

27 Returning to the factual background, the Defendants disagreed with the positions and submissions of Morganti Legal and moved to have both actions temporarily stayed until the conflict problems were resolved. The Defendants did not propose that both actions be stayed permanently and conceded that Morganti Legal could be lawyer of record in one or the other of the Vaeth Action or the Johnson Class Action. The Defendants also agreed that if the Vaeth Plaintiffs wished to discontinue the Vaeth Action and again become the representative plaintiff or a Class Member in the Johnson Class Action, then the Defendants would release them from the undertaking not to resume a class action. I regard this concession as without prejudice to the Defendants' right to challenge the Vaeth Plaintiffs as satisfying the representative plaintiff criterion for certification. There is, however, no getting around the fact that the Vaeth Plaintiffs are putative Class Members in the Johnson Class Action.

28 By objecting to the multiplicity of proceedings, the Defendants also submitted that there were reasons to temporarily stay the Vaeth Action that are independent of the conflict of interest problems.

C. DISCUSSION AND ANALYSIS

Introduction

29 It's complicated.

30 But, in my opinion, Morganti Legal cannot be permitted to act as lawyer of record in both the Johnson Class Action and the Vaeth Action. The law firm may be retained by one or the other of Mr. Johnson or the Vaeth Plaintiffs, but the law firm cannot be retained to simultaneous act for both.

31 In my opinion, the mutual consent of Mr. Johnson and of the Vaeth Plaintiffs will not resolve the law firm's irreconcilable conflicts of interest and the procedural problems arising from the joint retainer.

32 Further, it is my opinion, that there are reasons to temporarily stay the Vaeth Action independent of the problems of Morganti Legal's joint retainer. As will become apparent, these independent reasons for a temporary stay of the Vaeth Action are complications in the problems of the law firm's joint retainer.

33 The problems of the joint retainer, however, can be resolved by the Order described above and explained below. As will be explained below, the purport of the Order is to permit a class action to go forward. In that class action, Morganti Legal can be Class Counsel only if the Vaeth Plaintiffs discontinue the Vaeth Action and participate in the Johnson Class Action; however, if the Vaeth Plaintiffs persist in opting out of the Johnson Class Action, then Morganti Legal can act for them, but Mr. Johnson must retain another law firm to be Class Counsel.

34 In order to explain my decision, I shall first explain why I am temporarily staying the Vaeth Action until the earlier of: (a) the discontinuance or other termination of the Johnson Class Action; or (b) the certification of the Johnson Class Action and the delivery of opt-out notices by the Plaintiffs of the Vaeth Action. This explanation will describe the court's jurisdiction to temporarily stay individual actions when there is a companion class action.

35 Second, I shall explain why Morganti Legal as putative Class Counsel has irreconcilable conflicts of interest and cannot have a joint retainer with a representative plaintiff (Mr. Johnson) and Opt-out Class Members (the Vaeth Plaintiffs).

36 Third, I shall explain the operation of the Order described above.

1. The Court's Jurisdiction to Temporarily Stay Actions Pending the Certification of a Class Action

37 Civil procedure encourages the avoidance of a multiplicity of proceedings. Multiple proceedings that litigate the same issue are obviously inefficient, a waste of scarce judicial resources, and the cause of expense and delay in the administration of justice. And multiple proceedings that litigate the same issues entail the possibility of inconsistent results that may be embarrassing to the administration of justice and instill sentiments of unfairness because similarly situated parties experience and perceive different outcomes. Multiple proceedings against the same defendant over the same issue may compromise the ability of the defendant to defend itself because it must defend itself over and over again, and while this circumstance may explain why the outcomes of virtually identical cases can be contradictory, it is not fair to the defendants.

38 Section 138 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided." This provision is fostered by s. 106 of the *Courts of Justice Act*, which provides that "[a] court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just." It is also fostered by s. 107 of the *Act*, which allows for a party in one action to seek the transfer of a related action to the same venue for consolidation or trial together with another action.

39 Section 138 of the *Courts of Justice Act* is recognized and facilitated by various *Rules of Civil Procedure*, including: the joinder of claims and parties (Rule 5); consolidation and hearing together (Rule 6); separate hearings (Rule 6.1); class proceedings (Rule 12); service outside Ontario (Rule 17); and the determination of an issue before trial (Rule 21), which rule, among other things, empowers the court to stay or dismiss an action on the ground that "the court has no jurisdiction over the subject matter" or that "another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter." The avoidance of a multiplicity of proceedings as far as possible is also facilitated by case managing together the multiple cases or by an order that all motions be heard by one judge pursuant to rule 37.15.

40 In the last regard, in *Dumoulin v. Ontario*, [2004] O.J. No. 2778 (Ont. S.C.J.), Justice Cullity jointly case managed a proposed class action by Mr. Dumoulin on behalf of a class of persons harmed by exposure to toxic mould at the Newmarket Court House along with an individual action by Ms. Verkerk who was a class member in the Dumoulin action. Justice Cullity said that to avoid unnecessary duplication of procedures, to avoid inconsistencies in the application of legal principles, and to achieve the most economical use of judicial and other litigation resources, it was desirable to manage both cases together.

41 The avoidance of a multiplicity of proceedings is also a goal of the *Class Proceedings Act, 1992*. The primary goal of class proceedings legislation is access to justice, but judicial economy, behaviour modification, and procedural fairness to all the parties are closely associated ancillary goals. Through the mechanism of a common issues trial, a class proceeding empowers the court to dispose of or substantially advance a multiplicity of individual claims through a single proceeding with consistent results. Class proceedings allow both plaintiffs and defendants to maximize the efficiency of their claims and defences respectively.

42 Optimally, a class proceeding would resolve in one proceeding all the claims and defences. This optimization frequently occurs; however, as in the case at bar, class members are not obliged to participate and are entitled to opt-out. Ultimately, the Vaeth Plaintiffs are entitled to pursue their joinder of claims outside of the Johnson Class Action.

43 From the vantage point of all of access to justice, judicial economy, behaviour modification, and fairness to Defendants, the circumstances of the Johnson Class Action, the former Vaeth Class Action, and the current Vaeth Action would be best served by a single class action. This is particularly true in the context of securities misrepresentations class actions, which were designed precisely to fit with class actions. It would have been preferable for judicial economy, etc., if in the fall of 2015, the Vaeth Action had been discontinued and the Vaeth Class Action had been continued and not abandoned. It then would not have been necessary for Mr. Johnson to commence a class action. However, with the leave of the court, the Vaeth Plaintiffs were entitled to abandon their class action and to pursue an individual action with a joinder of individual claims.

44 By providing Class Members with a right to opt-out, the *Class Proceedings Act, 1992* preserves an individual plaintiff's right to bring his or her own action. Where an individual plaintiff does not opt-out of class proceedings, a court will stay his or her individual proceedings: *Dumoulin v. Ontario*, *supra* at paras. 8-10; *Cheung v. Kings Land Developments Inc.* (2001), 55 O.R. (3d) 747 (Ont. S.C.J.) at para. 12, leave to appeal ref'd (2002), 156 O.A.C. 73 (Ont. Div. Ct.). A class member loses his or her litigation autonomy, if he or she does not opt-out of the class action.

45 However, class proceedings legislation is not intended to impede actions by individual plaintiffs who opt-out of the class proceedings: *Northfield Capital Corp. v. Aurelian Resources Inc.* (2007), 84 O.R. (3d) 748 (Ont. S.C.J.). The authorities reveal that putative class members may decide to maintain their litigation autonomy, opt-out, and sue the defendant in individual actions or in actions involving the joinder of two or more plaintiffs: *Northfield Capital Corp. v. Aurelian Resources Inc. supra*; *Durling v. Sunrise Propane Energy Group Inc.*, 2011 ONSC 266 (Ont. S.C.J.) at paras. 19-20; *Abdulrahim v. Air France*, 2010 ONSC 5542 (Ont. S.C.J.) at para. 66.

46 The Vaeth Plaintiffs' litigation autonomy, however, is not unfettered, and while they ultimately are entitled to pursue their joinder of claims outside the Johnson Class Action, the court has the jurisdiction to at least temporarily avoid a multiplicity of proceedings. The *Class Proceedings Act, 1992*, confers upon the court a broad discretion to manage the proceedings. Section 13 of the *Act* authorizes the court to "stay any proceeding related to the class proceeding," and s. 12 authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination." Sections 12 and 13 state:

Court may determine conduct of proceeding

12. 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.

Court may stay any other proceeding

13. 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.

47 Sections 12 and 13 of the *Class Proceedings Act, 1992*, may and are used to avoid a multiplicity of proceedings. As I discussed recently in *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 (Ont. S.C.J.), which was a carriage fight in Ontario about rival class actions in Ontario and across the country, the avoidance of a multiplicity of proceedings is a complex and troublesome problem that can arise in a variety of ways. The immediate case does not involve a carriage fight, but it involves a multiplicity of proceedings because there is both: (1) the Vaeth Action, which in the lingo of the trade, is an individual action or joinder of claims action; and (2) the Johnson Class Action, which is a form of representative action. Since both actions involve investors in Palladium, the same Defendants, the same factual circumstances, and the same legal issues, there is a multiplicity of proceedings. The motion now before the court raises the general issue of whether some avoidance of a multiplicity of proceedings can be achieved.

48 In *Durling v. Sunrise Propane Energy Group Inc., supra*, the individual plaintiffs, who planned to opt-out, withdrew their objection to the putative representative plaintiff's request that their individual actions be temporarily stayed pending the certification motion. Justice Horkins granted the request for a stay, and she stated at paras. 17-20:

17. Class proceedings often exist alongside individual actions. One does not automatically preclude the other from proceeding.

18. Section 13 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 permits the court, on its own initiative or on a motion by a party or class member, to stay a proceeding related to a class proceeding before it. Typically, the individual actions are stayed pending the outcome of a certification hearing, but this is not mandated by the *Class Proceedings Act, 1992*.

19. If the class proceeding is certified, the individual plaintiff must decide whether to opt out or participate as a member of the certified class. There is an absolute right to opt out of a class under s. 9 of the *Class Proceedings Act, 1992*. Existing case law suggests that individual plaintiffs who opt out of a certified class can move forward with their individual actions. However, the individual action commenced by a plaintiff who does not opt out, will be stayed: see *Cheung et al. v. King's Land Development Inc. et al.* (2001), 55 O.R. (3d) 747 (S.C.J.), at para. 12.

20. The *Class Proceedings Act, 1992* permits "freedom of choice by allowing those who do not wish to be bound by the outcome of the proceeding to opt out. Thus, the *Class Proceedings Act* clearly contemplates that there may be a multiplicity of proceedings arising from the same event or transaction": See *Abdulrahim v. Nav Canada*, [2010] O.J. No. 4660 at para. 66.

49 In *Hollinger International Inc. v. Hollinger Inc.*, [2004] O.J. No. 3464 (Ont. S.C.J. [Commercial List]), leave to appeal to Div. Ct. refused, [2005] O.J. No. 708 (Ont. Div. Ct.), Justice Farley, at para. 5, sets out the issues that courts have considered in deciding to exercise their discretion in issuing a temporary stay of a proceeding. These issues are: (a) whether there is substantial overlap of issues in the two proceedings; (b) whether the two cases share the same factual background; (c) whether issuing a temporary stay will prevent unnecessary and costly duplication of judicial and legal resources; and (d) whether the temporary stay will result in an injustice to the party resisting the stay.

50 In the immediate case, as noted above, the Vaeth Plaintiffs are putative Class Members of the Johnson Class Action, but they have indicated that if the Johnson Class Action were certified as a class proceeding, they would opt-out of the Johnson Class Action and they would pursue their claims in the Vaeth Action. They, therefore, submit that the Vaeth Action should not be temporarily stayed as requested by the Defendants to await the outcome of the certification motion and the leave application under Part XXII.1 of the Ontario *Securities Act*.

51 I disagree, and in my opinion there are good reasons independent of the conflict of interest matters, discussed below, associated with their choice of lawyer that justify a temporary stay of the Vaeth Action. In other words, assuming that the Vaeth Plaintiffs had retained a different law firm to pursue their individual joined claims, it would still be appropriate for the court to stay the Vaeth Action pending the outcome of the certification and leave motion in the Johnson Class Action. In my opinion, the fairest, most efficient, and sensible way to co-ordinate and administer the multiplicity of proceedings is to stay the Vaeth Action until the status of the Johnson Class Action crystallizes.

52 In other words, there are good reasons for imposing a temporary stay of the Vaeth Action regardless of who the lawyer of record is.

53 One reason for temporarily staying the Vaeth Action is that while the Vaeth Plaintiffs are entitled to opt-out of the class proceedings, they would not be prejudiced and rather would benefit by delaying making any decision until after the leave motion and the certification motion are adjudicated.

54 In *Rooney v. Arcelormittal S.A.*, 2013 ONSC 6062 (Ont. S.C.J.), there was a class action in which the plaintiff alleged misrepresentations in the disclosure documents of a takeover bid for Baffinland Iron Mines motion. A group of shareholders who were putative class members in the class action were also applicants in a share valuation application against one of the defendants in the class action. Thus the takeover of Baffinland was at the heart of both the class action and also the valuation proceeding. More specifically, the fair value of the shares in Baffinland was at issue in both proceedings. The plaintiff in the class action supported by the applicants in the valuation application sought a temporary stay of the valuation until after the certification motion.

55 Notwithstanding the resistance of the defendant common to both the class action and the valuation proceeding, Justice Leitch granted a temporary stay of the valuation proceeding. After noting that the two proceedings shared the same factual background and that there was a substantial overlap of issues, she saw no prejudice to the defendant if the temporary stay was granted. Further, issuing a temporary stay would prevent unnecessary and costly duplication of judicial and legal resources.

56 I can understand why in some class actions, a putative class member with sufficient resources to take on the defendants directly would be prepared to forgo the advantages of being a class member and not wait to learn the outcome of a certification motion, but this is not such a case. There are no apparent circumstances of urgency compelling the Vaeth Plaintiffs to prosecute their claims ahead of the Class Members' claims. The case at bar is not a personal injury claim where an individual plaintiff with a substantial claim may actually need the compensation sooner than the later of a class action that requires certification before it can progress.

57 A second reason, to speak colloquially, to temporarily stay the Vaeth Action is that the Defendants cannot be in two places at once. Practically speaking, the individual action and the class action require co-ordination and administration. The need to co-ordinate the multiplicity of proceedings is acute because the Vaeth Plaintiffs and Mr. Johnson both plead causes of action under the Ontario *Securities Act*. The Vaeth Plaintiffs do not need to bring a certification motion, but they do need to bring a motion for leave to pursue their claims under the Ontario *Securities Act*.

58 The Vaeth Plaintiffs, because they may be satisfied with their common law negligent misrepresentation action, plan to proceed to discoveries on just the common law claim and suggest that the Johnson Class Action can wait. However, the Vaeth Plaintiffs have no automatic right for a bifurcated examination for discovery separating the common law misrepresentation claims from the statutory misrepresentation claims for which leave is required under the Ontario *Securities Act*. At the current time, the Defendants in the Vaeth Action are being asked to deliver their statement of defence, but as I explained above, while they can do so voluntarily, they cannot be obligated to plead until after it is determined whether the court will grant leave to either the Vaeth Plaintiffs or Mr. Johnson to commence the statutory cause of action.

59 A third reason to temporarily stay the Vaeth Action, but one that is not independent of the fact that Morganti Legal is at the moment lawyer of record on the Vaeth Action and the Johnson Class Action is that practically speaking or *de facto* the Vaeth Action and the Johnson Class Action have been consolidated.

60 However, in *Obonsawin v. Canada*, [2002] O.J. No. 2502 (Ont. S.C.J.), Justice Epstein held that an individual action could not be joined, i.e. consolidated, with a class action about the same subject matter. She noted at para. 23:

23. Moreover, joinder of a class action with an individual claim is not compatible with the advancement of the objectives of class proceedings. Certainly joinder of an individual action with a class action is not consistent with the objectives of behaviour modification or access to justice. Depending on the facts of the particular case, joinder may also interfere with the type of judicial economy contemplated by class proceedings. In fact, joinder may unnecessarily complicate the class proceeding. There are therefore policy reasons why such joinder should not be permitted.

61 In *Northfield Capital Corp. v. Aurelian Resources Inc.*, *supra*, Justice Ground held that consolidating an individual claim with a class action proceeding would be contrary to the purpose and goals of the *Class Proceedings Act, 1992*.

62 In *Abdulrahim v. Air France*, *supra*, which involved a largely settled class action, Justice Strathy, as he then was, refused the remaining defendant's request to have the class action tried together with the individual actions brought by plaintiffs who had opted out of the class action. The opt-out plaintiffs supported this request. Class Counsel objected and submitted that this would be a perversion of the opt-out process because it would permit the opt-outs to dictate the pace of the litigation - to have their cake and eat it - by opting out but continuing to call the tune of the prosecution. Justice Strathy agreed with this submission and stated at para. 66:

66. These authorities acknowledge that class actions, by their very nature, avoid a multiplicity of proceedings and that the rules concerning consolidation of ordinary actions should be applied with some caution to class actions. I therefore agree with the submission of class counsel that a class action cannot be treated as being the same as any other action for the purposes of a motion such as this. A class action is the very embodiment of the principle that a multiplicity of proceedings should be avoided. In permitting a claim to be advanced on behalf of numerous similarly-situated individuals, the class action promotes access to justice and judicial economy. At the same time, the Ontario class action regime permits freedom of choice by allowing those who do not wish to be bound by the outcome of the proceeding to opt out. Thus, the C.P.A. [*Class Proceedings Act*] clearly contemplates that there may be a multiplicity of proceedings arising from the same event or transaction. The statute expressly contemplates that, in spite of its size and scope, the class action will be managed so as to promote its "fair and expeditious" determination. It would be a strange perversion of the intent of the statute if those who opt out are permitted to fetter the progress of the class action. It would be even stranger if those opt-outs could sit on the sidelines and do nothing while the class action marches to the finish line and then call "time out" so they can catch up.

63 Where this analysis takes me is to the conclusion that regardless of whom may be their lawyer of record, the Vaeth Plaintiffs should stand their action down until it is determined whether the Johnson Class Action is certified with or without a statutory claim for which leave of the court is required.

64 If the court grants leave under the Ontario *Securities Act* in the class action for the secondary market misrepresentation claim, it is highly unlikely that the Defendants would not oppose leave being granted in the Vaeth Action, and, in any event, the Vaeth Plaintiffs will be able to make a reasoned decision about whether to opt-out of the Johnson Class Action assuming it was certified.

2. The Joint Retainer Conflicts of Class Counsel

65 The above analysis has led to the conclusion that regardless of who may be lawyer of record, the Vaeth Action should be temporarily stayed to await the outcome of the leave motion and certification motion in the Johnson Class Action. The above analysis, however, does not address the problem that Morganti Legal is the lawyer of record for the Vaeth Plaintiffs and Mr. Johnson and will remain so during the temporary stay of the Vaeth Action and it will be lawyer of record after the stay is lifted, when the Vaeth Plaintiffs may opt-out of the Johnson Class Action.

66 Although it denies it, Morganti Legal has a conflict of interest with this joint retainer and may only act for one or the other of these clients. The clients have conflicting interests and the law firm has conflicts of interest in purporting to provide independent legal advice and professional services to both Mr. Johnson and the Vaeth Plaintiffs.

67 There are inherent conflicts between the joint retainer clients given that the Vaeth Plaintiffs are putative Class Members in the Johnson Class Action that plan to opt-out of the Johnson Class Action. Presumably, the reason that the Vaeth Plaintiffs would opt-out is the belief that they will do better outside the class action than as participants sheltered from adverse costs consequences and from examinations for discovery in the common issues trial without leave of the court.

68 Once the Vaeth Plaintiffs do opt-out of the Johnson Class Action, there is a direct conflict of interest between the Vaeth Plaintiffs and the Class Members in the Johnson Class Action about the sequence of any settlement if there are genuine or imposed solvency limits on the settlement proceeds. Visualize, if Mr. Johnson negotiated a settlement with the Palladium Defendants at their insurance limits and assuming the Palladium Defendants had no other assets, then there might be nothing left for the Vaeth Plaintiffs.

69 Visualize; if the Palladium Defendants or KPMG were only prepared to offer a fixed amount of settlement funds, and if the Vaeth Plaintiffs settled first, while their settlement would not require court approval, the settlement could deplete the resources available for Class Members in the Johnson Class Action who might be disappointed by their lawyers allowing this to happen.

70 If there was enough money for all, unless the formula for distributing the settlement funds was the same for the Vaeth Plaintiffs and the Class Members in the Johnson Class Action, then one or the other may be disappointed in the results achieved by Morganti Legal.

71 Visualize; if the Palladium Defendants or KPMG were only prepared to offer a fixed amount of settlement funds, then regardless of which client settled first, the other client might be disappointed by what it might regard as an unfair or disproportionate distribution of those settlement funds.

72 The circumstance of different recoveries for similarly situated persons may have particularly bad optics if the Vaeth Plaintiffs' settlement is a substantially better one than the settlement negotiated for the Class Members in the Johnson Class Action and this circumstance would make obtaining court approval of the settlement more difficult. Thus, the circumstance of Morganti Legal acting for both the Vaeth Plaintiffs and for Class Members in the Johnson Class Action compromises its ability to recommend a settlement for the class that might in their best interests but appear to be a capitulation when contrasted to what the Vaeth Plaintiffs recovered.

73 In this regard, in this area of the optics of class action settlements, it needs to be noted that the Vaeth Plaintiffs, given their significant individual losses, are more incented to demand a less compromising settlement than Mr. Johnson who given the entrepreneurial model of Ontario's class action regime is, practically speaking, in partnership with Morganti Legal. The law firm accepts the risks of the litigation in return for a contingency fee and it may be assumed that the law firm has agreed to protect Mr. Johnson from his exposure to costs. Morganti Legal, given its assumption of risk compared to the risk assumed by the Vaeth Plaintiffs in their individual actions, may be more inclined to negotiate a less remunerative settlement for Class Members in the Johnson Class Action but one that in the aggregate is a handsome return for the law firm.

74 Apart from the optics and apart from the difficulties associated with the prospect of different settlements, there is the problem of the deemed undertaking noted above. It is certainly possible that the court might relieve the Vaeth Plaintiffs and Morganti Legal from the deemed undertaking, but there is something unseemly in the Vaeth Plaintiffs opting out of the class action and then using the leverage of that class action against the Defendants possibly to secure a better settlement than the one achieved by the class.

75 There is also the problem for Morganti Legal of the possibility of conflicting instructions about the prosecution of the claims against the Defendants. As already noted above, there is already one example in the proposal to pursue the Vaeth Plaintiffs' common law negligence claim and park the Johnson Class Action. I do not see this as beneficial to the Class Members.

76 In *Logan v. Canada (Minister of Health)*, [2002] O.J. No. 522 (Ont. S.C.J.), Ms. Bulloch-MacIntosh had an individual personal injury action against Canada and others with respect to allegedly defective jaw implants. Without discontinuing her individual action, Ms. Bulloch-MacIntosh wished to be added as a representative plaintiff in a proposed class action brought by Ms. Logan against Canada so that the discovery evidence in her individual action could be used in Ms. Logan's action. Ms. Logan proposed that her individual action be stayed while she turned her attention to be added to the class action. Justice Winkler, as he then was, adjourned the motion because he reasoned that it was inappropriate for Ms. Bulloch-MacIntosh — and her lawyer of record - to have both a class action and an individual action outstanding and, therefore, the matter of the status of Ms. Bulloch-MacIntosh's individual action had to be addressed first. Justice Winkler stated at paras. 6-7, with emphasis added:

6. To permit a litigant to maintain their individual action, albeit subject to a stay, while at the same time acting as a representative plaintiff in a class proceeding in respect of the same issues appears, *prima facie*, to be inimical to the objects of the CPA [*Class Proceedings Act*], and in particular to the stated goal of judicial economy or litigation efficiency. The conduct of proceedings in this way creates duplicative litigation in respect of those issues which remain alive if the individual action is merely stayed while the plaintiff in that action participates in the class proceeding. Additionally, the stay against one defendant in the individual action creates the risk of an inherent prejudice through delay to the other defendants, who are not parties to the class proceeding and who have cross-claims to assert against the defendant subject to a stay. The class proceeding has the potential to continue for a significant time, especially if appeals are pursued. As well, there is the potential for a conflict of interest for Bulloch-MacIntosh and her counsel, who are also class counsel, if both actions are permitted to continue. Each will have obligations in the context of their respective roles as representative plaintiff and class counsel in the class proceeding. Those obligations cannot be performed where an individual action is being maintained by the representative plaintiff at the same time as the class proceeding is being prosecuted.

7. Moreover, in light of the inherent prejudice of delay, the prospect of duplicative litigation, the complexity occasioned by the presence of cross-claims and the appearance of a conflict of interest on the part of the representative plaintiff and class counsel, it is arguable that granting a stay as opposed to a discontinuance or dismissal, would defeat the elements of fairness, efficiency and manageability that must exist in a class proceeding. See: *Hollick v. Toronto (City)*, [2001] S.C.J. No. 67.

77 In short, Morganti Legal's plans to act for individual plaintiffs and Class Members is a multiplicity of problems added on top of a multiplicity of proceedings. None of the problems are answered by the consent of the Vaeth Plaintiffs and Mr. Johnson to the joint retainer.

78 In short, Morganti Legal can act for the Vaeth Plaintiffs, but then Mr. Johnson must retain a new lawyer of record. Or, Morganti Legal can act for Mr. Johnson, but then the Vaeth Plaintiffs must retain a new lawyer or discontinue their own action and participate in the class action, where they will be treated no better or no worse than Mr. Johnson and the other Class Members.

79 I, therefore, conclude that the Johnson Class Action should be temporarily stayed in the manner described in the introduction to these Reasons for Decision, which I will explain in the next part of these Reasons.

3. The Temporary Stay Orders

80 As explained above, independent of the conflict of interest problems of Morganti Legal, there are reasons to temporarily stay the Vaeth Action. I, therefore, stay it until the earlier of: (a) the certification of the Johnson Class Action and the delivery of opt-out notices by the Vaeth Plaintiffs; or (b) the discontinuance or other termination of the Johnson Class Action.

81 The temporary stay of the Vaeth Action would also be lifted if the Vaeth Plaintiffs voluntarily discontinued their own action, which would allow them to participate in the Johnson Class Action. As noted above, the Defendants release the Vaeth Plaintiffs from the undertaking not to commence another class action.

82 As explained above, because of the conflict of interest problems of Morganti Legal being lawyer of record in both the Vaeth Action and in the Johnson Class Action, it is also necessary to temporarily stay the Johnson Class Action.

83 Therefore, the Johnson Class Action shall be temporarily stayed until the earlier of: (a) the discontinuance of the Vaeth Action; (b) the delivery of a notice of change of lawyer in the Vaeth Action; or (c) the delivery of a notice of change of lawyer in the Johnson Class Action.

84 The purpose of this temporary stay is to move toward the situation where Morganti Legal is lawyer of record in just one action, which depends upon whether the Vaeth Plaintiffs discontinue their action or retain a new lawyer of record in the Vaeth Action in which case Morganti Legal could continue to act for Mr. Johnson in his proposed class action. However, if the Vaeth Plaintiffs propose to continue with their action with Morganti Legal as lawyer of record, then Mr. Johnson must obtain a new lawyer of record.

85 If the Vaeth Action is not discontinued or if no notice of change of lawyer is delivered in the Vaeth Action within ninety days and if no notice of change of lawyer is delivered in the Johnson Class Action within ninety days, then pursuant to s. 29 of the *Class Proceedings Act, 1992*, the Johnson Class Action shall be discontinued.

86 I have added the above temporal provision to my Order to resolve the current predicament in a timely way and to deal with the contingency of the Vaeth Plaintiffs continuing with Morganti Legal as lawyer of record but Mr. Johnson being unable to obtain new Class Counsel willing to take on the risks of a class action against the Palladium Defendants and KPMG.

87 Under the *Class Proceedings Act, 1992*, a representative plaintiff cannot be a self-represented party. If Mr. Johnson cannot retain class counsel, he would have no choice but to discontinue his proposed class action, and pursuant to s. 29 of the *Class Proceedings Act, 1992*, I direct that the Johnson Class Action shall be discontinued if he is unable to find a new lawyer of record.

D. CONCLUSION

88 For the above reasons, I make the order described at the outset of these Reasons for Decision.

89 If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Defendants' submissions within 20 days of the release of these Reasons for Decision followed by Mr. Johnson's and the Vaeth Plaintiffs' submissions within a further 20 days.

Motion granted on terms.

TAB 30

2019 ONSC 5766
Ontario Superior Court of Justice

Winder v. Marriott International Inc.

2019 CarswellOnt 16289, 2019 ONSC 5766

GLEN WINDER (Plaintiff) and MARRIOTT INTERNATIONAL, INC., MARRIOTT HOTELS OF CANADA LTD. and STARWOOD CANADA ULC (Defendants)

LAVERNE ARTHUR and ANNE ARTHUR (Plaintiffs) and MARRIOTT INTERNATIONAL, INC. (Defendant)

KARA MARTINEAU (Plaintiff) and MARRIOTT INTERNATIONAL, INC.
and STARWOOD HOTELS & RESORTS WORLDWIDE, LLC (Defendants)

RUTH KOGUT, ZACHARY SCHNARR and FRANK BROWN (Plaintiffs) and LUXURY HOTELS
INTERNATIONAL OF CANADA, ULC and MARRIOTT INTERNATIONAL, INC. (Defendants)

Perell J.

Heard: September 19, 2019

Judgment: October 7, 2019

Docket: CV-18-00611365-00CP, CV-18-00610076-00CP, CV-18-00610017-00CP, CV-18-00610079-00CP

Counsel: Michael G. Robb, Sajjad Nematollahi, Stefani Cuberovic, for Plaintiff, Glenn Winder

Adam Tanel, Christopher Du Vernet, Vadim Kats, for Plaintiffs, Ruth Kogut, Zachary Schnarr, and Frank Brown

Subject: Civil Practice and Procedure; Corporate and Commercial; International

MOTIONS by proposed class counsel S and consortium in two proposed national class actions for carriage of action.

Perell J.:

A. Introduction

1 Proposed Class Counsel in two proposed national class actions commenced in Ontario bring a carriage motion.

2 In *Winder v. Marriott International Inc., Marriott Hotels of Canada Ltd., and Starwood Canada ULC*, (the "Winder Action"), the proposed Class Counsel is Siskinds LLP. In *Kogut, Schnarr and Brown v. Luxury Hotels International of Canada ULC and Marriott International, Inc.* ("Kogut Action"), the proposed Class Counsel are a consortium of four Ontario law firms comprised of Koskie Minsky LLP, Landy Marr Kats LLP, McKenzie Lake Lawyers LLP, and Du Vernet, Stewart.

3 There are two other class actions commenced in Ontario; namely: *Arthur v. Marriott International, Inc.* (CV-18-00610076-00CP) and *Martineau v. Marriott International, Inc.* (CV-18-00610017-00CP), but counsel in those actions advise that they do not contest carriage. Thus, this is a motion to decide carriage between the *Winder Action* and the *Kogut Action*.

4 There are a long list of factors that courts consider when determining who should have carriage. As the discussion below will reveal, in the case at bar, most of the factors are neutral, and save for one factor, the carriage factors tend to balance each other out and do not tip the scales decisively in favour of the *Winder Action* or the *Kogut Action*. In the immediate case, the tipping point or decisive factor is about overlapping class actions and the management of a multiplicity of class actions across the country.

5 In the case at bar, in my opinion, the factor that weighs against the Consortium in the *Kogut Action* is that the Consortium has developed a strategy that concedes at the outset that there should be overlapping national class actions in all of British Columbia,

Alberta, and Ontario and also overlapping regional class actions in Québec and Nova Scotia. The Ontario Consortium is, in truth, a part of a larger consortium of law firms including two firms in Alberta and depending upon the outcome of a carriage fight, up to five law firms in British Columbia. The Consortium already has carriage in Alberta and Nova Scotia and is fighting for it in British Columbia and Ontario. Siskinds LLP fights for a carriage of a national class action out of Ontario.

6 I regard as a negative factor that the *Kogut Action* Consortium envisions that there inevitably will be a multiplicity of national and regional class actions in a case where there are strong arguments that there is a singular *forum conveniens* for a national class action. While it remains to be determined, there is a reasonably strong argument that a multiplicity of overlapping class actions is unnecessary and an undesirable waste of judicial resources for the courts in British Columbia, Alberta, Ontario, Québec, and Nova Scotia. While co-operating national consortiums may be desirable in some cases, in my opinion, it remains to be determined whether the case at bar is one of them; it may or may not be.

7 In contrast, Class Counsel in the *Winder Action* are committed to a national class action (possibly excluding Québec) in Ontario. While Class Counsel in the *Winder Action* will, if necessary, co-operate with the Class Counsel in British Columbia, Alberta, Québec, and Nova Scotia, should those actions all be prosecuted, Class Counsel in the *Winder Action* do not concede at the outset that it is inevitable that overlapping class actions should be prosecuted in British Columbia, Alberta, Ontario, Québec, and Nova Scotia.

8 Class Counsel in the *Winder Action* seem prepared to employ the Uniform Law Conference of Canada provisions that address competing multi-jurisdictional class actions.¹ The approach of the Uniform Law Conference of Canada has been adopted by statute in Alberta² and British Columbia³ and recently, the Law Commission of Ontario recommended that the Uniform Law Conference's recommendations for addressing multi-jurisdictional class actions be adopted in Ontario.⁴

9 The approach of the Uniform Law Conference of Canada is that Class Counsel in the domestic province is required to notify Class Counsel in other jurisdictions of the certification motion in the domestic province. Then, the court hearing the certification motion in the domestic province is directed to consider whether it would be preferable for some or all of the claims of the proposed class members to be resolved in the action in the other jurisdiction. Much like the considerations of a *forum conveniens* motion, the Uniform Law Conference's legislation include criteria to determine what would be the preferable choice between the multiple actions. The statutes contain jurisdictional provisions to enforce that choice; for example, the court hearing the certification motion is, among other things, empowered to refuse to certify, if the court determines that the class action should proceed in another jurisdiction.

10 In the immediate case, it is desirable that the matter of multi-jurisdictional class actions not be conceded at the outset, and for this reason and for several other reasons, I grant carriage to Siskinds, LLP in the *Winder Action*.

B. Factual Background

11 The Defendants, Marriott International, Inc., Marriott Hotels of Canada Ltd., Starwood Canada ULC and Luxury Hotels International of Canada ULC (collectively "Marriott") are a well-known operator of hotels and resorts around the world.

12 Marriott is a global operator, franchisor and licensor of hotel and hospitality properties. It is headquartered in Bethesda, Maryland, U.S. Marriott's properties are owned and operated under various brand names, including Starwood Hotels.

13 It shall prove important to note that Marriott acquired the Starwood Hotels through its acquisition of Starwood Hotels & Resorts Worldwide, Inc. in September 2016. In Canada, Marriott owns and/or operates its properties through wholly owned subsidiaries, including Marriott Canada and Starwood Canada.

14 As part of Marriott's reservation and booking system, Marriott asks its customers to create, maintain, and update personal profiles containing personal information, including names, gender, birthdays, addresses, email addresses, phone numbers, communication preferences, arrival and departure information, reservation dates, credit card numbers, and payment information.

For international travelers, Marriott requires customers to provide passport information. All of the data is stored by Marriott in its database or databases.

15 Marriott's Terms of Use for its reservation and booking system contain the following choice of law, choice of forum and class action waiver clauses:

Terms of Use for United States & Canada

1. Marriott International, Inc. with its corporate headquarters at 10400 Fernwood Road, Bethesda, Maryland 20817-1102, United States of America, and its subsidiaries, including The Ritz-Carlton Hotel Company L.L.C. (collectively, "Marriott", "we", "our" or "us") provide various websites available to visitors located throughout the world. Our websites include without limitation, this website, www.marriott.com, www.autographhotels.marriott.com, www.vacationsbymarriott.com, www.ritzcarlton.com and www.corproate.ritzcarlton.com (collectively, our "Sites"). These Terms of Use also apply to translations of our Sites, for example, www.espanol.marriott.com. Our Sites are controlled and operated from the United States and are subject to United States law.

[. . .]

15. These Terms of Use shall be construed and enforced under the laws of the State of Maryland, USA, applicable to contracts executed and performed within Maryland, USA. You specifically agree and submit to the jurisdiction of the State and Federal Courts situated in the State of Maryland and stipulate to the fairness and convenience of proceedings in such courts for all disputes arising out of or relating to the use of our Sites. You will not object to jurisdiction or venue on the grounds of lack of personal jurisdiction, inconvenient forum or otherwise. You agree that you will not file or participate in a class action against us. YOU HEREBY WAIVE ANY RIGHT YOU MAY NOW HAVE OR HEREAFTER POSSESS TO A TRIAL BY JURY.

The foregoing shall not apply to the extent that applicable law in your country of residence requires application of another law and/or jurisdiction and this cannot be excluded by contract.

16 On November 30, 2018, Marriott announced that the security of its reservation and booking system had been compromised. In the *Winder Action*, this data breach is associated only with the database of the Starwood Hotels, a database that was once separate from Marriott's other databases.

17 Marriott's announcement of the data breach on November 30, 2018 and its subsequent statements, including in its filings with the United States Securities and Exchange Commission, indicate that as far as presently known, the data breach affected only the reservations database of the Starwood Hotels.

18 The *Kogut Action* does not make this precise association between the data breach and the Starwood Hotels' database. As the discussion below will reveal, the significance of what databases were involved was a contentious issue on the carriage motion.

19 Marriott issued a notice to the public stating that approximately 500 million hotel guests may have been affected by the data breach. In the *Kogut Action*, it is alleged that although the public announcement was made on November 30, 2018, Marriott had learned around September 8, 2018, that nefarious actors had had access to the guest reservation database since 2014.

20 Immediately, in Québec, on November 30, 2018, Daniel Poulin and others commenced an action against Marriott International, Inc., Luxury Hotels of Canada ULC, and Starwood Canada ULC. Woods LLP and Rochon Genova LLP are the proposed Class Counsel in the *Poulin Action*. The *Poulin Action* began as a national class action, but the class definition was amended in May 2018 to make the action just for residents of Québec. The amended class definition is as follows:

"Class" and "Class Members" means all residents of Québec who stayed at one of the Starwood Properties hotels operated by the Defendants prior to November 30, 2018

21 In response to the data breach, Ruth Kogut, an Ontario resident, retained Landy Marr Kats LLP, McKenzie Lake Lawyers LLP, and Du Vernet, Stewart to prosecute a proposed class action.

22 It is to be noted that the Du Vernet, Stewart firm was added to this consortium of lawyers because Christopher Du Vernet was counsel for the successful plaintiff in *Jones v. Tsige*,⁵ the pre-eminent decision about the privacy tort of intrusion on seclusion. Subsequently, Koskie Minsky LLP joined the group and the Consortium was formed.

23 Ms. Kogut signed a contingency fee agreement that provides that Class Counsel's fees are payable only in the event of success as follows: (a) 15% of the recovery, if the action is settled prior to the delivery of the motion record for certification; (b) 20% of the recovery, if the action is settled after the delivery of the motion record for certification; (c) 25% of the recovery, if the action is settled after the commencement of the contested motion for certification or after a consent order is made certifying the class action; or (d) 30% of the recovery, if the Action is settled after the commencement of examinations for discovery including the delivery of an affidavit of documents to the Defendants by the Plaintiffs.

24 The Consortium have instructions to obtain third-party funding for the Plaintiffs. Although not initially prepared to do so, during oral argument of the carriage motion, the Consortium undertook to indemnify the Plaintiffs from adverse costs consequences and not to use the absence of third-party funding as a reason to apply to withdraw as Class Counsel. (I shall comment further below about the significance of this undertaking from the Consortium later in these Reasons for Decision).

25 The Consortium signed a Consortium Agreement. The Consortium Agreement, however, was not produced in the material for the carriage motion.

26 The Consortium has a cooperative working relationship with several American firms acting for plaintiffs in the U.S. Marriott Class Action. The Consortium has a cooperative working relationship with the counsel who were recently appointed as the co-lead of the Plaintiff's Steering Committee in the multi-district litigation in Maryland (the "MDL litigation").

27 On December 3, 2018, the *Kogut Action* was commenced by Notice of Action.

28 Meanwhile, in response to the data breach, Zachary Schnarr and Frank Brown had retained Koskie Minsky LLP to prosecute a proposed class action. This action, the *Schnarr Action* was commenced on December 7, 2018. As noted above, Messrs. Schnarr and Brown and Koskie Minsky LLP later joined the Consortium.

29 Meanwhile, in response to the data breach, Glenn Winder, an Ontario resident who is a member of the Starwood Preferred Guest program, retained Siskinds LLP. He signed a contingency fee retainer that provides that Siskinds LLP's fees are payable only in the event of success as follows: (a) 17.5% of the recovery if resolution occurs before certification; (b) 20% of the recovery if resolution occurs after certification but before the commencement of the common issues trial; or (c) 22.5% of the recovery if resolution occurs after the commencement of the common issues trial.

30 If there is no third-party funding, Siskinds LLP is entitled to a further 5% of the amount recovered. If Siskinds LLP does obtain third-party funding, Siskinds LLP is authorized to claim an additional legal fee premium representing the cost of any such percentage charged by the third-party financier. Siskinds LLP, however, has not obtained third-party funding and has no plans to do so. It has agreed to indemnify Mr. Winder for any adverse costs award.

31 On December 20, 2018, the *Winder Action* was commenced by Statement of Claim. The class definition in the *Winder Action* is as follows:

[All] Canadian residents whose Personal Information was accessed by unauthorized parties in or as a result of the Data Breach.

"Data Breach" means the unauthorized access to the Class Members' Personal Information through the Defendants' computer systems and networks, which was publicly disclosed on November 30, 2018, the events out of which this action arises;

32 Should carriage be granted to the *Winder Action*, Class Counsel plans to exclude Québec residents from the class action and co-operate with Class Counsel in the *Poulin Action*. At present, however, the *Winder Action* includes Québec residents.

33 On December 21, 2018, Mr. Winder served a motion record for certification of his action as a class action.

34 With the formation of the Consortium, the *Kogut Action* was consolidated with the *Schnarr Action*, and on June 19, 2019, the Consortium delivered a Fresh as Amended Statement of Claim in the *Kogut Action*. The Consortium has not filed a motion record for certification.

35 The class definition in the *Kogut Action* is as follows:

[All] persons in Canada (including their estates, executors or personal representatives) whose Data was stored in database(s) owned and/or operated by the Defendants or any of their affiliates or subsidiaries which Data was stolen from, released to, obtained by or accessed by unauthorized persons on or before November 30, 2018 (or such further or different period that is specified as investigations of this case progresses)

36 The *Winder Action* and *Kogut Action*, join the same defendants, save and except for Starwood Canada ULC, which is only named in the *Winder Action*.

37 Both the *Winder Action* and *Kogut Action* advance causes of action for: (a) breach of privacy statutes;⁶ and (b) intrusion upon seclusion. The *Winder Action* adds a claim of breach of consumer protection statutes from all of the Canadian provinces and territories including Québec.⁷ The *Kogut Action* adds claims for: (a) breach of contract; (b) breach of warranty; (c) negligence; (d) breach of confidence; and (e) breach of fiduciary duty.

38 There is also a proposed national class action in Alberta. Two actions were initially filed in Alberta, but on consent on June 27, 2019, carriage was granted to the action styled *Birnbaum v. Marriott International Inc.*, (the "*Birnbaum Action*"). Proposed Class Counsel in the *Birnbaum Action* are the Alberta-based law firms of Guardian Law Group LLP and James H. Brown Associates. There is a co-operation agreement between proposed Class Counsel in the *Birnbaum Action* and the Consortium of the *Kogut Action*.

39 The class definition in the *Birnbaum Action* is as follows:

40 Six class proceedings having commenced in British Columbia, including *Krygier v. Marriott International, Inc.*, ("the *Krygier Action*"), which is a national class action. Koskie Minsky LLP, a member of the Consortium, is the proposed Class Counsel in the *Krygier Action*.

41 The class definition in the *Krygier Action* is as follows:

[A]ll Canadian residents, except for Excluded Persons, whose Personal Information was improperly accessed as a result of the Database Breach.

"Database Breach" means the unauthorized access to the Defendants' Guest Database;

"Guest Data Base" means the Defendants' guest reservation systems and Starwood Prefence Guest Membership Systems;

42 The other class actions in British Columbia are: (2) *Sache v. Marriott International, Inc.* (S-1813823), in which Boughton Law Corporation is the proposed Class Counsel; (3) *Wenman v. Marriott International Inc.* (VLC-S-S-185437), in which Acheson Sweeney Foley Sahota LLP. Is the proposed Class Counsel; and (4)(5) and (6): *James v. Marriott International, Inc.* (S-1813409), *Wong v. Marriott International, Inc.*, and *Bhinder v. Marriott International, Inc.*, in which Hammerberg Lawyers LLP, Evolink Law Group and Garcha & Company have agreed to form a consortium.

43 There is a pending carriage contest in British Columbia amongst the *Krygier Action* and the three other rival proposed class actions.

44 There is also a maritime regional proposed class action in Nova Scotia, *Mann v. Marriott International Inc.* The proposed Class Counsel once again is Koskie Minsky LLP. It seeks to represent a proposed class defined as follows:

"Maritime Residents" means all individuals who are domiciled or residing in one of the following provinces: Nova Scotia, New Brunswick, and Prince Edward Island.

"Database Breach" means the unauthorized access to the Defendants' Guest Database;

45 Thus the Consortium already has carriage or co-operation agreements with respect the proposed class actions in Alberta and Nova Scotia, and it is seeking carriage in British Columbia and Ontario. The Consortium says that it has developed a national strategy that involves working cooperatively with other Canadian firms who have brought parallel proceedings in other provinces.

46 The details of that national strategy have not been disclosed.

47 If granted or controlling carriage in all of British Columbia, Alberta, Ontario, and Nova Scotia, the Consortium has not disclosed whether it intends to prosecute one or more class actions simultaneously or to pick one and idle the others. It appears that if the Consortium fails in obtaining carriage in British Columbia and Ontario Koskie Minsky LLP would attempt to prosecute a national class action out of Alberta and a regional class action out of Nova Scotia.

C. Discussion and Analysis

1. The Test for Carriage

48 The *Class Proceedings Act, 1992*, confers upon the court a broad discretion to manage the proceedings. Section 13 of the *Act* authorizes the court to "stay any proceeding related to the class proceeding", and s. 12 of the *Act* authorizes the court to "make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination". Section 138 of the *Courts of Justice Act*,⁸ directs that "as far as possible, multiplicity of legal proceedings shall be avoided".

49 Where two or more class proceedings are brought with respect to the same subject-matter, a proposed Representative Plaintiff in one action may bring a carriage motion to stay all other present or future class proceedings relating to the same subject-matter.⁹ There should not be two or more class actions that proceed in respect of the same putative class asserting the same cause(s) of action, and one action must be selected.¹⁰

50 The court will grant carriage to the putative Class Counsel whose proposed action is better for the interests of the putative Class Members while being fair to the defendants and promoting the prime objectives of class proceedings, which are access to justice for plaintiffs, class members, and defendants, behaviour modification, and judicial economy.¹¹ Although the determination of a carriage motion will decide which counsel will represent the plaintiff, the task of the court is not to choose between different counsel according to their relative resources and expertise; rather, it is to determine which of the competing actions is more, or most, likely to advance the interests of the class.¹²

51 Courts generally consider a list of overlapping and non-exhaustive factors in determining which action should proceed; including:¹³ (1) The Quality of the Proposed Representative Plaintiffs; (2) Funding; (3) Fee and Consortium Agreements; (4) The Quality of Proposed Class Counsel; (5) Disqualifying Conflicts of Interest; (6) Relative Priority of Commencement of the Action; (7) Preparation and Readiness of the Action; (8) Preparation and Performance on Carriage Motion; (9) Case Theory; (10) Scope of Causes of Action; (11) Selection of Defendants; (12) Correlation of Plaintiffs and Defendants; (13) Class Definition;

(14) Class Period; (15) Prospect of Success: (Leave and) Certification; (16) Prospect of Success against the Defendants; and (17) Interrelationship of Class Actions in more than one Jurisdiction.¹⁴

52 It is useful to note that: factors (1) to (3) concern the qualifications of the proposed Representative Plaintiffs; factors (4) to (8) concern the qualifications of the proposed Class Counsel; and factors (9) to (17) concern the quality of the litigation plan for the proposed class action. Thus, nine of the factors are about or are connected to case theory, which is understandable, because at the very heart of the test for determining carriage is a qualitative and comparative analysis of the case theories of the rival Class Counsel.¹⁵

53 As I shall explain below, Factor 17 (the Interrelationship of Class Actions in more than one Jurisdiction) is the tipping point factor in the immediate case. Because of this factors' significance to the immediate case, in the next section of these reasons, I shall explain the problems of overlapping class actions. Later in these reasons, I shall explain why Factor 17 is the tipping point in the immediate case. I shall also suggest a procedure to rationalize in the immediate case the existence of overlapping class actions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia.

2. Avoiding a Multiplicity of Class Proceedings

54 Judicial economy and the avoidance of a multiplicity of proceedings is a foundational principle of civil procedure generally. As far back as the great law reform movements of the middle-nineteenth century that fused the courts of equity and the common law courts, it is has been a policy of civil procedure to avoid a multiplicity of proceedings.

55 The policy favoring a singularity of proceedings is memorialized in s. 138 of Ontario's *Courts of Justice Act*¹⁶ which provides that "[a]s far as possible, multiplicity of legal proceedings shall be avoided". Similar provisions exist in the statutes of the other provinces.

56 One of the policy imperatives for the enactment of Ontario's *Class Proceedings Act, 1992*, and the class proceedings statutes across the country is to achieve access to justice for a group of similarly situated persons while at the same time avoiding a multiplicity of proceedings. Optimally, a class proceeding should resolve, in just one proceeding, all the claims and defences and distribute compensation and releases for all of the groups' claims.

57 The phenomena of multiple overlapping class actions, as exists in the case at bar, present problems for the courts across the country. The disadvantages of multiple proceedings about the same wrong are inefficiency, the duplication of creating an evidentiary record, the duplication of fact-finding, the duplication of legal analysis, the duplication of appeals, the embarrassment of inconsistent outcomes, the wasted forensic resources of lawyers and experts, and wasted judicial resources.

58 Further, multiple class actions raise the adverse prospect of the corruption of settlements and of extra-territorial judgment enforcement proceedings because for example, where there is more than one rival national class action, the defendant has an opportunity to shop around for a bargain settlement causing difficulties for courts across the country about whether to approve the settlement or to facilitate the enforcement of a judgment reached in another jurisdiction.

59 Avoiding a multiplicity of class actions about a single wrongdoing is particularly important to Class Counsel because the viability of an entrepreneurial class action is highly dependent on class size. Class proceedings increase access to justice by spreading litigation costs while increasing litigation rewards for Class Counsel across a large group. If that group is diluted by a rival regional, national, or global class action, then Class Counsel may forgo taking on the risk of prosecuting the group's claim.

60 However, before moving on in the discussion to consider whether there are any solutions to the problems of a multiplicity of class actions, it is important to disabuse any idea that a multiplicity of class actions is always a problem. Sometimes, more than one class action about the same wrongdoing is unobjectionable and even advantageous.

61 In the immediate case, for example, that there is a separate proceeding in Québec may be advantageous because Québec's *Civil Code* may offer advantages not available in the common law provinces. As another example, multiple class actions may be

desirable to administer a settlement of a national class action making the participation of class members in any claims program or individual issues trials feasible and convenient.

62 That said, I can say from experience that where there are overlapping class actions even when all but one of them are idled only to be revved up for the settlement approval and settlement administration stages of the national class action, the need for two or more courts having been involved is often a redundant and expensive waste to the administration of justice.

63 Turning to solutions for a multiplicity of overlapping class actions, in practice, one of the purported solutions to a multiplicity of class actions is the formation of consortiums and cooperation agreements among the Class Counsel of the overlapping class actions.

64 The Consortium in the immediate case pitches its assembly as one of the factors favoring it in the contest for carriage. It submits that the assembly of a team is economical, efficient, and proficient. It submits that a consortium provides a means to train novice law firms in the arts of class actions by partnering them with seasoned veterans. It submits that a consortium allows the mixing of expertise, and as noted above, the Consortium apparently sought out Mr. Du Vernet's law firm because of his personal experience with *Jones v. Tsige*,¹⁷ which undoubtedly will be at the forefront of the class action against Marriott.

65 Apart from the fact that it may avoid expensive carriage fights, it is true that in some cases the formation of an consortium of Class Counsel is a good because the members of the consortium can jointly undertake the risks of the class action and can efficiently share the workload of prosecuting what is often very complicated, very expensive, and very risky litigation.

66 However, the formation of a consortium is not intrinsically or inevitably good. Sometimes the formation of a consortium is bad because additional Class Counsel are just deadweight and their participation in the consortium is just a façade for unethical fee-splitting and for obtaining a share of the spoils of the class action without actually earning it, all to the detriment of the Class Members.

67 Although under the class proceedings statutes, the court must approve Class Counsel's fee, it is very difficult to uncover whether the members of a consortium genuinely worked as a team. It is easy for the members of the consortium to dress up their contribution as a team effort and, of course, the consortium members do not air their dirty laundry at the fee approval hearing.

68 It remains to be seen whether there is a consortium solution in the immediate case because there are carriage contests in British Columbia and Ontario. When there is not a consortium solution to the problem of a multiplicity of class actions, the carriage motion, like the one in the immediate case, is one mechanism for avoiding or at least reducing a multiplicity of proceedings.

69 However, a carriage motion is an awkward and somewhat limited mechanism because it can only indirectly address the situation that presents itself in the immediate case of overlapping and possibly rival class actions in other jurisdictions. Unlike the situation in the United States, there is no available pan-Canadian procedure to address the situation of overlapping class actions in several provinces.

70 The United States is a union of states and its multiple district litigation (MDL litigation) regulations provide a means to consolidate or organize proceedings that are initiated in several different states. Canada is a confederation of provinces and as a matter of Canadian constitutional law, the legislative power of the provinces is limited to legislating within the province and the courts of one province cannot be empowered to stop or organize class actions in the courts of another province or territory even if that litigation is redundant, duplicative, or unnecessary. As a matter of constitutional law, it is also very doubtful whether the federal government could impose on the provinces a supervisory tribunal to decide which province should have exclusive jurisdiction when there is more than one overlapping class action.

71 The Uniform Law Conference of Canada Civil Law Section, in its Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations,¹⁸ described the problem of a multiplicity of class proceedings across the country as follows:

17. Just as the class action is generally superior to a series of individual actions, the national class action may be superior to a series of provincial class actions, even if the latter can be coordinated to a certain extent by plaintiff's counsel. The national class serves judicial economy by avoiding duplication of fact-finding, judicial analysis and pre-trial procedures and eliminates the risk of inconsistent findings. It increases access to justice by spreading litigation costs across a larger group of claimants, thus reducing the litigation costs of each claim, increasing both settlement incentives and compensation per claim and increasing the likelihood that valid claims will be brought forward. This in turn serves the goal of behaviour modification, serving efficiency and justice by ensuring that actual and potential wrongdoers do not ignore their obligations to the public.

18. By comparison, multiple provincial class actions work against the interests of absent class members, who are the intended beneficiaries of class action legislation, and frustrate the efforts of class counsel, whose economic interests determine, to some degree, whether or not class actions are brought. Absent class members want quick and effective resolution to their claims. This outcome becomes less likely when there are thirteen overlapping actions with thirteen different counsel. The uncertainty created by the potential for multiple actions may also mean that fewer class actions will be brought, since: (1) class counsel in any given jurisdiction will not know the scope of the class that he or she will eventually be granted authority to represent; and (2) this in turn will make some class actions less economically viable, since counsel will have to enter into financial arrangements with multiple counsel, thus reducing both the expected fee and potential compensation to class members.

72 However, notwithstanding the absence in Canada of a MDL litigation protocol as exists in the U.S., the Uniform Law Conference of Canada Civil Law Section believed that with some amendments to the provincial class action statutes and with the use of the existing common law conflict of laws provisions about *jurisdiction simpliciter, forum conveniens* and the recognition of foreign judgments, the provincial courts may have all the authority they need to address the problems of multiple overlapping class actions. The Uniform Law Conference of Canada Civil Law Section stated:¹⁹

32. . . . Finally, it may be possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem. This latter approach, which we recommend, would require some modification of existing class proceedings legislation, including with respect to certification processes, and the development of a central class action registry.

73 The Uniform Law Conference of Canada recommended a notice procedure to respond to the circumstance of multiple multi-jurisdictional class actions. Class Counsel in the local class action is required to notify the counsel in the rival proceedings in the other jurisdiction. Then, the court hearing the certification motion is directed to consider whether it would be preferable for some or all of the claims of the proposed class members to be resolved in the rival proceeding in another jurisdiction. The Uniform Law Conference's legislation include criteria to determine what would be the preferable choice between the multiple actions and jurisdictional provisions to enforce that choice; for example, the court hearing the certification motion is, among other things, empowered to refuse to certify if the court determines that the class action should proceed in another jurisdiction.

74 The Uniform Law Conference of Canada Civil Law Section's legislation provides that in deciding whether a class action in another jurisdiction might be preferable for the resolution of the claims of all or some class members; *i.e.*, in deciding whether to defer a class action in one jurisdiction to another jurisdiction's class action, the courts across the country should consider the list of facts that have been developed for carriage motions. The factors about choosing between the rival class actions include: (a) the nature and the scope of the causes of actions advanced, including any variation in the cause of actions available in the various jurisdictions; (b) the theories offered by counsel in support of the claims; (c) the state of preparation of the various class actions; (d) the number and extent of involvement of the proposed representative plaintiffs; (e) the order in which the class actions were commenced; (f) the resources and experience of counsel; (g) the location of class members, defendants and witnesses; and (h) the location of any act underlying the cause of action.

75 The approach of the Uniform Law Conference of Canada has been adopted by statute in Alberta²⁰ and British Columbia,²¹ two of the provinces implicated in the case at bar, and recently the Law Commission of Ontario recommended that the provisions for addressing multi-jurisdictional class actions be adopted in Ontario.²²

76 It may be noted that when there are a multiplicity of overlapping class actions, the factors suggested by the Uniform Law Conference for determining what class action(s) should proceed are also connected to the factors that the courts use when determining whether to stay an action on the grounds that the action has been brought in a *forum non conveniens*. The non-exhaustive *forum conveniens* factor include: (a) the location of the majority of the parties; (b) the location of the key witnesses and evidence; (c) contractual provisions that specify applicable law or accord jurisdiction; (d) the avoidance of multiplicity of proceedings; (e) the applicable law and its weight in comparison to the factual questions to be decided; (f) geographical factors suggesting the natural forum; and (g) whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court.

3. The Carriage Factors

77 I shall save the analysis in the immediate case of the tipping point factor, Factor 17, (the Interrelationship of Class Actions in more than one Jurisdiction) to last, but I shall not ignore the other factors, which I shall discuss next below.

78 As noted at the outset of these Reasons for Decision, most of the factors are neutral and the remaining carriage factors tend to balance each other out and do not tip the scales decisively in favour of the *Winder Action* or the *Kogut Action*. That said, while not decisive, in my opinion, overall the factors do very narrowly favor the *Winder Action*.

(a) The Quality of the Proposed Representative Plaintiffs

79 In the immediate case, the quality of the proposed representative plaintiffs factor is neutral.

80 In future cases, I would suggest that the quality of the proposed representative plaintiff factor be removed as a carriage factor because it is a matter better left to the certification motion. The immediate carriage motion demonstrates why this suggestion is desirable.

81 In *Sondhi v. Deloitte Management Services LP*,²³ I stated that "[t]he proposed representative plaintiff must be a genuine plaintiff with a real role to play and not a placeholder plaintiff recruited to cater to the entrepreneurial interests of class counsel". While, I do not retract from that statement, the immediate case demonstrates that a carriage motion is not the place to resolve the matter of whether the proposed representative plaintiff is a genuine plaintiff or an incompetent or submissive puppet of entrepreneurial Class Counsel.

82 In the motion material and in the factum for the carriage motion, the Consortium in the *Kogut Action* extoll the competence and commitment of each of the three *Kogut Action* plaintiffs but devalue the more modest, in the sense of less self-aggrandizing, affidavit evidence of Mr. Winder.

83 For instance, the Consortium mistakenly points out that Mr. Winder did not swear an affidavit in support of his motion for carriage, which he in truth did, and the Consortium correctly points that Mr. Winder does not explain why he retained Siskinds LLP, which is truly something he did not expressly do. The Consortium submits that there is thus a limited basis to assess Mr. Winder's engagement, compared to the more detailed information submitted on behalf of the three Kogut Plaintiffs.

84 The weakness in these submissions against Mr. Winder is that they disregard the fact that Mr. Winder had already delivered an early affidavit in his proactive record for certification and that the obvious reason that any representative plaintiff retains counsel is that he or she is a member of a group that has been harmed by the defendant and is seeking access to justice.

85 It may be that Mr. Winder was more modest and less effusive than the *Kogut Action* Plaintiffs, but in most cases, including the immediate one, the quality of the proposed representative plaintiffs will be a neutral factor. At the carriage motion stage,

all that is required is that the proposed representative plaintiff personally be able to plead a claim against the defendant and have retained counsel do so.

86 Had the outcome of the carriage motion been different, Mr. Winder would have been a class member in the *Kogut Action*. In my opinion, it is unseemly and unnecessary on a carriage motion for Class Counsel in one proposed class action to disparage the proposed representative plaintiff in another proposed class action.

(b) *Funding*

87 In the immediate case, the Funding Factor is a neutral factor.

88 The Consortium and Siskinds LLP respectively have entered into contingency fee agreements. The Consortium and Siskinds LLP respectively have a sufficient track record in class proceedings to reveal that they have the resources to prosecute the action. The Consortium and Siskinds LLP respectively have undertaken to indemnify the Representative Plaintiffs from any adverse costs award. Siskinds LLP has not obtained third-party funding but is committed to prosecuting the action. The Consortium has plans to attempt to obtain third-party funding or the support of the Class Proceedings Fund, but the Consortium is committed to prosecuting the action regardless. The Funding Factor is thus neutral.

89 As I noted earlier in these Reasons for Decision, it was only during the oral argument of the carriage motion, that the Consortium undertook to indemnify the Plaintiffs from any adverse costs award. This undertaking was prompted because during the oral argument, I indicated that the absence of this undertaking might be a "deal breaker" as far as carriage was concerned.

90 I said as much because in promoting the *Winder Action* for carriage, Siskinds LLP had criticized the Consortium because it had reserved the right to seek to discontinue the action if an indemnity for adverse costs awards was not obtained from a third-party funder. In this regard, the retainer agreement in the *Kogut Action* stated:

18. In the event that funding for disbursements and/or an indemnity for the payment of adverse cost awards is not obtained from a third party funder or the [Class Proceedings Fund], the Clients acknowledge that [Kogut Counsel] may seek to discontinue the Action on a without costs basis.

[. . .]

21. This agreement and the Clients' participation as representative plaintiffs in this Class Action is contingent upon a private funder or the [Class Proceedings Fund] granting funding and, in particular, a cost indemnity to the Clients.

91 Siskind LLP's criticism of the approach of the Consortium was correct. In my opinion, if proposed Class Counsel wishes to make their commitment to a class action contingent upon a private funder or the Class Proceedings Fund granting funding and, in particular, a cost indemnity to the clients, then Class Counsel should not file a notice of action or a statement of claim or participate in a carriage motion until that third-party funding or the participation of the Class Proceedings Fund is secured. They ought not to hedge.

92 In my opinion, it is indeed a deal breaker on a carriage motion to commence a proposed class action and reserve the right to seek to discontinue the action if third-party funding is not obtained or an indemnity for the payment of costs is not obtained. As it is, Class Counsel has the right to select whether they will take on the risks associated with a class action, but Class Counsel cannot hedge their bets with a right to seek a bail-out by applying to discontinue the class action on the sole ground that third-party funding or an adverse costs indemnity for their client proved unavailable after they had already issued a statement of claim. This is to play red-light green light with the access to justice that Class Counsel control. It is a deal breaker as far as obtaining carriage is concerned.

93 In the immediate case, the Consortium heard the gospel and found class action religion, and in the result, the Funding Factor became a neutral factor.

94 To avoid problems in future cases, I wish to be clear that I am not saying that the plaintiff in a proposed class action must always be protected from adverse costs consequences by an entrepreneurial class counsel or a third-party funder. While I think it will be quite rare, there may be cases where it would be appropriate for the plaintiff to share the risks of the action with class counsel notwithstanding that the plaintiff's share of the settlement or judgment prize will dwarf class counsel's giant share of the prize. What I am saying is that this sharing of the risks and rewards must be clearly understood and accepted by the client and it must be determined before a proposed class action is commenced and not made a future contingency for the prosecution of the class action.

95 To avoid problems in future cases, I also wish to be clear that I am not saying that if Class Counsel does agree to indemnify the plaintiffs for adverse costs consequences, they cannot - with proper instructions from the plaintiff - apply for a discontinuance of the proposed class proceeding.

96 One final point about funding. I was not impressed with the Consortium's argument that obtaining external funding, as it was attempting to do, favoured granting carriage to it because third party funding would allow the Consortium to take more aggressive steps in the litigation, and advance Class Members' interests more assertively and that conversely, Siskinds LLP which was not seeking third-party funding would necessarily be more risk-averse absent any third-party funding agreement.

97 Without or without third party funding, Class Counsel takes on the risks associated with a contingency fee agreement, which is the major risk assumed by entrepreneurial class counsel action. It is doubtful that that the additional risk of picking up the tab of an adverse costs award will make Class Counsel risk adverse or abate its aggressiveness in prosecuting the class action.

(c) Fee and Consortium Agreements

98 The fee arrangements are a neutral factor in the immediate case.

99 The Consortium and Siskinds LLP have respectively been engaged pursuant to contingency fee agreements. Ultimately, the court must approve Class Counsel's fee regardless of what is stated in the retainer agreement.

100 In so far as the matter of consortium agreements effects fees, this is a matter that typically can be sorted out at the fee approval hearing. As such, in the immediate case, the Consortium Agreement factor is neutral.

101 I shall, however, return to the topic of value of forming consortiums in the discussion below about Factor 17 (the Interrelationship of Class Actions in more than one Jurisdiction).

(d) The Quality of Proposed Class Counsel

102 While the Consortium acknowledges that Siskinds LLP is excellent Class Counsel, the Consortium submits that its own experience and expertise with respect to the tort of intrusion upon seclusion cannot be matched by Siskinds LLP, whose materials do not include any evidence of the lead lawyers having experience with this tort. The Consortium says that its more substantial experience in privacy law tips the scales in favour of the Consortium.

103 I disagree that the quality of proposed Class Counsel favors the Consortium. Granted it is nice that the Consortium has Mr. Du Vernet on its team, but there is nothing to suggest that Siskinds LLP cannot get up to speed or that the Consortium without Mr. Du Vernet could not adequately do the job.

104 There is nothing to suggest that the putative Class Members will not be equally well served by whatever law firm or whatever combination of law firms is granted carriage of the class action. All of the law firms appear to have the legal and forensic skills to prosecute the representative plaintiff's claims.

105 The quality of proposed Class Counsel is a neutral factor in the immediate case.

(e) Disqualifying Conflicts of Interest

106 There are no apparent conflicts of interest, and so, this factor is neutral in the immediate case.

(f) *Relative Priority of Commencement of the Action*

107 The *Kogut Action* was commenced on December 3, 2018, and the *Winder Action* was commenced on December 20, 2019. Technically, this factor favors the *Kogut Action*, but the relative priority of the commencement of the actions is, practically speaking, neutral or of weightless significance in the circumstances of the immediate case.

(g) *Preparation and Readiness of the Action*

108 Siskinds LLP relied heavily on the preparation and readiness of the action factor in support of its quest for carriage. It submitted that its superior preparation and readiness was demonstrated by the fact that it, alone among the competing law firms, had already delivered its motion record for certification, including expert evidence and a detailed litigation plan.

109 In my opinion, this factor was neutral, and while Siskinds LLP was not harmed by the early delivery of its certification motion record, this is not a helpful practice when there is the prospect of a carriage contest.

110 Putting aside the matter of Siskind LLP's early delivery of the record for a certification motion, it and the Consortium have demonstrated that they have prepared and will be ready to proceed with the proposed class action. While not as revealing of its plans and preparation, the Consortium has revealed enough to neutralize the greater disclosure of information made by Siskinds LLP.

111 Turning to the matter of an early delivery of the motion material for the certification motion, it would appear that this was done for the purpose of winning carriage. If this is true, one is left to ask whether and why but for the carriage contest, would Siskinds LLP have been so prompt in delivering a certification motion? And, more importantly, one is left to ask when ought the record for a certification motion be delivered?

112 To begin to answer these questions, I begin by noting that although in practice the class action bar seem to ignore the matter, the proper practice *before a certification motion* is brought is to address, usually at a case conference, among other things: (a) whether the defendant proposes to bring a jurisdictional or stay motion; (b) whether the defendant intends to challenge the statement of claim as not disclosing a reasonable cause of motion; and (c) whether the defendant will be relieved of its obligation under the *Rules of Civil Procedure* to deliver a Statement of Defence before the certification motion. Until these matters are addressed, it is premature to deliver material for a certification motion.

113 I have opined on the matter of the close of pleadings in class actions, as have some other courts, but there is a strong case to be made that a certification motion should follow the close of pleadings because this facilitates the analysis of whether the certification criteria are satisfied.²⁴ In any event, there are a variety of issues that ought to be addressed before the plaintiff brings his or her motion for certification. Thus, it was presumptuous, procedurally disruptive, wasteful, and ill-advised for Siskinds LLP to serve a record for a certification motion for the purpose of shoring up its request for carriage.

114 Further, until the matter of carriage is resolved, generally speaking, it is ill-advised to deliver the evidentiary record for the certification motion for reasons apart from properly managing the progress of the proposed class action.²⁵ One disadvantage of a preemptive delivery of the record for the certification motion, as occurred in the immediate case, is that defendant's counsel sits at the back of the courtroom copiously taking notes of how the Consortium attacks the plans and preparation of the party that delivered its certification motion before learning whether it has carriage of the proposed class action.

115 Thus, in the immediate case, in seeking carriage, Siskinds LLP was ultimately not helped by the early delivery of a motion for certification. That said, for the purposes of the carriage motion, all that can be said is that Siskinds LLP and the Consortium both satisfy the preparation and readiness of the action factor and thus this factor is neutral.

(h) *Preparation and Performance on Carriage Motion*

116 Preparation and performance on the carriage motion is a neutral factor in the immediate case.

(i) *The Quality of the Litigation Plan Factors: Case Theory; Scope of Causes of Action; Selection of Defendants; Correlation of Plaintiffs and Defendants; Class Definition; Class Period; Prospect of Success: (Leave and) Certification; Prospect of Success against the Defendants*

117 As noted above, nine of the factors (Factors 9 to 17) are about or are connected to case theory, which is at the heart of the test for determining carriage. However, while these factors are very important on a carriage motion, once again, they are problematic, ironical, controversial, and difficult to weigh.

118 Amongst the problems is the problem that to win the carriage contest, the rival proposed Class Counsel laud the ingenuity and the advantages of their own case theory while savaging their rival's case theory as prosaic, mistaken, and disadvantageous, but it is both premature and difficult for the court on the carriage motion to decide who wins this extolling and dissing match.

119 In most cases, the debate is not beneficial to the putative Class Members, but the debate is all to the delight to the defendants' counsel sitting in the back of the court room monitoring the carriage motion. Because of the open-court debate about case theory, the defendants are tipped off to the strengths and weaknesses of both case theories.

120 Another problem is that putative Class Counsel's self-praise of its case theory, particularly the supposedly ingenious aspects of it, must be evaluated with a high level of skepticism.

121 Amongst the many ironies of class action practice, what is lauded about the case theory on a carriage motion is on a settlement motion discarded and used to explain; (a) how enormous were the high litigation risks of proceeding in the action to a trial; and (b) why Class Counsel now recommends a settlement that is at some considerable distance from the aspirations of the case theory extoled at the carriage motion.

122 The reality is that the overwhelming majority of class actions settle based on standard case theories and not the ingenious ones advanced at the carriage motion. The ingenious claims are shed like bargaining chips that have served their purpose.

123 In the immediate case, with these thoughts in mind, in comparing and contrasting the case theories of the Consortium and Siskinds LLP, I make the following observations.

124 With the exception of the matter of whether only Starwood's database was compromised and whether Starwood Canada is a proper, necessary, or unnecessary party, there is negligible difference about the factual underpinning for the competing case theories.

125 From the perspective of the facts, the theory of both Siskinds LLP and the Consortium is built upon how the Defendants received and used the Class Member' information as part of Marriott's reservation and booking system or systems. Both theories build on whether the Defendants took adequate care to protect information and whether Marriott's response to the discovery of the data breach was appropriate. Based on these facts, both Siskinds LLP's case theory and the Consortium's case theory focus on the provincial privacy statutes and most particularly the tort of intrusion on seclusion.

126 Although Starwood Canada is a party in some of the Consortium's overlapping class actions, the Consortium's case theory - for Ontario - does not have Starwood Canada as a party. Ultimately nothing might turn on this circumstance because of the parallel actions, and, in any event, the design of the Consortium's action against the Defendants in Ontario does not make Starwood Canada a necessary party because joining the parent company defendants is adequate.

127 I do not regard the matter of whether Starwood Canada is a party, which it is in the *Winder Action*, or is not a party, which is the situation in the *Kogut Action*, is a substantive factor in the context of the carriage motion.

128 In the *Kogut Action*, the Consortium augments the statutory claims and the predominant intrusion on seclusion tort with claims for: (a) breach of contract; (b) breach of warranty; (c) negligence; (d) breach of confidence; and (e) breach of fiduciary duty.

129 For its part, Siskind LLP's adds the consumer protection statutory claims from all of the provinces. It submits these claims cover more readily and to the same end the legal territory of the breach of contract and other civil claims advanced by the Consortium. Further, Siskinds LLP submits that the statutory claims it advances avoid problems that would confront the Consortium's case theories because of the choice of law, choice of forum, and class action waiver clauses in the agreements between Marriott and those consumers using its reservation and booking system(s).

130 Notwithstanding the arguments of the Consortium or the arguments of Siskinds LLP, I do not regard the claims that are additional to the claims based on the provincial privacy statutes and the tort of intrusion on seclusion as enhancing either case theory in the sense of enhancing the chances of certification, which will depend on whether the intrusion on seclusion claim satisfies the test for certification. Thus, the case theory contest is essentially a tie.

131 In my opinion, in the context of the carriage factors, the extolled strengths and the disses weakness of the case theories of either the Consortium or of Siskinds LLP balance each other out. Since both theories are built on the same factual foundation and since the workhorse for both case theories is the tort of intrusion on seclusion on the macroscopic level of grand strategy, the case theory carriage factor approaches neutral.

132 Relatively speaking, I do not see either the Consortiums or Siskinds LLP added statutory or common law claims as adding to the complexity or expense of what will be a very complex intrusion on seclusion claim that involves whether or not Marriott met the standard that the law requires in protecting the privacy of consumers.

133 Because of the disagreement about what Marriott databases were compromised, Siskinds LLP criticizes the class definition of the Consortium's case theory and also suggests that the Consortium has revealed that it does not understand the nature of the Class Member's claims. In turn, the Consortium defends its class definition and criticizes Siskinds LLP for introducing a merits-based class definition, which is a no-no to class action aficionados.

134 While I do not think that there is anything technically wrong with either proposed class definition, once again, at this juncture, I do not see the differences as a substantive factor in the determination of whom should be granted carriage.

135 Practically speaking, the right definition of the Class will be determined when more is known about the data breach. Practically speaking, the investigation and pinning down who was affected by the data breach will not add to the expense or the complexity of the class action. If it emerges that more than the Starwood database was compromised, it does not follow that that the class action proposed by the Consortium would be unmanageable. And the result of properly identifying Class Members would not be a merits-based analysis or a merit-based class definition, because it would remain to be determined whether all the elements of their causes of action could be proven.

136 Thus, case theory, scope of the causes of action, selection of defendants, correlation of plaintiffs and defendants, class definition, and class period are all more or less equal or equalized as carriage factors. Although Siskinds LLP disclosed more of its litigation plan because of the delivery of its motion for certification, the Consortium disclosed enough to neutralize this carriage factor. I would rate the prospects of either case theory obtaining certification as equal. At this juncture of the proceedings, I would rate the prospects of ultimate success against the defendants of either case theory as equal.

4. Interrelationship of Class Actions in more than one Jurisdiction

137 This brings the discussion to what I regard as the tipping point or determinative factor in the carriage contest. The discussion below should be read with the discussion above about avoiding a multiplicity of class proceedings.

138 In normal litigation, if a defendant was sued by the same plaintiff about the same cause of action in British Columbia, Alberta, Ontario, Québec, and Nova Scotia, the defendant would bring motions in those provinces for the purpose of being sued

in just one jurisdiction; *i.e.*, the defendant would seek to have the action tried in the one court with jurisdiction *simpliciter* and that was the *forum conveniens* for the action. As noted above, the criteria for determining which is the *forum conveniens* are well known and bear some resemblance to the factors used to determine carriage.

139 In class actions, however, when there is a multiplicity of overlapping class actions, instead of using the procedures available to identify the *forum conveniens*, defendants acquiesce to there being more than one class action. They acquiesce because Class Counsel or the Consortium of Class Counsel informally agree to prosecute the class action in one jurisdiction while informally "parking" or "pausing" the other class actions.

140 This approach is what appears to be happening in the immediate case where overlapping class actions have been brought in British Columbia, Alberta, Ontario, Québec, and Nova Scotia. In the immediate case, the approach of the Consortium is to use the approach of having a multiplicity of overlapping class actions and then sorting out the matter of how to proceed with them through the use of co-operation agreements. Indeed, the Consortium relies on this approach as being a factor strongly in its favour.

141 In contrast, while Siskinds LLP is prepared to co-operate and co-ordinate with other Class Counsel, its approach does not concede that there should be overlapping class actions. Siskinds LLP has not prejudged the outcome of using the Uniform Law Conference of Canada provisions that address competing multi-jurisdictional class actions.

142 Indeed, Siskinds LLP harshly criticizes the approach of the Consortium and submits that its different approach favours granting it carriage. To quote from its responding factum on the carriage motion, Siskinds LLP states:

Kogut Counsel has brought four distinct class actions with substantially overlapping or identical classes in four distinct jurisdictions across Canada, including in British Columbia where they also contest carriage on behalf of a proposed national class (a proposed class definition identical to the Kogut Action). Pursuing the four actions across Canada is *prima facie* inefficient use of the parties' and the courts' resources. Additionally, Kogut Counsel has advanced no evidence on the reason why four actions had to be commenced across Canada, or what they plan to do about them, giving rise to concerns regarding potential abuses of the courts' processes. Furthermore, the four actions cannot be pursued at the same time coherently, but would inevitably give rise to complexities, inefficiencies and potential conflicts. Kogut Counsel has not produced any plans regarding how it plans to manage and prosecute the four actions.

143 While Siskinds LLP's criticism may be overly critical and somewhat hypocritical given that it has participated in consortiums in other cases, in my opinion, in the immediate case, Siskind LLP's approach does strongly favour granting carriage to it.

144 The approach adopted by Siskinds LLP does not suffer from the not uncommon inconsistencies and ironies of class action practice in Canada of a putative Class Counsel commencing more than one national or regional class action, as for example Koskie Minsky LLP did in the immediate case.

145 In the immediate case, Koskie Minsky LLP achieved carriage in Alberta by settlement and in Nova Scotia without opposition while it is fighting for carriage in British Columbia and Ontario. It is difficult to explain why Koskie Minsky LLP thought it desirable for the administration of justice to have it commence or participate in national class actions in three provinces and bring a demi-national class action in a fourth province.

146 In my opinion, in the immediate case, it is desirable that the courts across the country, not Class Counsel, determine how to manage a multiplicity of overlapping class actions. I agree with the Uniform Law Conference that it is "possible to resolve the conflicts between competing class actions simply by using the existing structures and adapting the current rules governing jurisdiction to the national class problem".

147 Based on the record on the carriage motion, I am not convinced that class proceedings about the same wrongdoing are inevitable or necessary in all of British Columbia, Alberta, Ontario, Québec, and Nova Scotia. Based on the record on the carriage motion, there is a reasonably strong case that a single national class action be it in British Columbia, Alberta, or Ontario

would provide of access to justice, behaviour modification, and judicial economy. Based on the record on the carriage motion, there is a reasonably strong case that while any of the courts of British Columbia, Alberta, or Ontario could do the job, Ontario is the *forum conveniens* for a national class action having regard to the current rules governing jurisdiction, which focus on such matters as the avoidance of multiplicity of proceedings; the applicable law and its weight in comparison to the factual questions to be decided; geographical factors suggesting the natural forum; and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage in the domestic court.

148 As I stated above, sometimes a multiplicity of overlapping class actions may be desirable and that may be true in the immediate case, but the Consortium in the immediate case assumes this to be true without having it tested, and the Consortium in the immediate case simply leaves unanswered the question of whom among all of the following shall share the work, risks, and rewards of being Class Counsel: (1) Siskinds LLP, (2) Koskie Minsky LLP, (3) Landy Marr Kats LLP, (4) McKenzie Lake Lawyers LLP, (5) Du Vernet, Stewart, (6) Guardian Law Group LLP, (7) James H. Brown Associates, (8) Woods LLP; (9) Rochon Genova LLP; (10) Boughton Law Corporation; (11) Acheson Sweeney Foley Sahota LLP; (11) Hammerberg Lawyers LLP, (12) Evolink Law Group; and (13) Garcha & Company

149 If the Consortium were granted carriage in Ontario and in British Columbia and with the national strategy of working cooperatively with other Canadian law firms, it appears that without being tested as to desirability or necessity as many as nine law firms might be involved in resolving a national class action.

150 In contrast, if carriage is granted to Siskinds LLP, while it is possible that there will be overlapping class actions with nine or more law firms sharing the risks and the rewards, it is also possible that there might be: (a) one national class action out of Ontario involving one law firm; or (b) two class actions, one for the common law provinces out of Ontario with a regional action for Québec involving just three law firms.

151 In the circumstances of the immediate case, in my opinion, Siskinds LLP approach to the interrelationship of class actions in more than one jurisdiction favours granting it carriage.

152 I should add that although it would have been a very close call, I would have granted it carriage in any event.

D. Conclusion

153 For the above reasons, I grant carriage to the *Winder Action* and I stay: (a) *Kogut, Schnarr and Brown v. Luxury Hotels International of Canada ULC and Marriott International, Inc.*; (b) *Arthur v. Marriott International, Inc.*; and (c) *Martineau v. Marriott International, Inc. and Starwood Hotels & Reports Worldwide*.

E. Epilogue

154 In Ontario, carriage has now been granted to Siskinds LLP for a national class action. In Québec, carriage has been granted to Woods LLP and Rochon Genova LLP for a regional class action. In Alberta, Koskie Minsky LLP, along with Guardian Law Group LLP and James H. Brown Associates has carriage for a national class action. In Nova Scotia, Koskie Minsky LLP has carriage in for a regional class action for the maritime provinces. In British Columbia, carriage has not been determined.

155 To sort out this procedural morass, I suggest that: (a) either the Marriott Defendants simultaneously bring *forum conveniens* motions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia; or (b) Siskinds LLP simultaneously bring motions in British Columbia, Alberta, Ontario, Québec, and Nova Scotia to settle how many class actions should proceed pursuant to the model of the Uniform Law Conference's legislation.

156 The model legislation is already in place in British Columbia and Alberta and it already fits nicely with the existing *forum conveniens* law in Ontario, Québec, and Nova Scotia.

157 Using modern technology, the simultaneous motions could be heard simultaneously, or given the Supreme Court of Canada's decision in *Endean v. British Columbia*,²⁶ there could be a joint hearing in any of British Columbia, Alberta, Ontario,

Québec, and Nova Scotia. It may be that this approach will allow Canadian courts to develop a procedure akin to and perhaps better than the MDL procedure (multiple district litigation) used by American states.

S's motion granted; consortium's motion dismissed.

Footnotes

- 1 *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations*, Vancouver, B.C., March 9, 2005.
- 2 *Class Proceedings Amendment Act*, SA 2010, c15.
- 3 *Class Proceedings Amendment Act*, 2018, SBC 2018, c 16.
- 4 *Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, July 2019)
- 5 2012 ONCA 32 (Ont. C.A.).
- 6 *Privacy Act*, RSBC 1996, c. 373; *The Privacy Act*, RSS 1978, c. P-24; *The Privacy Act*, CCSM, c. P125; the *Civil Code of Québec*, CQLR c CCQ-1991, the *Charter of Human Rights and Freedoms*, CQLR c. C-12; the *Act Respecting the Protection of Personal Information in the Private Sector*, RSQ, c P-39.1; and the *Privacy Act*, RSNL 1990, c. P-22.
- 7 *Business Practices and Consumer Protection Act*, SBC 2004, c 2; *the Fair Trading Act*, RSA 2000, c. F-2; *the Consumer Protection Act*, SS 1996, c. C-30.1; the *Consumer Protection and Business Practices Act*, SS 2014, c. C-30.2; *the Business Practices Act*, CCSM, c. B120; *Consumer Protection Act*, 2002, SO 2002, c. 30, Sch A; the *Consumer Protection Act*, CQLR, c P-40.1, the *Consumer Protection and Business Practices Act*, SNL 2009, c. C-31.1, *the Consumer Protection Act*, RSNS 1989, c. 92; and, *the Business Practices Act*, RSPEI 1988, c. B-7
- 8 R.S.O. 1990, c. 43.
- 9 *Setterington v. Merck Frosst Canada Ltd.*, [2006] O.J. No. 376 (Ont. S.C.J.) at paras. 9-11; *Ricardo v. Air Transat A.T. Inc.*, [2002] O.J. No. 1090 (Ont. S.C.J.), leave to appeal dismissed [2002] O.J. No. 2122 (Ont. Div. Ct.).
- 10 *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.).
- 11 *Sharma v. Timminco Ltd.* (2009), 99 O.R. (3d) 260 (Ont. S.C.J.) at para. 14; *Setterington v. Merck Frosst Canada Ltd.*, *supra*, at para. 13; *VitaPharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2000] O.J. No. 4594 (Ont. S.C.J.) at para. 48.
- 12 *Simmonds v. Armtec Infrastructure Inc.*, *sub nom. Locking v. Armtec Infrastructure Inc.*, 2012 ONSC 44 (Ont. S.C.J.), leave to appeal to Div. Ct. granted, 2012 ONSC 5228 (Ont. S.C.J.), affirmed 2013 ONSC 331 (Ont. Div. Ct.); *Tiboni v. Merck Frosst Canada Ltd.*, [2008] O.J. No. 2996 (Ont. S.C.J.), *sub. nom Mignacca v. Merck Frosst Canada Ltd.*, leave to appeal granted [2008] O.J. No. 4731 (Ont. S.C.J.), aff'd [2009] O.J. No. 821 (Ont. Div. Ct.), application for leave to appeal to C.A. ref'd May 15, 2009, application for leave to appeal to S.C.C. ref'd [2009] S.C.C.A. No. 261 (S.C.C.).
- 13 *Rogers v. Aphria Inc.*, 2019 ONSC 3698 (Ont. S.C.J.); *Agnew-American v. Equifax Canada*, 2018 ONSC 275 (Ont. S.C.J.); *Kaplan v. Casino Rama Services Inc.*, 2017 ONSC 2671 (Ont. S.C.J.); *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 (Ont. S.C.J.); *Mancinelli v. Barrick Gold Corp.*, 2014 ONSC 6516 (Ont. S.C.J.) aff'd 2015 ONSC 2717 (Ont. Div. Ct.), aff'd 2016 ONCA 571 (Ont. C.A.); *Wilson v. LG Chem Ltd.*, 2014 ONSC 1875 (Ont. S.C.J.); *McSherry v. Zimmer GMBH*, 2012 ONSC 4113 (Ont. S.C.J.); *Smith v. Sino-Forest Corp.*, 2012 ONSC 24 (Ont. S.C.J.); *Sharma v. Timminco Ltd.*; *Genier v. CCI Capital Canada Ltd.* [2005 CarswellOnt 1141 (Ont. S.C.J.)], *supra*; *Gorecki v. Canada (Attorney General)*, [2004] O.J. No. 1315 (Ont. S.C.J.); *Ricardo v. Air Transat A.T. Inc.*, *supra*.
- 14 *Quenneville v. Audi AG*, 2018 ONSC 1530 (Ont. S.C.J.).
- 15 *Kowalyshyn v. Valeant Pharmaceuticals International, Inc.*, 2016 ONSC 3819 (Ont. S.C.J.) at para. 146.

16 R.S.O. 1990, c. 34.

17 2012 ONCA 32 (Ont. C.A.).

18 Vancouver, B.C., March 9, 2005.

19 The Uniform Law Conference of Canada Civil Law Section, *Report of the Uniform Law Conference of Canada's Committee on the National Class and Related Interjurisdictional Issues: Background, Analysis and Recommendations* (Vancouver, B.C., March 9, 2005), para. 32.

20 *Class Proceedings Amendment Act*, SA 2010, c15.

21 *Class Proceedings Amendment Act*, 2018, SBC 2018, c 16.

22 *Law Commission of Ontario, Class Actions: Objectives, Experiences and Reforms: Final Report* (Toronto, July 2019)

23 2018 CarswellOnt 364 (Ont. S.C.J.) at para. 44.

24 *Pennyfeather v. Timminco Ltd.*, 2011 ONSC 4257 (Ont. S.C.J.).

25 *Quenneville v. Audi AG*, 2018 ONSC 1530 (Ont. S.C.J.).

26 2016 SCC 42 (S.C.C.).

TAB 31

CLASS ACTIONS

Objectives, Experiences and Reforms

FINAL REPORT • JULY 2019



LCO
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LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

CLASS ACTIONS

Objectives, Experiences and Reforms

Final Report

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LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO

In this section, the LCO considers several other options, policy responses, and best practices to address some of the shortcomings in the test.

1. Interpreting the Statutory Criteria

The LCO believes the current wording of the five criteria in s.5(1) of the CPA is generally sufficient and does not warrant amendment. However, the LCO recommends that courts consider proportionality and give significant weight to alternative options under the preferable procedure analysis.

Preferable Procedure and Proportionality

Counsel representing auto manufacturers suggested making explicit the requirement that judges consider a defendant's recall and replacement or repair of a product in assessing whether the class action is preferable,²⁰⁹ and introduce a provision that would require the court, on a motion brought by the defendant, to consider the alternative procedure *before* a full certification motion is heard.²¹⁰ The goal is to recognize, at an early stage, actions taken by defendants to remedy potential harm. The Canadian Vehicle Manufacturers' Association (CVMA) advised the LCO that "Where a party provides reasonable relief or redress has been, or will be, provided to a prospective class, such remedy or redress should be recognized as a preferable procedure thus negating the need for a class action. The ability to avoid a class action would promote the objective of behaviour modification/deterrence by encouraging companies to voluntarily remedy harm."²¹¹ The CVMA specifically called for the following amendment to s. 5(1)(d):

(d) the class has not been, and will not be, provided with a reasonable alternative means of redress or remedial response by regulatory action, a product recall, a remedy program or through any other procedure other than a class proceeding, and a class proceeding would be the preferable procedure for the resolution of the common issues and the provision of any redress or remedy to the class.

The LCO agrees that the existence of robust recall programs or regulatory action can weigh heavily against the utility of a class action. The lack of damages coupled with the remedial conduct of the defendant can justify rejecting the proposed class action under s. 5(1)(d). However, judges already have the authority to prefer alternate remedies over a class proceeding. The Supreme Court has held that the "preferability requirement is broad enough to take into account all reasonably available means of resolving the class members' claims including avenues of redress other than court actions."²¹²

The issue is not the lack of statutory authority but rather a narrow interpretation of the preferable procedure criterion. To this end, there is merit to the CVMA's recommendation that "for the purposes of Subsection 5(1)(d), a reasonable alternative means of redress or remedial response need not be a complete remedy in law."²¹³ A more generous approach to alternative remedies would disincentivize class actions that are largely duplicative of regulatory or other remedial schemes pursuant to which class members have been compensated. Moreover, there is precedent for closely examining the benefits already accrued by class members. In *AIC v. Fisher* the Supreme Court of Canada held that in the rather unusual case where the alternative proceedings have run their course and the results of those proceedings are known, "the comparative analysis cannot ignore the question of whether a cost-benefit analysis supports the [plaintiffs'] contention that the proposed class proceeding is the preferable way to address their claims."²¹⁴ While the Court determined that substantive access to justice concerns remained at the conclusion of the alternative process before it (class members had recovered less than one-third of their estimated losses), in theory a remedial program that largely makes class members whole ought to be preferred over the more cumbersome, lengthy and expensive class litigation process. As noted by Rady J. in *Richardson v. Samsung*, "the law does not demand perfect compensation. Indeed, perfect compensation is unlikely even if pursued by way of class action."²¹⁵

The cost-benefit analysis averted to in *Fischer* should be given a more generous reading. Although the LCO is not persuaded that legislative amendment is warranted, we encourage judges to give more weight to alternative remedies. There are three main policy reasons justifying a greater emphasis on such alternatives:

- Comprehensive remedial programs may reduce litigation exposure and create positive incentives for compensating harm.
- Such programs may be speedier and less costly than class actions (taking into account that legal fees are not deducted from the compensation).
- Since class actions themselves are vehicles for ‘rough justice’ and rarely indemnify class members fully for all losses sustained, there is no principled reason to expect alternative remedies to provide perfect remedies.

Some will argue that engaging in this limited cost-benefits analysis under s. 5(1)(d) will require parties to engage in the merits. This is true but only insofar as the evidence supporting the alternative procedure necessarily overlaps with the merits. In the minority of cases where a regulatory body or defendant has remediated the harm at issue in the litigation, evidence of the kind admitted in *Fischer* would not be onerous and should be considered carefully by the certification motion judge.

With the rise in importance of the principle of procedural proportionality across Canada,²¹⁶ a costs-benefit approach to class actions could also serve to decide whether the action should be commenced altogether.²¹⁷ As the Supreme Court of Canada stated in *Dutton*, at certification courts should consider “the benefits the class action offers in the circumstances of the case as well as any unfairness that class proceedings may cause. In the end, the court must strike a balance between efficiency and fairness.”²¹⁸ In fact, since *Hryniak*,¹⁹ courts have found that they must consider proportionality in the context of preferable procedure.

*[O]ne should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the focus on judicial economy and with the part of the preferable procedure analysis that considers manageability and whether the claimants will receive a just and effective remedy for their claims.*²²⁰

Proportionality in civil litigation reflects that the time and expense devoted to a proceeding must be proportionate to what's at stake. In standard litigation this cost benefit analysis is typically in the context of size of the proceedings (productions, discovery, experts, costs etc). Class actions, however, are by definition large and complex, the costs are huge and the potential exposure is always enormous. The LCO sees proportionality in class actions as a weighing of the cost that large, complex, protracted actions impose on everyone involved including the use of scarce public resources, against the potential benefits of behaviour modification and damages awarded to the class. In the context of trying to determine whether a class action is the preferable procedure, the LCO believes it is reasonable for the court to consider whether the proposed action furthers the three objectives of the CPA.

2. Pre-certification Motions (Summary Judgement Motions)

The LCO encourages the use of summary judgment motions in class actions. This is especially true when: 1) a motion might dispose of the entire proceeding or substantially narrow the issues to be determined; 2) when the delays and costs associated with the motion will be restricted; 3) when the outcome of the motion will promote settlement; 4) when the motion will not give rise to interlocutory appeals and delays affecting certification; 5) when the interests of economy and judicial efficiency will be promoted; and generally, 6) when scheduling the motion in advance of certification would promote the “fair and efficient determination” of the proceeding.²²¹

Given that class proceedings in Ontario must “disclose a cause of action” to be certified, and that the same test applies under this section as that on a motion to strike, class proceedings judges are typically reluctant to hear motions to strike in advance

TAB 32

Current to November 16, 2019

Class Proceedings Act, 1992

S.O. 1992, c. 6

Amended by: S.O. 2006, c. 19, Sched. C, s. 1 (1).

Amended by: S.O. 2006, c. 19, Sched. C, s. 1 (1).

Definitions

1. In this Act,

"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; ("questions communes")

"court" means the Superior Court of Justice but does not include the Small Claims Court; ("tribunal")

"defendant" includes a respondent; ("défendeur")

"plaintiff" includes an applicant. ("demandeur")

S.O. 1992, c. 6, s. 1; S.O. 2006, c. 19, Sched. C, s. 1 (1).

Plaintiff's class proceeding

2.--(1) One or more members of a class of persons may commence a proceeding in the court on behalf of the members of the class.

Motion for certification

(2) A person who commences a proceeding under subsection (1) shall make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing the person representative plaintiff.

Idem

(3) A motion under subsection (2) shall be made,

(a) within ninety days after the later of,

- (i) the date on which the last statement of defence, notice of intent to defend or notice of appearance is delivered, and
 - (ii) the date on which the time prescribed by the rules of court for delivery of the last statement of defence, notice of intent to defend or a notice of appearance expires without its being delivered; or
- (b) subsequently, with leave of the court.

S.O. 1992, c. 6, s. 2.

Defendant's class proceeding

3. A defendant to two or more proceedings may, at any stage of one of the proceedings, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative plaintiff.

S.O. 1992, c. 6, s. 3.

Classing defendants

4. Any party to a proceeding against two or more defendants may, at any stage of the proceeding, make a motion to a judge of the court for an order certifying the proceeding as a class proceeding and appointing a representative defendant.

S.O. 1992, c. 6, s. 4.

Certification

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.

Idem, subclass protection

(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.

Evidence as to size of class

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class.

Adjournments

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence.

Certification not a ruling on merits

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding.

S.O. 1992, c. 6, s. 5.

Certain matters not bar to certification

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. S.O. 1992, c. 6, s. 6.

Refusal to certify: proceeding may continue in altered form

7. Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

- (a) order the addition, deletion or substitution of parties;
- (b) order the amendment of the pleadings or notice of application; and
- (c) make any further order that it considers appropriate.

S.O. 1992, c. 6, s. 7.

Contents of certification order

8.--(1) An order certifying a proceeding as a class proceeding shall,

- (a) describe the class;
- (b) state the names of the representative parties;
- (c) state the nature of the claims or defences asserted on behalf of the class;
- (d) state the relief sought by or from the class;
- (e) set out the common issues for the class; and
- (f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out.

Subclass protection

(2) 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, subsection (1) applies with necessary modifications in respect of the subclass.

Amendment of certification order

(3) The court, on the motion of a party or class member, may amend an order certifying a proceeding as a class proceeding.

S.O. 1992, c. 6, s. 8.

Opting out

9. Any member of a class involved in a class proceeding may opt out of the proceeding in the manner and within the time specified in the certification order.

S.O. 1992, c. 6, s. 9.

Where it appears conditions for certification not satisfied

10.--(1) On the motion of a party or class member, where it appears to the court that the conditions mentioned in subsections 5 (1) and (2) are not satisfied with respect to a class proceeding, the court may amend the certification order, may decertify the proceeding or may make any other order it considers appropriate.

Proceeding may continue in altered form

(2) Where the court makes a decertification order under subsection (1), the court may permit the proceeding to continue as one or more proceedings between different parties.

Powers of court

(3) For the purposes of subsections (1) and (2), the court has the powers set out in clauses 7 (a) to (c).

S.O. 1992, c. 6, s. 10.

Stages of class proceedings

11.--(1) Subject to section 12, in a class proceeding,

- (a) common issues for a class shall be determined together;
- (b) common issues for a subclass shall be determined together; and
- (c) individual issues that require the participation of individual class members shall be determined individually in accordance with sections 24 and

25.

Separate judgments

(2) The court may give judgment in respect of the common issues and separate judgments in respect of any other issue.

S.O. 1992, c. 6, s. 11.

Court may determine conduct of proceeding

12. 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.

S.O. 1992, c. 6, s. 12.

Court may stay any other proceeding

13. 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.

S.O. 1992, c. 6, s. 13.

Participation of class members

14.--(1) In order to ensure the fair and adequate representation of the interests of the class or any subclass or for any other appropriate reason, the court may, at any time in a class proceeding, permit one or more class members to participate in the proceeding.

Idem

(2) Participation under subsection (1) shall be in whatever manner and on whatever terms, including terms as to costs, the court considers appropriate.

S.O. 1992, c. 6, s. 14.

Discovery of parties

15.--(1) Parties to a class proceeding have the same rights of discovery under the rules of court against one another as they would have in any other proceeding.

Discovery of class members with leave

(2) After discovery of the representative party, a party may move for discovery under the rules of court against other class members.

Idem

- (3) In deciding whether to grant leave to discover other class members, the court shall consider,
- (a) the stage of the class proceeding and the issues to be determined at that stage;
 - (b) the presence of subclasses;
 - (c) whether the discovery is necessary in view of the claims or defences of the party seeking leave;
 - (d) the approximate monetary value of individual claims, if any;
 - (e) whether discovery would result in oppression or in undue annoyance, burden or expense for the class members sought to be discovered; and
 - (f) any other matter the court considers relevant.

Idem

- (4) A class member is subject to the same sanctions under the rules of court as a party for failure to submit to discovery.

S.O. 1992, c. 6, s. 15.

Examination of class members before a motion or application

- 16.--(1) A party shall not require a class member other than a representative party to be examined as a witness before the hearing of a motion or application, except with leave of the court.

Idem

- (2) Subsection 15 (3) applies with necessary modifications to a decision whether to grant leave under subsection (1).

S.O. 1992, c. 6, s. 16.

Notice of certification

- 17.--(1) Notice of certification of a class proceeding shall be given by the representative party to the class members in accordance with this section.

Court may dispense with notice

(2) The court may dispense with notice if, having regard to the factors set out in subsection (3), the court considers it appropriate to do so.

Order respecting notice

(3) The court shall make an order setting out when and by what means notice shall be given under this section and in so doing shall have regard to,

- (a) the cost of giving notice;
- (b) the nature of the relief sought;
- (c) the size of the individual claims of the class members;
- (d) the number of class members;
- (e) the places of residence of class members; and
- (f) any other relevant matter.

Idem

(4) The court may order that notice be given,

- (a) personally or by mail;
- (b) by posting, advertising, publishing or leafleting;
- (c) by individual notice to a sample group within the class; or
- (d) by any means or combination of means that the court considers appropriate.

Idem

(5) The court may order that notice be given to different class members by different means.

Contents of notice

(6) Notice under this section shall, unless the court orders otherwise,

- (a) describe the proceeding, including the names and addresses of the representative parties and the relief sought;
- (b) state the manner by which and time within which class members may opt out of the proceeding;
- (c) describe the possible financial consequences of the proceeding to class members;
- (d) summarize any agreements between representative parties and their solicitors respecting fees and disbursements;

- (e) describe any counterclaim being asserted by or against the class, including the relief sought in the counterclaim;
- (f) state that the judgment, whether favourable or not, will bind all class members who do not opt out of the proceeding;
- (g) describe the right of any class member to participate in the proceeding;
- (h) give an address to which class members may direct inquiries about the proceeding; and
- (i) give any other information the court considers appropriate.

Solicitations of contributions

(7) With leave of the court, notice under this section may include a solicitation of contributions from class members to assist in paying solicitor's fees and disbursements.

S.O. 1992, c. 6, s. 17.

Notice where individual participation is required

18.--(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, the representative party shall give notice to those members in accordance with this section.

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

Contents of notice

- (3) Notice under this section shall,
- (a) state that common issues have been determined in favour of the class;
 - (b) state that class members may be entitled to individual relief;
 - (c) describe the steps to be taken to establish an individual claim;
 - (d) state that failure on the part of a class member to take those steps will result in the member not being entitled to assert an individual claim except with leave of the court;
 - (e) give an address to which class members may direct inquiries about the proceeding; and
 - (f) give any other information that the court considers appropriate.

S.O. 1992, c. 6, s. 18.

Notice to protect interests of affected persons

19.--(1) At any time in a class proceeding, the court may order any party to give such notice as it considers necessary to protect the interests of any class member or party or to ensure the fair conduct of the proceeding.

Idem

(2) Subsections 17 (3) to (5) apply with necessary modifications to notice given under this section.

S.O. 1992, c. 6, s. 19.

Approval of notice by the court

20. A notice under section 17, 18 or 19 shall be approved by the court before it is given.

S.O. 1992, c. 6, s. 20.

Delivery of notice

21. The court may order a party to deliver, by whatever means are available to the party, the notice required to be given by another party under section 17, 18 or 19, where that is more practical.

S.O. 1992, c. 6, s. 21.

Costs of notice

22.--(1) The court may make any order it considers appropriate as to the costs of any notice under section 17, 18 or 19, including an order apportioning costs among parties.

Idem

(2) In making an order under subsection (1), the court may have regard to the different interests of a subclass.

S.O. 1992, c. 6, s. 22.

Statistical evidence

23.--(1) For the purposes of determining issues relating to the amount or distribution of a monetary award under this Act, the court may admit as evidence statistical information that would not otherwise

be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

Idem

(2) A record of statistical information purporting to be prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada may be admitted as evidence without proof of its authenticity.

Notice

(3) Statistical information shall not be admitted as evidence under this section unless the party seeking to introduce the information has,

- (a) given reasonable notice of it to the party against whom it is to be used, together with a copy of the information;
- (b) complied with subsections (4) and (5); and
- (c) complied with any requirement to produce documents under subsection (7).

Contents of notice

(4) Notice under this section shall specify the source of any statistical information sought to be introduced that,

- (a) was prepared or published under the authority of the Parliament of Canada or the legislature of any province or territory of Canada;
- (b) was derived from market quotations, tabulations, lists, directories or other compilations generally used and relied on by members of the public; or
- (c) was derived from reference material generally used and relied on by members of an occupational group.

Idem

(5) Except with respect to information referred to in subsection (4), notice under this section shall,

- (a) specify the name and qualifications of each person who supervised the preparation of statistical information sought to be introduced; and
- (b) describe any documents prepared or used in the course of preparing the statistical information sought to be introduced.

Cross-examination

(6) A party against whom statistical information is sought to be introduced under this section may require, for the purposes of cross-examination, the attendance of any person who supervised the preparation of the information.

Production of documents

(7) Except with respect to information referred to in subsection (4), a party against whom statistical information is sought to be introduced under this section may require the party seeking to introduce it to produce for inspection any document that was prepared or used in the course of preparing the information, unless the document discloses the identity of persons responding to a survey who have not consented in writing to the disclosure.

S.O. 1992, c. 6, s. 23.

Aggregate assessment of monetary relief

24.--(1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.

Average or proportional application

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis.

Idem

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members.

Court to determine whether individual claims need to be made

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order.

Procedures for determining claims

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims.

Idem

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis.

Time limits for making claims

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court.

Extension of time

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given.

Court may amend subs. (1) judgment

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so.

S.O. 1992, c. 6, s. 24.

Individual issues

25.--(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

- (a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;
- (b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and
- (c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

- (a) dispense with any procedural step that it considers unnecessary; and
- (b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

Extension of time

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).

Determination under cl. (1) (c) deemed court order

(7) A determination under clause (1) (c) is deemed to be an order of the court.

S.O. 1992, c. 6, s. 25.

Judgment distribution

26.--(1) The court may direct any means of distribution of amounts awarded under section 24 or 25 that it considers appropriate.

Idem

(2) In giving directions under subsection (1), the court may order that,

- (a) the defendant distribute directly to class members the amount of monetary relief to which each class member is entitled by any means authorized by the court, including abatement and credit;
- (b) the defendant pay into court or some other appropriate depository the total amount of the defendant's liability to the class until further order of the court; and
- (c) any person other than the defendant distribute directly to class members the amount of monetary relief to which each member is entitled by any means authorized by the court.

Idem

(3) In deciding whether to make an order under clause (2) (a), the court shall consider whether distribution by the defendant is the most practical way of distributing the award for any reason, including the fact that the amount of monetary relief to which each class member is entitled can be determined from the records of the defendant.

Idem

(4) The court may order that all or a part of an award under section 24 that has not been distributed within a time set by the court 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, if the court is satisfied that a reasonable number of class members who would not otherwise receive monetary relief would benefit from the order.

Idem

(5) The court may make an order under subsection (4) whether or not all class members can be identified or all of their shares can be exactly determined.

Idem

- (6) The court may make an order under subsection (4) even if the order would benefit,
- (a) persons who are not class members; or
 - (b) persons who may otherwise receive monetary relief as a result of the class proceeding.

Supervisory role of the court

- (7) The court shall supervise the execution of judgments and the distribution of awards under section 24 or 25 and may stay the whole or any part of an execution or distribution for a reasonable period on such terms as it considers appropriate.

Payment of awards

- (8) The court may order that an award made under section 24 or 25 be paid,
- (a) in a lump sum, forthwith or within a time set by the court; or
 - (b) in instalments, on such terms as the court considers appropriate.

Costs of distribution

- (9) The court may order that the costs of distribution of an award under section 24 or 25, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution, be paid out of the proceeds of the judgment or may make such other order as it considers appropriate.

Return of unclaimed amounts

- (10) Any part of an award for division among individual class members that remains unclaimed or otherwise undistributed after a time set by the court shall be returned to the party against whom the award was made, without further order of the court.

S.O. 1992, c. 6, s. 26.

Contents of judgment on common issues

- 27.--(1) A judgment on common issues of a class or subclass shall,
- (a) set out the common issues;
 - (b) name or describe the class or subclass members;
 - (c) state the nature of the claims or defences asserted on behalf of the class or subclass; and
 - (d) specify the relief granted.

Effect of judgment on common issues

- (2) A judgment on common issues of a class or subclass does not bind,
- (a) a person who has opted out of the class proceeding; or
 - (b) a party to the class proceeding in any subsequent proceeding between the party and a person mentioned in clause (a).

Idem

- (3) A judgment on common issues of a class or subclass binds every class member who has not opted out of the class proceeding, but only to the extent that the judgment determines common issues that,

- (a) are set out in the certification order;
- (b) relate to claims or defences described in the certification order; and
- (c) relate to relief sought by or from the class or subclass as stated in the certification order.

S.O. 1992, c. 6, s. 27.

Limitations

28.--(1) Subject to subsection (2), any limitation period applicable to a cause of action asserted in a class proceeding is suspended in favour of a class member on the commencement of the class proceeding and resumes running against the class member when,

- (a) the member opts out of the class proceeding;
- (b) an amendment that has the effect of excluding the member from the class is made to the certification order;
- (c) a decertification order is made under section 10;
- (d) the class proceeding is dismissed without an adjudication on the merits;
- (e) the class proceeding is abandoned or discontinued with the approval of the court; or
- (f) the class proceeding is settled with the approval of the court, unless the settlement provides otherwise.

Idem

- (2) Where there is a right of appeal in respect of an event described in clauses (1) (a) to (f), the limitation period resumes running as soon as the time for appeal has expired without an appeal being commenced or as soon as any appeal has been finally disposed of.

S.O. 1992, c. 6, s. 28.

Discontinuance and abandonment

29.--(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

S.O. 1992, c. 6, s. 29.

Appeals: refusals to certify and decertification orders

30.--(1) A party may appeal to the Divisional Court from an order refusing to certify a proceeding as a class proceeding and from an order decertifying a proceeding.

Appeals: certification orders

(2) A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

Appeals: judgments on common issues and aggregate awards

(3) A party may appeal to the Court of Appeal from a judgment on common issues and from an order under section 24, other than an order that determines individual claims made by class members.

Appeals by class members on behalf of the class

(4) If a representative party does not appeal or seek leave to appeal as permitted by subsection (1) or (2), or if a representative party abandons an appeal under subsection (1) or (2), any class member may make a motion to the court for leave to act as the representative party for the purposes of the relevant subsection.

Idem

(5) If a representative party does not appeal as permitted by subsection (3), or if a representative party abandons an appeal under subsection (3), any class member may make a motion to the Court of Appeal for leave to act as the representative party for the purposes of subsection (3).

Appeals: individual awards

(6) A class member may appeal to the Divisional Court from an order under section 24 or 25 determining an individual claim made by the member and awarding more than \$3,000 to the member.

Idem

(7) A representative plaintiff may appeal to the Divisional Court from an order under section 24 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

Idem

(8) A defendant may appeal to the Divisional Court from an order under section 25 determining an individual claim made by a class member and awarding more than \$3,000 to the member.

Idem

(9) With leave of the Superior Court of Justice as provided in the rules of court, a class member may appeal to the Divisional Court from an order under section 24 or 25,

- (a) determining an individual claim made by the member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by the member for monetary relief.

Idem

(10) With leave of the Superior Court of Justice as provided in the rules of court, a representative plaintiff may appeal to the Divisional Court from an order under section 24,

- (a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by a class member for monetary relief.

Idem

(11) With leave of the Superior Court of Justice as provided in the rules of court, a defendant may appeal to the Divisional Court from an order under section 25,

- (a) determining an individual claim made by a class member and awarding \$3,000 or less to the member; or
- (b) dismissing an individual claim made by a class member for monetary relief.

S.O. 1992, c. 6, s. 30; S.O. 2006, c. 19, *Sched. C*, s. 1 (1).

Costs

31.--(1) In exercising its discretion with respect to costs under subsection 131 (1) of the Courts of Justice Act, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest.

Liability of class members for costs

(2) Class members, other than the representative party, are not liable for costs except with respect to the determination of their own individual claims.

Small claims

(3) Where an individual claim under section 24 or 25 is within the monetary jurisdiction of the Small Claims Court where the class proceeding was commenced, costs related to the claim shall be assessed as if the claim had been determined by the Small Claims Court.

S.O. 1992, c. 6, s. 31.

Agreements respecting fees and disbursements

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.

Court to approve agreements

(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.

Priority of amounts owed under approved agreement

(3) Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

Determination of fees where agreement not approved

(4) If an agreement is not approved by the court, the court may,

- (a) determine the amount owing to the solicitor in respect of fees and disbursements;
- (b) direct 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.

S.O. 1992, c. 6, s. 32.

Agreements for payment only in the event of success

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.

Interpretation: success in a 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.

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur")

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier.

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

- (a) given judgment on common issues in favour of some or all class members; or
- (b) approved a settlement that benefits any class member.

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(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.

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee.

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding.

S.O. 1992, c. 6, s. 33.

Motions

34.--(1) The same judge shall hear all motions before the trial of the common issues.

Idem

(2) Where a judge who has heard motions under subsection (1) becomes unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose.

Idem

(3) Unless the parties agree otherwise, a judge who hears motions under subsection (1) or (2) shall not preside at the trial of the common issues.

S.O. 1992, c. 6, s. 34.

Rules of court

35. The rules of court apply to class proceedings.

S.O. 1992, c. 6, s. 35.

Crown bound

36. This Act binds the Crown.

S.O. 1992, c. 6, s. 36.

Application of Act

37. This Act does not apply to,

- (a) a proceeding that may be brought in a representative capacity under another Act;
- (b) a proceeding required by law to be brought in a representative capacity; and
- (c) a proceeding commenced before this Act comes into force.

S.O. 1992, c. 6, s. 37.

TAB 33

Current to November 16, 2019

Courts of Justice Act

R.S.O. 1990, c. C.43

Amended by: S.O. 1991, c. 46; O. Reg. 922/93; S.O. 1994, c. 12, ss. 1-48; S.O. 1994, c. 27, s. 43; S.O. 1996, c. 25, ss. 1, 9(1-3), (5-21); S.O. 1996, c. 31, ss. 65, 66; S.O. 1997, c. 19, s. 32; S.O. 1997, c. 23, s. 5; S.O. 1997, c. 26, Sched.; S.O. 1998, c. 4, s. 2; S.O. 1998, c. 18, Sched. B, s. 5; S.O. 1998, c. 20, s. 2; S.O. 1998, c. 12, Sched. B, s. 4(1), (3), (4); S.O. 1999, c. 6, s. 18; S.O. 2000, c. 26, Sched. A, s. 5; O. Reg. 53/01; S.O. 2002, c. 14, Schedule, s. 9; S.O. 2002, c. 18, Sched. A, s. 4; S.O. 2002, c. 17, Sched. F; S.O. 2002, c. 13, s. 56; S.O. 2004, c. 17, s. 32; S.O. 2005, c. 5, s. 17; S.O. 2006, c. 19, Sched. D, s. 5; S.O. 2006, c. 1, s. 4; S.O. 2006, c. 21, Sched. A, ss. 1-18; S.O. 2006, c. 21, Sched. C, s. 105; S.O. 2006, c. 21, Sched. F, ss. 106, 136 (1); S.O. 2006, c. 35, Sched. C, s. 20 (1), (4); S.O. 2009, c. 11, ss. 19-20; S.O. 2009, c. 33, Sched. 2, s. 20; S.O. 2009, c. 33, Sched. 6, s. 50; S.O. 2015, c. 23, ss. 1-3; S.O. 2015, c. 27, Sched. 1, s. 1; S.O. 2016, c. 5, Sched. 7; S.O. 2017, c. 2, Sched. 2, ss. 1-19; S.O. 2017, c. 14, Sched. 4, s. 10; S.O. 2017, c. 20, Sched. 2, ss. 3-7; S.O. 2017, c. 24, s. 75; S.O. 2017, c. 34, Sched. 46, s. 10; S.O. 2018, c. 8, Sched. 15, s. 8; S.O. 2018, c. 17, Sched. 10; S.O. 2019, c. 7, Sched. 15, s. 1.

Amended by: S.O. 1991, c. 46; O. Reg. 922/93; S.O. 1994, c. 12, ss. 1-48; S.O. 1994, c. 27, s. 43; S.O. 1996, c. 25, ss. 1, 9(1-3), (5-21); S.O. 1996, c. 31, ss. 65, 66; S.O. 1997, c. 19, s. 32; S.O. 1997, c. 23, s. 5; S.O. 1997, c. 26, Sched.; S.O. 1998, c. 4, s. 2; S.O. 1998, c. 18, Sched. B, s. 5; S.O. 1998, c. 20, s. 2; S.O. 1998, c. 18, Sched. G, s. 48; S.O. 1998, c. 20, Sched. A, ss. 1-22; S.O. 1999, c. 12, Sched. B, s. 4(1), (3), (4); S.O. 1999, c. 6, s. 18; S.O. 2000, c. 26, Sched. A, s. 5; O. Reg. 53/01; S.O. 2002, c. 14, Schedule, s. 9; S.O. 2002, c. 18, Sched. A, s. 4; S.O. 2002, c. 17, Sched. F; S.O. 2002, c. 13, s. 56; S.O. 2004, c. 17, s. 32; S.O. 2005, c. 5, s. 17; S.O. 2006, c. 19, Sched. D, s. 5; S.O. 2006, c. 1, s. 4; S.O. 2006, c. 21, Sched. A, ss. 1-18; S.O. 2006, c. 21, Sched. C, s. 105; S.O. 2006, c. 21, Sched. F, ss. 106, 136 (1); S.O. 2006, c. 35, Sched. C, s. 20 (1), (4); S.O. 2009, c. 11, ss. 19-20; S.O. 2009, c. 33, Sched. 2, s. 20; S.O. 2009, c. 33, Sched. 6, s. 50; S.O. 2015, c. 23, ss. 1-3; S.O. 2015, c. 27, Sched. 1, s. 1; S.O. 2016, c. 5, Sched. 7; S.O. 2017, c. 2, Sched. 2, ss. 1-19; S.O. 2017, c. 14, Sched. 4, s. 10; S.O. 2017, c. 20, Sched. 2, ss. 3-7; S.O. 2017, c. 24, s. 75; S.O. 2017, c. 34, Sched. 46, s. 10; S.O. 2018, c. 8, Sched. 15, s. 8; S.O. 2018, c. 17, Sched. 10; S.O. 2019, c. 7, Sched. 15, s. 1.

Definitions

1. (1) In this Act,

"action" means a civil proceeding that is not an application and includes a proceeding commenced by,

- (a) claim,
- (b) statement of claim,
- (c) notice of action,
- (d) counterclaim,
- (e) crossclaim,
- (f) third or subsequent party claim, or
- (g) divorce petition or counterpetition; ("action")

(4) There shall be such additional offices of supernumerary judge of the Court of Appeal as are from time to time required, to be held by judges of the Court of Appeal who have elected under the Judges Act (Canada) to hold office only as a supernumerary judge of the court.

R.S.O. 1990, c. C.43, s. 3.

Assignment of judges from Superior Court of Justice

4.--(1) The Chief Justice of Ontario, with the concurrence of the Chief Justice of the Ontario Court, may assign a judge of the Superior Court of Justice to perform the work of a judge of the Court of Appeal.

Superior Court of Justice judges

(2) A judge of the Superior Court of Justice is, by virtue of his or her office, a judge of the Court of Appeal and has all the jurisdiction, power and authority of a judge of the Court of Appeal.

R.S.O. 1990, c. C.43, s. 4; S.O. 1996, c. 25, s. 9.

Powers and duties of Chief Justice

5.--(1) The Chief Justice of Ontario has general supervision and direction over the sittings of the Court of Appeal and the assignment of the judicial duties of the court.

Absence of Chief Justice

(2) If the Chief Justice of Ontario is absent from Ontario or is for any reason unable to act, his or her powers and duties shall be exercised and performed by the Associate Chief Justice of Ontario.

Absence of Associate Chief Justice

(3) If the Chief Justice of Ontario and the Associate Chief Justice of Ontario are both absent from Ontario or for any reason unable to act, the powers and duties of the Chief Justice shall be exercised and performed by a judge of the Court of Appeal designated by the Chief Justice or Associate Chief Justice.

R.S.O. 1990, c. C.43, s. 5.

Court of Appeal jurisdiction

6. (1) An appeal lies to the Court of Appeal from,

- (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act;
- (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court.
- (d) an order made under section 137.1.

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

Idem

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2).

R.S.O. 1990, c. C.43, s. 6; S.O. 1994, c. 12, s. 1; S.O. 1996, c. 25, s. 9; S.O. 2015, c. 23, s. 1.

Composition of court for hearings

7.--(1) A proceeding in the Court of Appeal shall be heard and determined by not fewer than three judges sitting together, and always by an uneven number of judges.

Idem, motions

(2) A motion in the Court of Appeal and an appeal under clause 6(1)(c) shall be heard and determined by one judge.

Idem

(3) Subsection (2) does not apply to a motion for leave to appeal, a motion to quash an appeal or any other motion that is specified by the rules of court.

Idem

(4) A judge assigned to hear and determine a motion may adjourn the motion to a panel of the Court of Appeal.

TAB 34

This document is an unofficial consolidation of all amendments to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (NI 31-103), effective as of June 12, 2019. This document is for reference purposes only. The unofficial consolidation of NI 31-103 is not an official statement of the law.

The text boxes in this document are for explanatory purposes only and are not part of NI 31-103.

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Registration Requirements, Exemptions
and Ongoing Registrant Obligations**

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National Instrument 31-103
Registration Requirements, Exemptions
and Ongoing Registrant Obligations

Part 1 Interpretation

1.1 Definitions of terms used throughout this Instrument

In this Instrument

“book cost” means the total amount paid to purchase a security, including any transaction charges related to the purchase, adjusted for reinvested distributions, returns of capital and corporate reorganizations;

“Canadian custodian” means any of the following:

- (a) a bank listed in Schedule I, II or III of the *Bank Act* (Canada);
- (b) a trust company that is incorporated under the laws of Canada or a jurisdiction of Canada and licensed or registered under the laws of Canada or a jurisdiction of Canada, and that has equity, as reported in its most recent audited financial statements, of not less than \$10,000,000;
- (c) a company that is incorporated under the laws of Canada or a jurisdiction of Canada, and that is an affiliate of a bank or trust company referred to in paragraph (a) or (b), if either of the following applies:
 - (i) the company has equity, as reported in its most recent audited financial statements, of not less than \$10,000,000;
 - (ii) the bank or trust company has assumed responsibility for all of the custodial obligations of the company for the cash and securities the company holds for a client or investment fund;
- (d) an investment dealer that is a member of IIROC and that is permitted under the rules of IIROC, as amended from time to time, to hold the cash and securities of a client or investment fund;

“Canadian financial institution” has the same meaning as in section 1.1 of National Instrument 45-106 *Prospectus Exemptions*;

“connected issuer” has the same meaning as in section 1.1 of National Instrument 33-105 *Underwriting Conflicts*;

“debt security” has the same meaning as in section 1.1 of National Instrument 45-106 *Prospectus Exemptions*;

“designated rating” has the same meaning as in paragraph (b) of the definition of “designated rating” in National Instrument 81-102 *Investment Funds*;

“designated rating organization” has the same meaning as in National Instrument 44-101 *Short Form Prospectus Distributions*;

“DRO affiliate” means an affiliate of a designated rating organization that issues credit ratings in a foreign jurisdiction and that has been designated as such under the terms of the designated rating organization’s designation;

“eligible client” means a client of a person or company if any of the following apply:

- (a) the client is an individual and was a client of the person or company immediately before becoming resident in the local jurisdiction;
- (b) the client is the spouse or a child of a client referred to in paragraph (a);
- (c) except in Ontario, the client is a client of the person or company on September 27, 2009 pursuant to the person or company’s reliance on an exemption from the registration requirement under Part 5 of Multilateral Instrument 11-101 *Principal Regulator System* on that date;

“exempt market dealer” means a person or company registered in the category of exempt market dealer;

“foreign custodian” means any of the following:

- (a) an entity that
 - (i) is incorporated or organized under the laws of a country, or a political subdivision of a country, other than Canada,

Except in Québec, if the MFDA revokes or suspends a registered individual's approval in respect of a mutual fund dealer, the individual's registration as a dealing representative of the mutual fund dealer is suspended until reinstated or revoked under securities legislation.

6.4 If sponsoring firm is suspended

If a registered firm's registration in a category is suspended, the registration of each registered dealing, advising or associate advising representative acting on behalf of the firm in that category is suspended until reinstated or revoked under securities legislation.

6.5 Dealing and advising activities suspended

If an individual's registration in a category is suspended, the individual must not act as a dealer, an underwriter or an adviser, as the case may be, under that category.

6.6 Revocation of a suspended registration – individual

If a registration of an individual has been suspended under this Part and it has not been reinstated, the registration is revoked on the 2nd anniversary of the suspension.

6.7 Exception for individuals involved in a hearing or proceeding

Despite section 6.6, if a hearing or proceeding concerning a suspended individual is commenced under securities legislation or under the rules of an SRO, the individual's registration remains suspended.

6.8 Application of Part 6 in Ontario

Other than section 6.5 [*dealing and advising activities suspended*], this Part does not apply in Ontario.

Note: In Ontario, measures governing suspension in section 29 of the *Securities Act* (Ontario) are similar to those in Parts 6 and 10.

Part 7 Categories of registration for firms

7.1 Dealer categories

(1) The following are the categories of registration for a person or company that is required, under securities legislation, to be registered as a dealer:

- (a) investment dealer;
- (b) mutual fund dealer;
- (c) scholarship plan dealer;
- (d) exempt market dealer;
- (e) restricted dealer.

(2) A person or company registered in the category of

- (a) investment dealer may act as a dealer or an underwriter in respect of any security,
- (b) mutual fund dealer may act as a dealer in respect of any security of
 - (i) a mutual fund, or
 - (ii) an investment fund that is a labour-sponsored investment fund corporation or labour-sponsored venture capital corporation under legislation of a jurisdiction of Canada,
- (c) scholarship plan dealer may act as a dealer in respect of a security of a scholarship plan, an educational plan or an educational trust,

- (d) exempt market dealer may
 - (i) act as a dealer by trading a security that is distributed under an exemption from the prospectus requirement,
 - (ii) act as a dealer by trading a security if all of the following apply:
 - (A) the trade is not a distribution;
 - (B) an exemption from the prospectus requirement would be available to the seller if the trade were a distribution;
 - (C) the class of security is not listed, quoted or traded on a marketplace, or
 - (iii) **[repealed]**
 - (iv) act as an underwriter in respect of a distribution of securities that is made under an exemption from the prospectus requirement;
 - (e) restricted dealer may act as a dealer or an underwriter in accordance with the terms, conditions, restrictions or requirements applied to its registration.
- (3) **[repealed]**
- (4) Subsection (1) does not apply in Ontario.
- (5) **[repealed]**

Note: In Ontario, the same categories of registration for firms acting as dealers as in subsection 7.1(1) are set out under subsection 26(2) of the *Securities Act* (Ontario).

7.2 Adviser categories

- (1) The following are the categories of registration for a person or company that is required, under securities legislation, to be registered as an adviser:
 - (a) portfolio manager;
 - (b) restricted portfolio manager.
- (2) A person or company registered in the category of
 - (a) portfolio manager may act as an adviser in respect of any security, and
 - (b) restricted portfolio manager may act as an adviser in respect of any security in accordance with the terms, conditions, restrictions or requirements applied to its registration.
- (3) Subsection (1) does not apply in Ontario.

Note: In Ontario, the same categories of registration for firms acting as advisers as in subsection 7.2(1) are set out under subsection 26(6) of the *Securities Act* (Ontario).

7.3 Investment fund manager category

The category of registration for a person or company that is required, under securities legislation, to be registered as an investment fund manager is “investment fund manager”.

Part 8 Exemptions from the requirement to register

Division 1 Exemptions from dealer and underwriter registration

8.0.1 General condition to dealer registration requirement exemptions

TAB 35

Current to November 5, 2019

NATIONAL INSTRUMENT 45-106 PROSPECTUS EXEMPTIONS

B.C. Reg. 227/2009 Deposited September 22, 2009

Enabling Act: Securities Act

B.C. Securities Comm. effective September 28, 2009 [includes amendments up to B.C. Reg. 198/2018]

PART 1: DEFINITIONS AND INTERPRETATION

Definitions

1.1 In this Instrument

"accredited investor" means

- (a) except in Ontario, a Canadian financial institution, or a Schedule III bank,
- (b) except in Ontario, the Business Development Bank of Canada incorporated under the Business Development Bank of Canada Act (Canada),
- (c) except in Ontario, a subsidiary of any person referred to in paragraphs (a) or (b), if the person owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of that subsidiary,
- (d) except in Ontario, a person registered under the securities legislation of a jurisdiction of Canada as an adviser or dealer,
- (e) an individual registered under the securities legislation of a jurisdiction of Canada as a representative of a person referred to in paragraph (d),
- (e.1) an individual formerly registered under the securities legislation of a jurisdiction of Canada, other than an individual formerly registered solely as a representative of a limited market dealer under one or both of the Securities Act (Ontario) or the Securities Act (Newfoundland and Labrador),
- (f) except in Ontario, the Government of Canada or a jurisdiction of Canada, or any crown corporation, agency or wholly owned entity of the Government of Canada or a jurisdiction of Canada,
- (g) except in Ontario, a municipality, public board or commission in Canada and a metropolitan community, school board, the Comité de gestion de la taxe scolaire de l'île de Montréal or an intermunicipal management board in Québec,
- (h) except in Ontario, any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government,

- (i) except in Ontario, a pension fund that is regulated by the Office of the Superintendent of Financial Institutions (Canada), a pension commission or similar regulatory authority of a jurisdiction of Canada,
- (j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1 000 000,
- (j.1) an individual who beneficially owns financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$5 000 000,
- (k) an individual whose net income before taxes exceeded \$200 000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded \$300 000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
- (l) an individual who, either alone or with a spouse, has net assets of at least \$5 000 000,
- (m) a person, other than an individual or investment fund, that has net assets of at least \$5 000 000 as shown on its most recently prepared financial statements,
- (n) an investment fund that distributes or has distributed its securities only to
 - (i) a person that is or was an accredited investor at the time of the distribution,
 - (ii) a person that acquires or acquired securities in the circumstances referred to in sections 2.10 [Minimum amount investment], or 2.19 [Additional investment in investment funds], or
 - (iii) a person described in paragraph (i) or (ii) that acquires or acquired securities under section 2.18 [Investment fund reinvestment],
- (o) an investment fund that distributes or has distributed securities under a prospectus in a jurisdiction of Canada for which the regulator or, in Québec, the securities regulatory authority, has issued a receipt,
- (p) a trust company or trust corporation registered or authorized to carry on business under the Trust and Loan Companies Act (Canada) or under comparable legislation in a jurisdiction of Canada or a foreign jurisdiction, acting on behalf of a fully managed account managed by the trust company or trust corporation, as the case may be,
- (q) a person acting on behalf of a fully managed account managed by that person, if that person is registered or authorized to carry on business as an adviser or the equivalent under the securities legislation of a jurisdiction of Canada or a foreign jurisdiction,
- (r) a registered charity under the Income Tax Act (Canada) that, in regard to the trade, has obtained advice from an eligibility adviser or an adviser registered under the securities legislation of the jurisdiction of the registered charity to give advice on the securities being traded,
- (s) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) to (d) or paragraph (i) in form and function,
- (t) a person in respect of which all of the owners of interests, direct, indirect or beneficial, except the voting securities required by law to be owned by directors, are persons that are accredited investors,

- (u) an investment fund that is advised by a person registered as an adviser or a person that is exempt from registration as an adviser,
- (v) a person that is recognized or designated by the securities regulatory authority or, except in Ontario and Québec, the regulator as an accredited investor, or
- (w) a trust established by an accredited investor for the benefit of the accredited investor's family members of which a majority of the trustees are accredited investors and all of the beneficiaries are the accredited investor's spouse, a former spouse of the accredited investor or a parent, grandparent, brother, sister, child or grandchild of that accredited investor, of that accredited investor's spouse or of that accredited investor's former spouse;

"acquisition date" has the same meaning as in the issuer's GAAP;

"AIF" means

- (a) an AIF as defined in National Instrument 51-102 Continuous Disclosure Obligations ,
- (b) a prospectus filed in a jurisdiction, other than a prospectus filed under a CPC instrument, if the issuer has not filed or been required to file an AIF or annual financial statements under National Instrument 51-102 Continuous Disclosure Obligations, or
- (c) a QT circular if the issuer has not filed or been required to file annual financial statements under National Instrument 51-102 Continuous Disclosure Obligations subsequent to filing a QT circular;

"asset pool" means a pool of cash-flow generating assets in which an issuer of a securitized product has a direct or indirect ownership or security interest;

"asset transaction" means a transaction or series of transactions in which a conduit acquires a direct or indirect ownership or security interest in an asset pool in connection with issuing a short-term securitized product;

"bank" means a bank named in Schedule I or II of the Bank Act (Canada);

"Canadian financial institution" means

- (a) an association governed by the Cooperative Credit Associations Act (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act, or
- (b) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction of Canada;

"conduit" means an issuer of a short-term securitized product

- (a) created to conduct one or more asset transactions, and
- (b) in respect of which it is reasonable for the issuer to expect that, in the event of a bankruptcy or insolvency proceeding under the Bankruptcy and Insolvency Act (Canada), the Companies Creditors' Arrangement Act (Canada) or a proceeding under similar legislation in Canada, a jurisdiction of Canada or a foreign jurisdiction,

(i) none of the assets in an asset pool of the issuer in which the issuer has an ownership interest will be consolidated with the assets of a third party that transferred or participated in the transfer of assets to the issuer prior to satisfaction in full of all securitized products that are backed in whole or in part by the assets transferred by the third party, or

(ii) for the assets in an asset pool of the issuer in which the issuer has a security interest, the issuer will realize against the assets in that asset pool in priority to the claims of other persons;

"CPC instrument" means a rule, regulation or policy of the TSX Venture Exchange Inc. that applies only to capital pool companies, and, in Quebec, includes Policy Statement 41-601Q, Capital Pool Companies;

"credit enhancement" means a method used to reduce the credit risk of a series or class of securitized product;

"debt security" means any bond, debenture, note or similar instrument representing indebtedness, whether secured or unsecured;

"designated rating" has the same meaning as in paragraph (b) of the definition of "designated rating" in National Instrument 81-102 Investment Funds;

"designated rating organization" has the same meaning as in National Instrument 44-101 Short Form Prospectus Distributions;

"director" means

- (a) a member of the board of directors of a company or an individual who performs similar functions for a company, and
- (b) with respect to a person that is not a company, an individual who performs functions similar to those of a director of a company;

"DRO affiliate" has the same meaning as in section 1 of National Instrument 25-101 Designated Rating Organizations;

"eligible investor" means

- (a) a person whose
 - (i) net assets, alone or with a spouse, in the case of an individual, exceed \$400 000,
 - (ii) net income before taxes exceeded \$75 000 in each of the 2 most recent calendar years and who reasonably expects to exceed that income level in the current calendar year, or
 - (iii) net income before taxes, alone or with a spouse, in the case of an individual, exceeded \$125 000 in each of the 2 most recent calendar years and who reasonably expects to exceed that income level in the current calendar year,
- (b) a person of which a majority of the voting securities are beneficially owned by eligible investors or a majority of the directors are eligible investors,
- (c) a general partnership of which all of the partners are eligible investors,
- (d) a limited partnership of which the majority of the general partners are eligible investors,

(e) a trust or estate in which all of the beneficiaries or a majority of the trustees or executors are eligible investors,

(f) an accredited investor,

(g) a person described in section 2.5 [Family, friends and business associates], or

(h) a person that has obtained advice regarding the suitability of the investment and, if the person is resident in a jurisdiction of Canada, that advice has been obtained from an eligibility adviser;

"eligibility adviser" means

(a) a person that is registered as an investment dealer and authorized to give advice with respect to the type of security being distributed, and

(b) in Saskatchewan or Manitoba, also means a lawyer who is a practicing member in good standing with a law society of a jurisdiction of Canada or a public accountant who is a member in good standing of an institute or association of chartered accountants, certified general accountants or certified management accountants in a jurisdiction of Canada provided that the lawyer or public accountant must not

(i) have a professional, business or personal relationship with the issuer, or any of its directors, executive officers, founders, or control persons, and

(ii) have acted for or been retained personally or otherwise as an employee, executive officer, director, associate or partner of a person that has acted for or been retained by the issuer or any of its directors, executive officers, founders or control persons within the previous 12 months;

"executive officer" means, for an issuer, an individual who is

(a) a chair, vice-chair or president,

(b) a vice-president in charge of a principal business unit, division or function including sales, finance or production, or

(c) performing a policy-making function in respect of the issuer;

"financial assets" means

(a) cash,

(b) securities, or

(c) a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation;

"financial statements" includes interim financial reports;

"founder" means, in respect of an issuer, a person who,

(a) acting alone, in conjunction, or in concert with one or more persons, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of the issuer, and

(b) at the time of the distribution or trade is actively involved in the business of the issuer;

"fully managed account" means an account of a client for which a person makes the investment decisions if that person has full discretion to trade in securities for the account without requiring the client's express consent to a transaction;

"investment fund" has the same meaning as in National Instrument 81-106 Investment Fund Continuous Disclosure;

"issuer's GAAP" has the same meaning as in National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards;

"liquidity provider" means a person that is obligated to provide funds to a conduit to enable the conduit to pay principal or interest in respect of a maturing securitized product;

"marketplace" has the same meaning as in National Instrument 21-101 Marketplace Operation;

"MD&A" has the same meaning as in National Instrument 51-102 Continuous Disclosure Obligations;

"non-redeemable investment fund" has the same meaning as in National Instrument 81-106 Investment Fund Continuous Disclosure;

"person" includes

(a) an individual,

(b) a corporation,

(c) a partnership, trust, fund and an association, syndicate, organization or other organized group of persons, whether incorporated or not, and

(d) an individual or other person in that person's capacity as a trustee, executor, administrator or personal or other legal representative;

"private enterprise" has the same meaning as in Part 3 of National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards;

"publicly accountable enterprise" has the same meaning as in Part 3 of National Instrument 52-107 Acceptable Accounting Principles and Auditing Standards;

"QT circular" means an information circular or filing statement in respect of a qualifying transaction for a capital pool company filed under a CPC instrument;

"qualifying issuer" means a reporting issuer in a jurisdiction of Canada that

(a) is a SEDAR filer,

(b) has filed all documents required to be filed under the securities legislation of that jurisdiction, and

(c) if not required to file an AIF, has filed in the jurisdiction,

(i) an AIF for its most recently completed financial year for which annual statements are required to be filed, and

(ii) copies of all material incorporated by reference in the AIF not previously filed;

"related liabilities" means

- (a) liabilities incurred or assumed for the purpose of financing the acquisition or ownership of financial assets, or
- (b) liabilities that are secured by financial assets;

"retrospective" has the same meaning as in Canadian GAAP applicable to publicly accountable enterprises;

"retrospectively" has the same meaning as in Canadian GAAP applicable to publicly accountable enterprises;

"RRIF" means a registered retirement income fund as defined in the Income Tax Act (Canada);

"RRSP" means a registered retirement savings plan as defined in the Income Tax Act (Canada);

"Schedule III bank" means an authorized foreign bank named in Schedule III of the Bank Act (Canada);

"securitized product" means a security that

- (a) is governed by a trust indenture or similar agreement setting out the rights and protections applicable to a holder of the security,
- (b) provides a holder with a direct or indirect ownership or security interest in one or more asset pools, and
- (c) entitles a holder to one or more payments of principal or interest primarily obtained from one or more of the following:
 - (i) the proceeds from the distribution of securitized products;
 - (ii) the cash flows generated by one or more asset pools;
 - (iii) the proceeds obtained on the liquidation of one or more assets in one or more asset pools;

"SEDAR filer" means an issuer that is an electronic filer under National Instrument 13-101 System for Electronic Document Analysis and Retrieval (SEDAR);

"self-directed RESP" means an educational savings plan registered under the Income Tax Act (Canada)

- (a) that is structured so that a contribution by a subscriber to the plan is deposited directly into an account in the name of the subscriber, and
- (b) under which the subscriber maintains control and direction over the plan to direct how the assets of the plan are to be held, invested or reinvested subject to compliance with the Income Tax Act (Canada);

"short-term securitized product" means a securitized product that is a negotiable promissory note or commercial paper that matures not more than one year from the date of issue;

"spouse" means, an individual who,

(a) is married to another individual and is not living separate and apart within the meaning of the Divorce Act (Canada), from the other individual,

(b) is living with another individual in a marriage-like relationship, including a marriage-like relationship between individuals of the same gender, or

(c) in Alberta, is an individual referred to in paragraph (a) or (b), or is an adult interdependent partner within the meaning of the Adult Interdependent Relationships Act (Alberta);

"subsidiary" means an issuer that is controlled directly or indirectly by another issuer and includes a subsidiary of that subsidiary;

"successor credit rating organization" has the same meaning as in National Instrument 44-1 01 Short Form Prospectus Distributions;

"TFSA" means a tax-free savings account as described in the Income Tax Act (Canada).

[am. B.C. Reg. 382/2010, Sched. F, s. 2, effective January 1, 2011 (B.C. Regs. Bull. 47/2010); 179/2013, Sched. E, s. 2, effective May 31, 2013 (B.C. Regs. Bull. 17/2013); 176/2014, Sched. F, s. 1(f), effective September 22, 2014 (B.C. Regs. Bull. 33/2014); 66/2015, Sched. B, s. 2, effective May 5, 2015 (B.C. Regs. Bull. 13/2015); 67/2015, Sched. A, s. 3, effective May 5, 2015 (B.C. Regs. Bull. 13/2015); 111/2018, Sched. F, ss. 2 to 4, effective June 12, 2018 (B.C. Regs. Bull. 22/2018).]

Interpretation of indirect interest

1.2 For the purposes of paragraph (t) of the definition of "accredited investor" in section 1.1, in British Columbia, an indirect interest means an economic interest in the person referred to in that paragraph.

Affiliate

1.3 For the purpose of this Instrument, an issuer is an affiliate of another issuer if

(a) one of them is the subsidiary of the other, or

(b) each of them is controlled by the same person.

Control

1.4 Except in Part 2, Division 4, for the purpose of this Instrument, a person (first person) is considered to control another person (second person) if

(a) the first person beneficially owns or directly or indirectly exercises control or direction over securities of the second person carrying votes which, if exercised, would entitle the first person to elect a majority of the directors of the second person, unless that first person holds the voting securities only to secure an obligation,

(b) the second person is a partnership, other than a limited partnership, and the first person holds more than 50% of the interests of the partnership, or

(4) Subsection (1) does not apply to a distribution of a security of an investment fund.

(5) If the security distributed under a plan described in subsection (1) is of a different class or series than the class or series of the security to which the dividend or distribution is attributable, the issuer or the trustee, custodian or administrator must have provided to each participant that is eligible to receive a security under the plan either a description of the material attributes and characteristics of the security distributed under the plan or notice of a source from which the participant can obtain the information without charge.

[am. B.C. Reg. 67/2015, Sched. A, s. 5, effective May 5, 2015 (B.C. Regs. Bull. 13/2015).]

Accredited investor

2.3 (0.1) In this section, "accredited investor exemption" means

- (a) in a jurisdiction other than Ontario, the prospectus exemption under subsection (1), and
- (b) in Ontario, the prospectus exemption under subsection 73.3(2) of the Securities Act (Ontario).

(1) The prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor.

(2) Subject to subsection (3), for the purpose of the accredited investor exemption, a trust company or trust corporation described in paragraph (p) of the definition of "accredited investor" in section 1.1 [Definitions] is deemed to be purchasing as principal.

(3) Subsection (2) does not apply to a trust company or trust corporation registered under the laws of Prince Edward Island that is not registered or authorized under the Trust and Loan Companies Act (Canada) or under comparable legislation in another jurisdiction of Canada.

(4) For the purpose of the accredited investor exemption, a person described in paragraph (q) of the definition of "accredited investor" in section 1.1 [Definitions] is deemed to be purchasing as principal.

(5) The accredited investor exemption does not apply to a distribution of a security to a person if the person was created, or is used, solely to purchase or hold securities as an accredited investor described in paragraph (m) of the definition of "accredited investor" in section 1.1 [Definitions].

(6) The accredited investor exemption does not apply to a distribution of a security to an individual described in paragraphs (j), (k) or (l) of the definition of "accredited investor" in section 1.1 [Definitions] unless the person distributing the security obtains from the individual a signed risk acknowledgement in the required form at the same time or before that individual signs the agreement to purchase the security.

(7) A person relying on the accredited investor exemption to distribute a security to an individual described in paragraphs (j), (k) or (l) of the definition of "accredited investor" in section 1.1 [Definitions] must retain the signed risk acknowledgement required in subsection (6) of this section for 8 years after the distribution.

(8) Subsection (1) does not apply in Ontario.

TAB 36

Ontario Rules of Court

RULES OF CIVIL PROCEDURE [Part 1]

R.R.O. 1990, Reg. 194

Enabling Act: Courts of Justice Act

GENERAL MATTERS

RULE 1 - CITATION, APPLICATION AND INTERPRETATION

CITATION

Title

1.01 (1) These rules may be cited as the Rules of Civil Procedure.

Subdivision

(2) In these rules,

- (a) all the provisions identified by the same number to the left of the decimal point comprise a Rule (for example, Rule 1, which consists of rules 1.01 to 1.09);
- (b) a provision identified by a number with a decimal point is a rule (for example, rule 1.01); and
- (c) a rule may be subdivided into,
 - (i) subrules (for example, subrule 1.01 (2)),
 - (ii) clauses (for example, clause 1.01 (2) (c) or 2.02 (a)),
 - (iii) subclauses (for example, subclause 1.01 (2) (c) (iii) or 7.01(c)(i)),
 - (iv) paragraphs (for example, paragraph 1 of subrule 52.07 (1)), and
 - (v) definitions (for example, the definition of "action" in rule 1.03).

Alternative Method of Referring to Rules

(3) In a proceeding in a court, it is sufficient to refer to a rule or subdivision of a rule as "rule" followed by the number of the rule, subrule, clause, subclause or paragraph (for example, rule 1.01, rule 1.01(2), rule 1.01 (2) (c), rule 1.01 (2) (c) (iii) or rule 52.07 (1) 1).

60.20 Only the following persons may have documents issued electronically or may file documents electronically under Rule 60:

1. A lawyer or a person licensed under the Law Society Act to provide legal services in Ontario.
2. A person who has filed a requisition with the registrar to provide for the electronic issuance and filing of documents in relation to the enforcement of an order.
3. A Minister or body acting under the authority of an Act of Canada or Ontario.

O. Reg. 487/16, s. 13.

APPEALS

RULE 61 - APPEALS TO AN APPELLATE COURT

APPLICATION OF THE RULE

61.01 Rules 61.02 to 61.16 apply to all appeals to an appellate court except as provided in clause 62.01 (1) (b) or rule 62.02 and, with necessary modifications, to proceedings in an appellate court by way of,

- (a) stated case under a statute;
- (b) special case under rule 22.03, subject to any directions given under subrule 22.03 (2); and
- (c) reference under section 8 of the Courts of Justice Act.

R.R.O. 1990, Reg. 194, r. 61.01; O. Reg. 536/96, s. 7; O. Reg. 14/04, s. 28.

DEFINITION

61.02 In rules 61.03 to 61.16,

"Registrar" means,

- (a) in the Court of Appeal, the Registrar of the Court of Appeal, or
- (b) in the Divisional Court, the registrar in the regional centre of the region where the appeal is to be heard in accordance with subsection 20(1) of the Courts of Justice Act.

R.R.O. 1990, Reg. 194, r. 61.02.

MOTION FOR LEAVE TO APPEAL TO DIVISIONAL COURT

Notice of Motion for Leave

O. Reg. 61/96, s. 6; O. Reg. 333/96, s. 2; O. Reg. 175/96, s. 2; O. Reg. 206/02, s. 14; O. Reg. 14/04, s. 30; O. Reg. 575/07, s. 4; O. Reg. 394/09, s. 25; O. Reg. 82/17, ss. 7, 18 (F) and 19 (F).

COMMENCEMENT OF APPEALS

Time for Appeal and Service of Notice

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A or 61A.1) together with the certificate required by subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

- (a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and
- (b) on any person entitled by statute to be heard on the appeal.

(1.1) The notice of appeal and certificate need not be served on,

- (a) a defendant who was noted in default; or
- (b) a respondent who has not delivered a notice of appearance, unless the respondent was heard at the hearing with leave.

Title of Proceeding

(2) The title of the proceeding in an appeal shall be in accordance with Form 61B.

Notice of Appeal

(3) The notice of appeal (Form 61A or 61A.1) shall state,

- (a) the relief sought;
- (b) the grounds of appeal; and
- (c) the basis for the appellate court's jurisdiction, including references to,
 - (i) any provision of a statute or regulation establishing jurisdiction,
 - (ii) whether the order appealed from is final or interlocutory,
 - (iii) whether leave to appeal is necessary and if so whether it has been granted, and
 - (iv) any other facts relevant to establishing jurisdiction.

(4) The notice of appeal, with proof of service, shall be filed in accordance with subrule 4.05 (4) (leaving in or mailing to court office) in the Registrar's office within ten days after service.

R.R.O. 1990, Reg. 194, r. 61.04; O. Reg. 19/03, s. 11; O. Reg. 14/04, s. 31; O. Reg. 536/18, s. 2.

TAB 37

Current to October 1, 2019

SECURITIES ACT

RSBC 1996, CHAPTER 418

Enabling Act:

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Persons who must be registered

34 A person must not

- (a) trade in a security or exchange contract,
- (b) act as an adviser,
- (c) act as an investment fund manager, or
- (d) act as an underwriter,

unless the person is registered in accordance with the regulations and in the category prescribed for the purpose of the activity.

Provision	Changed by	In force	Authority
34	2007-37-8	2009 Sep 28	BC Reg 224/09
34(2)	2006-32-11	2006 May 18	R.A.
34(3)	2002-32-15	2002 May 9	R.A.

RSBC 1996-418-34; SBC 2002-32-15; SBC 2006-32-11; SBC 2007-37-8.

Insider trading, tipping and recommending

57.2 (1) In this section, "issuer" means

- (a) a reporting issuer, or
- (b) any other issuer whose securities are publicly traded.

(2) A person must not enter into a transaction involving a security of an issuer, or a related financial instrument of a security of an issuer, if the person

- (a) is in a special relationship with the issuer, and

comply with this Part or the regulations, the executive director may order the issuer to provide to that person the information and material that the executive director considers necessary.

(2) The information and material supplied under subsection (1) may be used by the person to whom it is provided for the purpose of complying with this Part and the regulations.

(3) If a person proposing to make a distribution of previously issued securities of an issuer is unable

(a) to obtain any or all of the signatures to the certificates required by this Part and the regulations, or

(b) to comply otherwise with this Part and the regulations,

the executive director may make an order exempting that person from any of the provisions of this Part or the regulations, on being satisfied that

(c) the person has made all reasonable efforts to comply, and

(d) no person is likely to be prejudicially affected by the failure to comply.

SBC 1985-83-52; SBC 1995-45-7.

Part 10 -- Exemptions from Prospectus Requirements

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REPEALED

73 REPEALED: SBC 2006-32-18, effective September 28, 2009 (B.C. Reg. 223/2009).

RSBC 1996-418-73; SBC 2006-32-18.

REPEALED

74 REPEALED: SBC 2006-32-18, effective September 28, 2009 (B.C. Reg. 223/2009).

RSBC 1996-418-74; SBC 1999-20-20; SBC 2002-32-23; SBC 2003-70-272; SBC 2006-32-18.

REPEALED

75 REPEALED: SBC 2006-32-18, effective September 28, 2009 (B.C. Reg. 223/2009).

RSBC 1996-418-75; SBC 2006-32-18.

Exemption order by commission or executive director

76 (1) If the commission or the executive director considers that to do so would not be prejudicial to the public interest, the commission or the executive director may order that

- (a) a trade, intended trade, security or person or class of trades, intended trades, securities or persons is exempt from one or more of the requirements of Part 9 or the regulations related to Part 9, and
- (b) a trade or intended trade or class of trades or intended trades is deemed to be a distribution.

(2) An order under subsection (1) may be made on application by an interested person or on the commission's or the executive director's own motion.

(3) On application of an interested person, the commission or the executive director may determine whether the distribution of a security has been concluded or is currently in progress.

SBC 1985-83-59; SBC 1988-58-13; SBC 1992-52-10; SBC 1995-45-7.

List of defaulting reporting issuers

77 The commission may publish a list of defaulting reporting issuers.

RSBC 1996-418-77; SBC 2006-32-19.

Part 11 -- Circulation of Materials

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Waiting period

78 (1) In this section, "waiting period" means the interval between the issue of a receipt by the executive director for a preliminary prospectus and the issue of a receipt by the executive director for the prospectus in respect of the same distribution.

(2) Despite section 61, but subject to Part 7, during the waiting period for the distribution of a security, a dealer or the issuer of the security may

- (a) communicate with a person
 - (i) identifying the security proposed to be distributed,
 - (ii) stating the price of the security, if determined,
 - (iii) stating the name and address of a person from whom purchases of the security may be made, and
 - (iv) stating further information permitted or required by the regulations,

so long as the dealer or issuer states the name and address of a person from whom a preliminary prospectus may be obtained,

TAB 38

Current to November 16, 2019

Securities Act

R.S.O. 1990, c. S.5

Amended by: S.O. 1992, c. 18, s. 56; S.O. 1993, c. 27, Sched.; S.O. 1994, c. 11, ss. 349-381; S.O. 1994, c. 33, ss. 1-9; S.O. 1997, c. 19, s. 23; S.O. 1997, c. 10, ss. 36-40; S.O. 1997, c. 43, Sched. F, s. 13; S.O. 1997, c. 31, s. 179; S.O. 1999, c. 9, ss. 193-221; S.O. 1999, c. 6, s. 60; S.O. 2001, c. 23, ss. 209-217; S.O. 2002, c. 18, Sched. H, ss. 6-14; S.O. 2002, c. 22, ss. 177-188; S.O. 2004, c. 16, Sched. D, Table; S.O. 2004, c. 17, s. 32; S.O. 2004, c. 31, Sched. 34, ss. 1-26; S.O. 2005, c. 5, s. 64; S.O. 2004, c. 8, s. 46; S.O. 2005, c. 31, Sched. 20, ss. 1-9; S.O. 2006, c. 19, Sched. C, s. 1 (1) and (2); S.O. 2006, c. 8, s. 144; S.O. 2006, c. 21, Sched. F, s. 136 (1); S.O. 2006, c. 29, s. 66; S.O. 2006, c. 33, Sched. Z.5, ss. 1, 2-20; S.O. 2006, c. 35, Sched. C, s. 121; S.O. 2007, c. 7, Sched. 38, ss. 1-14; S.O. 2008, c. 19, Sched. R, s. 1; S.O. 2009, c. 18, Sched. 26; S.O. 2009, c. 34, Sched. S, ss. 1-9; S.O. 2010, c. 1, Sched. 26, s. 5; S.O. 2010, c. 26, Sched. 18, ss. 1(2)-(4), (6)-(12), (14)-(21), 2-18, 23-27, 29-30, 31(2)-(4), 32-35(1), 35(3)-(6), 36-46; S.O. 2010, c. 1, Sched. 26, ss. 1, 2, 4, 6, 8; S.O. 2011, c. 9, Sched. 38; S.O. 2012, c. 8, Sched. 55, ss. 1 and 2; S.O. 2013, c. 2, Sched. 13; S.O. 2014, c. 7, Sched. 28; S.O. 2015, c. 20, Sched. 39, ss. 1-4; S.O. 2015, c. 38, Sched. 18; S.O. 2016, c. 5, Sched. 26; S.O. 2016, c. 23, s. 69; S.O. 2016, c. 37, Sched. 23; S.O. 2017, c. 8, Sched. 28, ss. 1 (2) and (3), 2-9; S.O. 2017, c. 34, Sched. 37, ss. 1-3 and 6-12; S.O. 2017, c. 34, Sched. 46, s. 51; S.O. 2018, c. 17, Sched. 38; S.O. 2019, c. 7, Sched. 17, s. 159; S.O. 2019, c. 7, Sched. 55.

Amended by: S.O. 1992, c. 18, s. 56; S.O. 1993, c. 27, Sched.; S.O. 1994, c. 11, ss. 349-381; S.O. 1994, c. 33, ss. 1-9; S.O. 1997, c. 19, s. 23; S.O. 1997, c. 10, ss. 36-40; S.O. 1997, c. 43, Sched. F, s. 13; S.O. 1997, c. 31, s. 179; S.O. 1999, c. 9, ss. 193-221; S.O. 1999, c. 6, s. 60; S.O. 2001, c. 23, ss. 209-217; S.O. 2002, c. 18, Sched. H, ss. 6-14; S.O. 2002, c. 22, ss. 177-188; S.O. 2004, c. 16, Sched. D, Table; S.O. 2004, c. 17, s. 32; S.O. 2004, c. 31, Sched. 34, ss. 1-26; S.O. 2005, c. 5, s. 64; S.O. 2004, c. 8, s. 46; S.O. 2005, c. 31, Sched. 20, ss. 1-9; S.O. 2006, c. 19, Sched. C, s. 1 (1) and (2); S.O. 2006, c. 8, s. 144; S.O. 2006, c. 21, Sched. F, s. 136 (1); S.O. 2006, c. 29, s. 66; S.O. 2006, c. 33, Sched. Z.5, ss. 1, 2-20; S.O. 2006, c. 35, Sched. C, s. 121; S.O. 2007, c. 7, Sched. 38, ss. 1-14; S.O. 2008, c. 19, Sched. R, s. 1; S.O. 2009, c. 18, Sched. 26; S.O. 2009, c. 34, Sched. S, ss. 1-9; S.O. 2010, c. 1, Sched. 26, s. 5; S.O. 2010, c. 26, Sched. 18, ss. 1(2)-(4), (6)-(12), (14)-(21), 2-18, 23-27, 29-30, 31(2)-(4), 32-35(1), 35(3)-(6), 36-46; S.O. 2010, c. 1, Sched. 26, ss. 1, 2, 4, 6, 8; S.O. 2011, c. 9, Sched. 38; S.O. 2012, c. 8, Sched. 55, ss. 1 and 2; S.O. 2013, c. 2, Sched. 13; S.O. 2014, c. 7, Sched. 28; S.O. 2015, c. 20, Sched. 39, ss. 1-4; S.O. 2015, c. 38, Sched. 18; S.O. 2016, c. 5, Sched. 26; S.O. 2016, c. 23, s. 69; S.O. 2016, c. 37, Sched. 23; S.O. 2017, c. 8, Sched. 28, ss. 1 (2) and (3), 2-9; S.O. 2017, c. 34, Sched. 37, ss. 1-3 and 6-12; S.O. 2017, c. 34, Sched. 46, s. 51; S.O. 2018, c. 17, Sched. 38; S.O. 2019, c. 7, Sched. 17, s. 159; S.O. 2019, c. 7, Sched. 55.

INTERPRETATION

Definitions

1. (1) In this Act,

"adviser" means a person or company engaging in or holding himself, herself or itself out as engaging in the business of advising others as to the investing in or the buying or selling of securities; ("conseiller")

"alternative trading system" means a marketplace that,

(a) is not a recognized quotation and trade reporting system or a recognized exchange,

- (b) does not require an issuer to enter into an agreement to have its securities traded on the marketplace,
- (c) does not provide, directly or through one or more subscribers, a guarantee of a two-sided market for a security or derivative on a continuous or reasonably continuous basis,
- (d) does not set requirements governing the conduct of subscribers, other than conduct in respect of the trading by those subscribers on the marketplace, and
- (e) does not discipline subscribers other than by exclusion from participation in the marketplace; ("système de négociation parallèle")

"associate", where used to indicate a relationship with any person or company, means,

- (a) any company of which such person or company beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights attached to all voting securities of the company for the time being outstanding,
- (a.1) REPEALED: S.O. 2015, c. 38, Sched. 18, s. 1 (2), effective May 9, 2016 (O. Gaz. 2016, p. 987).
- (b) any partner of that person or company,
- (c) any trust or estate in which such person or company has a substantial beneficial interest or as to which such person or company serves as trustee or in a similar capacity,
- (d) any relative of that person who resides in the same home as that person,
- (e) any person who resides in the same home as that person and to whom that person is married or with whom that person is living in a conjugal relationship outside marriage, or
- (f) any relative of a person mentioned in clause (e) who has the same home as that person; ("personne qui a un lien")

"benchmark" means a price, estimate, rate, index or value that is,

- (a) determined, from time to time, by reference to an assessment of one or more underlying interests,
- (b) made available to the public, either free of charge or on payment, and
- (c) used for reference for any purpose, including,
 - (i) determining the interest payable, or other sums that are due, under a contract, derivative, instrument or security,
 - (ii) determining the value of a contract, derivative, instrument or security or the price at which it may be traded,
 - (iii) measuring the performance of a contract, derivative, investment fund, instrument or security, or
 - (iv) any other use by an investment fund; ("indice de référence")

"benchmark administrator" means a person or company that administers a benchmark; ("administrateur d'indice de référence")

"benchmark contributor" means a person or company that engages or participates in the provision of information for use by a benchmark administrator for the purpose of determining a benchmark, including a person or company subject to a decision under section 24.2; ("contributeur à un indice de référence")

"benchmark user" means a person or company that, in relation to a contract, derivative, investment fund, instrument or security, uses a benchmark; ("utilisateur d'indice de référence")

"chief compliance officer" means, in respect of a registrant that is a registered dealer, registered adviser or registered investment fund manager, an individual designated by the registrant,

- (a) to establish and maintain policies and procedures to assess, monitor and report on the registrant's compliance with Ontario securities law, and
- (b) to fulfil such other compliance functions as may be prescribed by the regulations; ("chef de la conformité")

"clearing agency" means,

- (a) with respect to securities, a person or company that,
 - (i) acts as an intermediary in paying funds or delivering securities, or both, in connection with trades and other transactions in securities,
 - (ii) provides centralized facilities for the clearing of trades and other transactions in securities, including facilities for comparing data respecting the terms of settlement of a trade or transaction, or
 - (iii) provides centralized facilities as a depository of securities,
- but does not include,
 - (iv) the Canadian Payments Association or its successors,
 - (v) an exchange or a quotation and trade reporting system,
 - (vi) a registered dealer, or
 - (vii) a bank, trust company, loan corporation, insurance company, treasury branch, credit union or caisse populaire that, in the normal course of its authorized business in Canada, engages in an activity described in subclause (a) (i), but does not also engage in an activity described in subclause (a) (ii) or (iii), and

(b) with respect to derivatives, a person or company that provides centralized facilities for the clearing and settlement of trades in derivatives that, with respect to a contract, instrument or transaction,

- (i) enables each party to the contract, instrument or transaction to substitute, through novation or otherwise, the credit of the clearing agency for the credit of the parties,
- (ii) arranges or provides, on a multilateral basis, for the settlement or netting of obligations resulting from such contracts, instruments or transactions executed by participants in the clearing agency, or

(iii) otherwise provides clearing services or arrangements that mutualize or transfer among participants in the clearing agency the credit risk arising from such contracts, instruments or transactions executed by the participants,

but does not include a person or company solely because the person or company arranges or provides for,

(iv) settlement, netting or novation of obligations resulting from agreements, contracts or transactions on a bilateral basis and without a central counterparty,

(v) settlement or netting of cash payments through the Automated Clearing Settlement System or the Large Value Transfer System, or

(vi) settlement, netting or novation of obligations resulting from a sale of a commodity in a transaction in the spot market; ("agence de compensation")

"Commission" means the Ontario Securities Commission; ("Commission")

"company" means any corporation, incorporated association, incorporated syndicate or other incorporated organization; ("compagnie")

"contract" includes a trust agreement, declaration of trust or other similar instrument; ("contrat")

"contractual plan" means any contract or other arrangement for the purchase of shares or units of a mutual fund by payments over a specified period or by a specified number of payments where the amount deducted from any one of the payments as sales charges is larger than the amount that would have been deducted from such payment for sales charges if deductions had been made from each payment at a constant rate for the duration of the plan; ("plan à versements périodiques")

"control person" means,

(a) a person or company who holds a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a person or company holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the person or company is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or

(b) each person or company in a combination of persons or companies, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a combination of persons or companies holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer; ("personne qui a le contrôle")

"credit rating" means an assessment that is publicly disclosed or distributed by subscription concerning the creditworthiness of an issuer,

(a) as an entity, or

(b) with respect to specific securities or a specific pool of securities or assets; ("notation")

"credit rating organization" means a person or company that issues credit ratings; ("organisme de notation")

"dealer" means, except for the purposes described in subsection (1.2), a person or company engaging in or holding himself, herself or itself out as engaging in the business of trading in securities as principal or agent; ("courtier")

"debt security" means a bond, debenture, note or similar instrument representing indebtedness, whether secured or unsecured; ("titre de créance")

"decision" means, in respect of a decision of the Commission or a Director, a direction, decision, order, ruling or other requirement made under a power or right conferred by this Act or the regulations; ("décision")

"derivative" means an option, swap, futures contract, forward contract or other financial or commodity contract or instrument whose market price, value, delivery obligations, payment obligations or settlement obligations are derived from, referenced to or based on an underlying interest (including a value, price, rate, variable, index, event, probability or thing), but does not include,

- (a) a commodity futures contract as defined in subsection 1 (1) of the Commodity Futures Act,
- (b) a commodity futures option as defined in subsection 1 (1) of the Commodity Futures Act,
- (c) a contract or instrument that, by reason of an order of the Commission under subsection (10), is not a derivative, or
- (d) a contract or instrument in a class of contracts or instruments prescribed by the regulations not to be derivatives; ("produit dérivé")

"designated benchmark" means a benchmark that is designated by the Commission under section 24.1; ("indice de référence désigné")

"designated benchmark administrator" means a benchmark administrator that is designated by the Commission under section 24.1 in respect of a designated benchmark; ("administrateur d'indice de référence désigné")

"designated credit rating organization" means a credit rating organization that is designated by the Commission under Part IX; ("organisme de notation désigné")

"designated derivative" means a derivative,

- (a) that, by reason of an order of the Commission under subsection (11), is a designated derivative, or
- (b) that belongs to a class of derivatives prescribed by the regulations; ("produit dérivé désigné")

"designated information processor" means an information processor that is designated by the Commission under section 21.2.3; ("agence désignée de traitement de l'information")

"designated trade repository" means a trade repository that is designated by the Commission under section 21.2.2; ("répertoire des opérations désigné")

"Director" means the Executive Director of the Commission, a Director or Deputy Director of the Commission, or a person employed by the Commission in a position designated by the Executive Director for the purpose of this definition; ("directeur")

"director" means a director of a company or an individual performing a similar function or occupying a similar position for any person; ("administrateur")

"distribution", where used in relation to trading in securities, means,

- (a) a trade in securities of an issuer that have not been previously issued,
- (b) a trade by or on behalf of an issuer in previously issued securities of that issuer that have been redeemed or purchased by or donated to that issuer,
- (c) a trade in previously issued securities of an issuer from the holdings of any control person,
- (d) a trade by or on behalf of an underwriter in securities which were acquired by that underwriter, acting as underwriter, prior to the 15th day of September, 1979 if those securities continued on that date to be owned by or for that underwriter, so acting,
- (e) a trade by or on behalf of an underwriter in securities which were acquired by that underwriter, acting as underwriter, within eighteen months after the 15th day of September, 1979, if the trade took place during that eighteen months, and
- (f) any trade that is a distribution under the regulations,

and also includes any transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution and "distribute", "distributed" and "distributing" have a corresponding meaning; ("placement", "placer", "placé")

"distribution company" means a person or company distributing securities under a distribution contract; ("compagnie de placement")

"distribution contract" means a contract between an investment fund or its trustees or other legal representative and a person or company under which that person or company is granted the right to purchase the shares or units of the investment fund for distribution or to distribute the shares or units of the investment fund on behalf of the investment fund; ("contrat de placement")

"distribution to the public", where used in relation to trading in securities, means a distribution that is made for the purpose of distributing to the public securities issued by an issuer, whether such trades are made directly or indirectly to the public through an underwriter or otherwise; ("placement dans le public")

"economic exposure" in relation to a reporting issuer means the extent to which the economic or financial interests of a person or company are aligned with the trading price of securities of the reporting issuer or the economic or financial interests of the reporting issuer; ("risque financier")

"economic interest in a security" means,

- (a) a right to receive or the opportunity to participate in a reward, benefit or return from a security, or
- (b) an exposure to a loss or a risk of loss in respect of a security; ("intérêt financier dans une valeur mobilière")

"form of proxy" means a written or printed form that, upon completion and execution by or on behalf of a security holder, becomes a proxy; ("formule de procuration")

"forward-looking information" means disclosure regarding possible events, conditions or financial performance that is based on assumptions about future economic conditions and courses of action

and includes future oriented financial information with respect to prospective financial performance, financial position or cash flows that is presented either as a forecast or a projection; ("information prospective")

"individual" means a natural person, but does not include a partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, or a natural person in his or her capacity as trustee, executor, administrator or other legal personal representative; ("particulier")

"information processor" means a person or company that receives and provides information related to orders for and trades of securities; ("agence de traitement de l'information")

"insider" means,

- (a) a director or officer of a reporting issuer,
- (b) a director or officer of a person or company that is itself an insider or subsidiary of a reporting issuer,
- (c) a person or company that has,
 - (i) beneficial ownership of, or control or direction over, directly or indirectly, securities of a reporting issuer carrying more than 10 per cent of the voting rights attached to all the reporting issuer's outstanding voting securities, excluding, for the purpose of the calculation of the percentage held, any securities held by the person or company as underwriter in the course of a distribution, or
 - (ii) a combination of beneficial ownership of, and control or direction over, directly or indirectly, securities of a reporting issuer carrying more than 10 per cent of the voting rights attached to all the reporting issuer's outstanding voting securities, excluding, for the purpose of the calculation of the percentage held, any securities held by the person or company as underwriter in the course of a distribution,
- (d) a reporting issuer that has purchased, redeemed or otherwise acquired a security of its own issue, for so long as it continues to hold that security,
- (e) a person or company designated as an insider in an order made under subsection (11),
- (f) a person or company that is in a class of persons or companies designated under subparagraph 40 v of subsection 143 (1); ("initié")

"investment fund" means a mutual fund or a non-redeemable investment fund; ("fonds d'investissement")

"investment fund manager" means a person or company that directs the business, operations or affairs of an investment fund; ("gestionnaire de fonds d'investissement")

"issuer" means a person or company who has outstanding, issues or proposes to issue, a security; ("émetteur")

"management company" means a person or company who provides investment advice, under a management contract; ("compagnie de gestion")

"management contract" means a contract under which an investment fund is provided with investment advice, alone or together with administrative or management services, for valuable consideration; ("contrat de gestion")

"market participant" means,

- (a) a registrant,
- (b) a person or company exempted from the requirement to be registered under this Act,
- (c) a reporting issuer,
- (c.1) a person or company that has issued securities to a registrant or through a registrant acting as agent,
- (c.2) a director, officer or promoter of a person or company described in clause (c) or (c.1),
- (d) a manager or custodian of assets, shares or units of an investment fund,
- (e) a recognized clearing agency,
- (f) a recognized commodity futures exchange,
- (g) a recognized exchange,
- (h) a recognized quotation and trade reporting system,
- (i) a recognized self-regulatory organization,
 - (i.1) a person or company that is exempt from the requirement under section 21, 21.1, 21.2 or 21.2.1 to be recognized by the Commission,
 - (i.2) a designated benchmark administrator,
 - (i.3) a person or company that engages or participates in the provision of information for use by a benchmark administrator for the purpose of determining a designated benchmark,
- (j) a designated credit rating organization,
- (k) a designated trade repository,
- (k.1) a designated information processor,
- (l) a transfer agent for securities of an issuer,
- (m) a registrar for securities of an issuer,
- (n) the Canadian Investor Protection Fund,
- (o) the Ontario Contingency Trust Fund,
- (o.1) the MFDA Investor Protection Corporation,
- (p) the general partner of a market participant, or
- (q) any other person or company or member of a class of persons or companies prescribed by the regulations; ("participant au marché")

"marketplace" means any of the following, but does not include an inter- dealer bond broker:

1. An exchange.

2. A quotation and trade reporting system.
 3. A person or company not included in paragraph 1 or 2 that,
 - i. constitutes, maintains or provides a market or facility for bringing together buyers and sellers of securities or derivatives,
 - ii. brings together the orders for securities or derivatives of multiple buyers and sellers, and
 - iii. uses established non-discretionary methods under which the orders interact with each other, and the buyers and sellers entering the orders agree to the terms of a trade.
 4. With respect to securities, a dealer who executes a trade of an exchange-traded security outside a marketplace described in paragraph 1, 2 or 3; ("marché")
- "material change",
- (a) when used in relation to an issuer other than an investment fund, means,
 - (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or
 - (ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, and
 - (b) when used in relation to an issuer that is an investment fund, means,
 - (i) a change in the business, operations or affairs of the issuer that would be considered important by a reasonable investor in determining whether to purchase or continue to hold securities of the issuer, or
 - (ii) a decision to implement a change referred to in subclause (i) made,
 - (A) by the board of directors of the issuer or the board of directors of the investment fund manager of the issuer or other persons acting in a similar capacity,
 - (B) by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable, or
 - (C) by senior management of the investment fund manager of the issuer who believe that confirmation of the decision by the board of directors of the investment fund manager of the issuer or such other persons acting in a similar capacity is probable; ("changement important")
- "material fact", when used in relation to securities issued or proposed to be issued, means a fact that would reasonably be expected to have a significant effect on the market price or value of the securities; ("fait important")
- "Minister" means the Minister of Finance or such other member of the Executive Council to whom the administration of this Act may be assigned; ("ministre")
- "misrepresentation" means,

(a) an untrue statement of material fact, or

(b) an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made; ("présentation inexacte des faits")

"mutual fund" means an issuer whose primary purpose is to invest money provided by its security holders and whose securities entitle the holder to receive on demand, or within a specified period after demand, an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer; ("fonds mutuel")

"mutual fund in Ontario" means a mutual fund that is a reporting issuer or that is organized under the laws of Ontario, but does not include a private mutual fund; ("fonds mutuel de l'Ontario")

"non-redeemable investment fund" means an issuer,

(a) whose primary purpose is to invest money provided by its security holders,

(b) that does not invest,

(i) for the purpose of exercising or seeking to exercise control of an issuer, other than an issuer that is a mutual fund or a non-redeemable investment fund, or

(ii) for the purpose of being actively involved in the management of any issuer in which it invests, other than an issuer that is a mutual fund or a non-redeemable investment fund, and

(c) that is not a mutual fund; ("fonds d'investissement à capital fixe")

"offering memorandum" means a document, together with any amendments to that document, purporting to describe the business and affairs of an issuer that has been prepared primarily for delivery to and review by a prospective purchaser so as to assist the prospective purchaser to make an investment decision in respect of securities being sold in a distribution to which section 53 would apply but for the availability of one or more of the exemptions contained in Ontario securities law, but does not include a document setting out current information about an issuer for the benefit of a prospective purchaser familiar with the issuer through prior investment or business contacts; ("notice d'offre")

"officer" with respect to an issuer or registrant, means,

(a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,

(b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and

(c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b); (dirigeant")

"Ontario securities law" means,

(a) this Act,

(b) the regulations, and

(c) in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject; ("droit ontarien des valeurs mobilières")

"person" means an individual, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, trustee, executor, administrator, or other legal representative; ("personne")

"portfolio manager" REPEALED: S.O. 2009, c. 18, Sched. 26, s. 1 (4), effective September 28, 2009 (O. Gaz. 2009 p. 2615).

"portfolio securities", where used in relation to a mutual fund, means securities held or proposed to be purchased by the mutual fund; ("valeurs de portefeuille")

"private company" means a company in whose constating document,

(a) the right to transfer its shares is restricted,

(b) the number of its shareholders, exclusive of persons who are in its employment and exclusive of persons who, having been formerly in the employment of the company, were, while in that employment, and have continued after termination of that employment to be, shareholders of the company, is limited to not more than fifty, two or more persons who are the joint registered owners of one or more shares being counted as one shareholder, and

(c) any invitation to the public to subscribe for its securities is prohibited; ("compagnie fermée")

"private mutual fund" means a mutual fund that is,

(a) operated as an investment club, where,

(i) its shares or units are held by not more than fifty persons and its indebtedness has never been offered to the public,

(ii) it does not pay or give any remuneration for investment advice or in respect of trades in securities, except normal brokerage fees, and

(iii) all of its members are required to make contributions in proportion to the shares or units each holds for the purpose of financing its operations, or

(b) administered by a trust corporation registered under the Loan and Trust Corporations Act and consists of a common trust fund as defined in section 1 of that Act; ("fonds mutuel fermé")

"promoter" means,

(a) a person or company who, acting alone or in conjunction with one or more other persons, companies or a combination thereof, directly or indirectly, takes the initiative in founding, organizing or substantially reorganizing the business of an issuer, or

(b) a person or company who, in connection with the founding, organizing or substantial reorganizing of the business of an issuer, directly or indirectly, receives in consideration of services or property, or both services and property, 10 per cent or more of any class of securities of the issuer or 10 per cent or more of the proceeds from the sale of any class of securities of a particular issue, but a person or company who receives such securities or proceeds either solely as underwriting commissions or solely in consideration of property shall not be deemed a promoter within the meaning of this definition if such person or company

does not otherwise take part in founding, organizing, or substantially reorganizing the business; ("promoteur")

"proxy" means a completed and executed form of proxy by means of which a security holder has appointed a person or company as the security holder's nominee to attend and act for and on the security holder's behalf at a meeting of security holders; ("procuration")

"published market" means, with respect to a class of securities, a market in Canada or outside of Canada on which the securities are traded, if the prices at which they have been traded on that market are regularly,

(a) disseminated electronically, or

(b) published in a newspaper or business or financial publication of general and regular paid circulation; ("marché organisé")

"quotation and trade reporting system" means a person or company that operates facilities that permit the dissemination of price quotations for the purchase and sale of securities and reports of completed transactions in securities for the exclusive use of registered dealers, but does not include an exchange or a registered dealer; ("système de cotation et de déclaration des opérations")

"recognized clearing agency" means a clearing agency recognized by the Commission under section 21.2; ("agence de compensation reconnue")

"recognized commodity futures exchange" means a person or company that is registered or recognized by the Commission as a commodity futures exchange under the Commodity Futures Act or that is exempted from the requirement to be registered or recognized by order of the Commission; ("Bourse reconnue de contrats à terme sur marchandises")

"recognized quotation and trade reporting system" means a quotation and trade reporting system recognized by the Commission under section 21.2.1; ("système reconnu de cotation et de déclaration des opérations")

"recognized self-regulatory organization" means a self- regulatory organization recognized by the Commission under section 21.1 or recognized as a self-regulatory body by the Commission under the Commodity Futures Act; ("organisme d'autoréglementation reconnu")

"recognized exchange" means a person or company recognized by the Commission under section 21; ("bourse reconnue")

"registrant" means a person or company registered or required to be registered under this Act; ("personne ou compagnie inscrite")

"regulations" means the regulations made under this Act and, unless the context otherwise indicates, includes the rules; ("règlements")

"related derivative" means, with respect to a security, a derivative that is related to the security because the derivative's market price, value, delivery obligations, payment obligations or settlement obligations are, in a material way, derived from, referenced to or based on the market price, value, delivery obligations, payment obligations or settlement obligations of the security; ("produit dérivé connexe")

"related financial instrument" means an agreement, arrangement or understanding to which an insider of a reporting issuer is a party, the effect of which is to alter, directly or indirectly, the insider's,

- (a) economic interest in a security of the reporting issuer, or
- (b) economic exposure to the reporting issuer; ("instrument financier connexe")

"reporting issuer" means an issuer,

- (a) that has issued voting securities on or after the 1st day of May, 1967 in respect of which a prospectus was filed and a receipt therefor obtained under a predecessor of this Act or in respect of which a securities exchange take-over bid circular was filed under a predecessor of this Act,
- (b) that has filed a prospectus and for which the Director has issued a receipt under this Act,
- (b.1) that has filed a securities exchange take-over bid circular under this Act before December 14, 1999,
- (c) any of whose securities have been at any time since the 15th day of September, 1979 listed and posted for trading on any exchange in Ontario recognized by the Commission, regardless of when such listing and posting for trading commenced,
- (d) to which the Business Corporations Act applies and which, for the purposes of that Act, is offering its securities to the public,
- (e) that is the company whose existence continues following the exchange of securities of a company by or for the account of such company with another company or the holders of the securities of that other company in connection with,
 - (i) a statutory amalgamation or arrangement, or
 - (ii) a statutory procedure under which one company takes title to the assets of the other company that in turn loses its existence by operation of law, or under which the existing companies merge into a new company,

where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least twelve months, or

- (f) that is designated as a reporting issuer in an order made under subsection 1 (11);

"representative" means,

- (a) in respect of a registered dealer, an individual who trades securities on behalf of the dealer, whether or not the individual is employed by the dealer, or
- (b) in respect of a registered adviser, an individual who provides advice on behalf of the adviser with respect to investing in, buying or selling securities, whether or not the individual is employed by the adviser; ("reprsentant")

"rules" means the rules made under section 143; ("règles")

"salesperson" REPEALED: S.O. 2009, c. 18, Sched. 26, s. 1 (5), effective September 28, 2009 (O. Gaz. 2009 p. 2615).

"security" includes,

- (a) any document, instrument or writing commonly known as a security,

- (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company,
 - (c) any document constituting evidence of an interest in an association of legatees or heirs,
 - (d) any document constituting evidence of an option, subscription or other interest in or to a security,
 - (e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than,
 - (i) a contract of insurance issued by an insurance company licensed under the Insurance Act, and
 - (ii) evidence of a deposit issued by a bank listed in Schedule I, II or III to the Bank Act (Canada), by a credit union or league to which the Credit Unions and Caisses Populaires Act, 1994 applies, by a loan corporation or trust corporation registered under the Loan and Trust Corporations Act or by an association to which the Cooperative Credit Associations Act (Canada) applies,
 - (f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, except a contract issued by an insurance company licensed under the Insurance Act which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,
 - (g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,
 - (h) any certificate of share or interest in a trust, estate or association,
 - (i) any profit-sharing agreement or certificate,
 - (j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,
 - (k) any oil or natural gas royalties or leases or fractional or other interest therein,
 - (l) any collateral trust certificate,
 - (m) any income or annuity contract not issued by an insurance company,
 - (n) any investment contract,
 - (o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and
 - (p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the Commodity Futures Act or the form of which is not accepted by the Director under that Act,
- whether any of the foregoing relate to an issuer or proposed issuer; ("valeur mobilière")

"self-regulatory organization" means a person or company that is organized for the purpose of regulating the operations and the standards of practice and business conduct, in capital markets, of

its members and their representatives with a view to promoting the protection of investors and the public interest; ("organisme d'autoréglementation")

"senior officer" REPEALED: S.O. 2006, c. 33, Sched. Z.5, s. 1 (5), effective December 20, 2006 (R.A.).

"trade" or "trading" includes,

- (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause (d), a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
- (b) any participation as a trader in any transaction in a security through the facilities of any exchange or quotation and trade reporting system,
- (b.1) entering into a derivative or making a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative, or
- (b.2) a novation of a derivative, other than a novation with a clearing agency;
- (c) any receipt by a registrant of an order to buy or sell a security,
- (d) any transfer, pledge or encumbering of securities of an issuer from the holdings of any person or company or combination of persons or companies described in clause (c) of the definition of "distribution" for the purpose of giving collateral for a debt made in good faith, and
- (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing; ("opération")

"trade repository" means a person or company that collects and maintains reports of completed trades by other persons and companies; ("répertoire des opérations")

"ultimate designated person" means, in respect of a registrant that is a registered dealer, registered adviser or registered investment fund manager, an individual designated by the registrant,

- (a) to supervise the registrant's activities that are directed towards ensuring compliance with Ontario securities law by the registrant and by each individual acting on the registrant's behalf, and
- (b) to fulfil such other functions as may be prescribed by the regulations in order to otherwise promote compliance with Ontario securities law; ("personne désignée responsable")

"underwriter" means a person or company who, as principal, agrees to purchase securities with a view to distribution or who, as agent, offers for sale or sells securities in connection with a distribution and includes a person or company who has a direct or indirect participation in any such distribution, but does not include,

- (a) a person or company whose interest in the transaction is limited to receiving the usual and customary distributor's or seller's commission payable by an underwriter or issuer,
- (b) a mutual fund that, under the laws of the jurisdiction to which it is subject, accepts its shares or units for surrender and resells them,
- (c) a company that, under the laws of the jurisdiction to which it is subject, purchases its shares and resells them, or

(d) a bank listed in Schedule I, II or III to the Bank Act (Canada) with respect to securities described in paragraph 1 of subsection 35 (2) or to such banking transactions as are designated by the regulations;

"voting security" means any security other than a debt security of an issuer carrying a voting right either under all circumstances or under some circumstances that have occurred and are continuing. ("valeur mobilière avec droit de vote")

Same

(1.1) For the purposes of this Act, any of "business combination", "consultant", "disclosure controls and procedures", "exchange-traded security", "future-oriented financial information", "going private transaction", "insider bid", inter-dealer bond broker", "internal controls", "offer to acquire", "offeror", "penny stocks", "related party transactions" and "reverse take-overs" may be defined in the regulations or the rules and, if so defined, has the defined meaning.

Purchase and sale of a derivative

(1.1.1) For the purposes of this Act,

- (a) a person or company purchases a derivative by entering into, making a material amendment to or otherwise acquiring a derivative;
- (b) a person or company sells a derivative by making a material amendment to, terminating, assigning or otherwise disposing of a derivative; and
- (c) a novation of a derivative, other than a novation with a clearing agency, is deemed to be the purchase and sale of a derivative.

Meaning of "dealer" for purposes of Parts XV and XVI and s. 133

(1.2) For the purposes of Parts XV and XVI and section 133,

"dealer" means a person or company that trades in securities in the capacity of principal or agent.

Affiliated companies

(2) A company shall be deemed to be an affiliate of another company if one of them is the subsidiary of the other or if both are subsidiaries of the same company or if each of them is controlled by the same person or company.

Controlled companies

(3) A company shall be deemed to be controlled by another person or company or by two or more companies if,

(3) The Director may, in his or her discretion, impose terms and conditions on the registration, reinstatement of registration or amendment of registration of any person or company and, without limiting the generality of the foregoing,

- (a) may restrict the duration of the registration; and
- (b) may restrict the person or company to,
 - (i) trading only specified securities or derivatives, specified classes of securities or derivatives or securities of specified classes of issuers,
 - (ii) underwriting only specified securities or specified classes of securities or securities of specified classes of issuers, or
 - (iii) providing advice with respect to,
 - (A) investing in, buying or selling only specified securities or specified classes of securities or securities of specified classes of issuers, or
 - (B) buying or selling only specified derivatives or specified classes of derivatives.

Right to require audit or review

(4) The Commission or the Director may, at any time, require a registrant that is a registered dealer, registered adviser or registered investment fund manager to direct its auditor, at the registrant's expense, to conduct any audit or financial review required by the Commission or the Director and deliver to the Commission as soon as practicable a report of the findings of the audit or review.

S.O. 1994, c. 11, s. 360, *in force July 11, 1994* (O. Gaz. 1994 p. 2248); S.O. 2009, c. 18, Sched. 26, s. 4; S.O. 2010, c. 26, Sched. 18, s. 20.

Revocation or suspension of registration or imposition of terms and conditions

28. The Director may revoke or suspend the registration of a person or company or impose terms or conditions of registration at any time during the period of registration of the person or company if it appears to the Director,

- (a) that the person or company is not suitable for registration or has failed to comply with Ontario securities law; or
- (b) that the registration is otherwise objectionable.

R.S.O. 1990, c. S.5, s. 28; S.O. 2009, c. 18, Sched. 26, s. 4.

Automatic suspension, person or company

29. (1) The registration of a person or company in a particular category of registration is suspended if any of the following events occurs:

1. A fee imposed on the person or company under this Act or the regulations relating to a particular category of registration of the person or company remains unpaid more than 30 days after the day it is due.
2. The membership of the person or company in a self-regulatory organization is suspended or terminated if,
 - i. the membership of the person or company relates to the particular category of registration, and
 - ii. the membership of the person or company is a condition of registration under Ontario securities law.
3. The approval by a self-regulatory organization of the person as a representative of a registered dealer is revoked or suspended by the self-regulatory organization if,
 - i. the approval of the representative relates to the particular category of registration in which the representative is registered under Ontario securities law, and
 - ii. the membership of the dealer in the self-regulatory organization is a condition of the dealer's registration under Ontario securities law.

Automatic suspension, representatives of suspended dealer or adviser

(2) A registered representative's registration in a particular category with respect to a particular registered dealer or registered adviser is suspended when the corresponding category of registration of that dealer or adviser is suspended.

Automatic suspension, representative ceasing to represent registrant

(3) The registration of a representative with respect to a registrant that is a registered dealer, registered adviser or registered investment fund manager is suspended at the time the representative ceases, by reason of any of the following events, to have the authority to act on behalf of the registrant in a capacity that requires the representative to be registered:

1. The employment of the representative by the registrant is terminated.
2. The representative's employment functions change.
3. The partnership or agency relationship of the representative with the registrant changes or is terminated.

Automatic suspension, chief compliance officer or ultimate designated person

(4) The registration of an individual as a chief compliance officer or ultimate designated person is suspended at the time the individual ceases to be the chief compliance officer or ultimate designated person of the registered dealer, registered adviser or registered investment fund manager that designated the individual.

Revocation after automatic suspension

(5) The registration of a person or company that is suspended under subsection (1), (2), (3) or (4) and not reinstated is revoked on the second anniversary of the suspension.

Exception

(6) Despite subsection (5), if a proceeding is commenced under section 122 or 128 or under the rules of a self-regulatory organization with respect to a registrant, or a hearing is commenced under section 127 with respect to the activities of the registrant, the registrant's registration continues to remain suspended until an order has been made by the court or a decision is made by the Commission or self-regulatory organization in the proceeding or hearing.

S.O. 1994, c. 11, s. 361, *in force July 11, 1994 (O. Gaz. 1994 p. 2248)*; S.O. 2009, c. 18, *Sched. 26*, s. 4; S.O. 2009, c. 34, *Sched. S*, s. 3; S.O. 2010, c. 1, *Sched. 26*, s. 3; S.O. 2019, c. 7, *Sched. 55*, s. 4 (E).

Surrender of registration

30. (1) On application by a person or company for the surrender of his, her or its registration, the Director may accept the application and revoke the registration if the Director is satisfied,

- (a) that all financial obligations of the person or company to his, her or its clients have been discharged;
- (b) that all requirements, if any, prescribed by the regulations for the surrender of registration have been fulfilled or the Director is satisfied that they will be fulfilled in an appropriate manner; and
- (c) that the surrender of the registration is not prejudicial to the public interest.

Conditions

(2) The Director may impose such terms and conditions on the surrender of a registration as the Director considers appropriate in the circumstances.

R.S.O. 1990, c. S.5, s. 30; S.O. 2009, c. 18, *Sched. 26*, s. 4.

Right to be heard

31. The Director shall not do any of the following without giving a person or company an opportunity to be heard:

1. Refuse to register the person or company.
2. Amend the registration of the person or company.

(8) The onus of proving that the time for giving notice under subsection (2) has expired is upon the dealer from whom the purchaser has agreed to purchase the security.

R.S.O. 1990, c. S.5, s. 71; S.O. 2011, c. 9, Sched. 38, s. 2; S.O. 2014, c. 7, Sched. 28, s. 4.

PART XVII

EXEMPTIONS FROM THE PROSPECTUS REQUIREMENT

Definition

72. In this Part,

"prospectus requirement" means sections 53 and 62.

R.S.O. 1990, c. S.5, s. 72; S.O. 1994, c. 11, s. 369; S.O. 1997, c. 19, s. 23; S.O. 1999, c. 9, s. 207; S.O. 1999, c. 6, s. 60; S.O. 2001, c. 23, s. 213; S.O. 2004, c. 16, Sched. D, Table; S.O. 2005, c. 5, s. 64 (3); S.O. 2006, c. 33, Sched. Z.5, s. 5; S.O. 2007, c. 7, Sched. 38, s. 7; S.O. 2009, c. 18, Sched. 26, s. 11.

Exemption, debt securities of governments in Canada

73. The prospectus requirement does not apply to a distribution of any of the following debt securities:

1. Debt securities issued or guaranteed by the Government of Canada or the government of a province or territory of Canada.
2. Debt securities that are,
 - i. issued by a municipal corporation in Canada for elementary, secondary or vocational school purposes,
 - ii. issued or guaranteed by a municipal corporation in Canada, or
 - iii. secured by or payable out of rates or taxes levied under the law of a province or territory of Canada on property in the province or territory and collectible by or through the municipality in which the property is situated.
3. Debt securities that are issued by a corporation established under regulations made under subsection 248 (1) of the Education Act.

R.S.O. 1990, c. S.5, s. 73; S.O. 1993, c. 27, Sched., deemed in force December 31, 1991; S.O. 2009, c. 18, Sched. 26, s. 12.

Exemption, securities of financial institutions

Debt securities

73.1 (1) The prospectus requirement does not apply to a distribution of a debt security that is issued or guaranteed by any of the following financial institutions:

1. A bank listed in Schedule I, II or III to the Bank Act (Canada).
2. An association to which the Cooperative Credit Associations Act (Canada) applies or a central cooperative credit society for which an order has been made under subsection 473 (1) of that Act.
3. A loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services cooperative or credit union league or federation that is authorized by a statute of Canada or Ontario to carry on business in Canada or Ontario, as the case may be.
4. Such other financial institutions as may be prescribed by the regulations.

Exception, subordinated debt securities

(2) The exemption under paragraph 1, 2 or 3 of subsection (1) from the prospectus requirement does not apply to debt securities issued or guaranteed by a financial institution described in the paragraph that are subordinate in right of payment to deposits held by the issuer or guarantor of those debt securities.

Conditions and restrictions

(3) The exemption under subsection (1) with respect to a financial institution described in paragraph 1, 2 or 3 of that subsection is subject to such conditions and restrictions as may be prescribed by a regulation made by the Lieutenant Governor in Council.

Same

(4) The exemption under subsection (1) with respect to a financial institution referred to in paragraph 4 of that subsection is subject to such conditions and restrictions as may be prescribed by the regulations.

Report

(5) Without limiting the generality of subsection (4), the regulations may prescribe reporting requirements that apply in connection with the exemption under subsection (1) with respect to a financial institution referred to in paragraph 4 of that subsection.

Other securities

(6) The prospectus requirement does not apply to a distribution of any of the following securities:

1. Securities issued by a corporation to which the Co-operative Corporations Act applies.

2. Membership shares and patronage shares, within the meaning of the Credit Unions and Caisses Populaires Act, 1994, of a credit union.
3. Securities issued to its members by a credit union to which the Credit Unions and Caisses Populaires Act, 1994 applies.
4. Securities issued to its members or to the members of its member credit unions by a league to which the Credit Unions and Caisses Populaires Act, 1994 applies.

S.O. 2009, c. 18, Sched. 26, s. 12 (2).

Exemption, where other legislation applies

Secured by or under a security agreement

73.2 (1) Subject to subsection (2), the prospectus requirement does not apply to a distribution of a security evidencing indebtedness that is secured by or under a security agreement, as defined in subsection 1 (1) of the Personal Property Security Act , or that is secured in a similar manner in accordance with comparable legislation of another province or territory of Canada that provides for the granting of security in personal property.

Exception to exemption

(2) The exemption under subsection (1) from the prospectus requirement does not apply to a distribution to an individual.

Distribution by licensed mortgage brokerage, etc.

(3) The prospectus requirement does not apply to a distribution of a security evidencing indebtedness secured by a mortgage or charge on real property in Canada if the distribution is made by a person or company,

- (a) that is licensed under the Mortgage Brokerages, Lenders and Administrators Act, 2006 or is exempt from the requirement to be licensed under that Act, if the real property is in Ontario; or
- (b) that is licensed or registered under comparable legislation in the province or territory of Canada, other than Ontario, in which the real property is located, or is exempt from any legislative requirement to be licensed or registered in the province or territory.

S.O. 2009, c. 18, Sched. 26, s. 12 (2).

Exemption, accredited investor

Definition

73.3 (1) For the purposes of this section,

"accredited investor" means,

- (a) a financial institution described in paragraph 1, 2 or 3 of subsection 73.1 (1),
- (b) the Business Development Bank of Canada,
- (c) a subsidiary of any person or company referred to in clause (a) or (b), if the person or company owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by directors of that subsidiary,
- (d) a person or company registered under the securities legislation of a province or territory of Canada as an adviser or dealer, except as otherwise prescribed by the regulations,
- (e) the Government of Canada, the government of a province or territory of Canada, or any Crown corporation, agency or wholly owned entity of the Government of Canada or of the government of a province or territory of Canada,
- (f) a municipality, public board or commission in Canada and a metropolitan community, school board, the Comit de gestion de la taxe scolaire de l'ile de Montral or an intermunicipal management board in Quebec,
- (g) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government,
- (h) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a pension commission or similar regulatory authority of a province or territory of Canada,
- (i) a person or company that is recognized or designated by the Commission as an accredited investor,
- (j) such other persons or companies as may be prescribed by the regulations.

Exemption

(2) The prospectus requirement does not apply to a distribution of a security if the purchaser purchases the security as principal and is an accredited investor.

Status as principal

(3) The regulations may prescribe circumstances in which a person or company is deemed to be purchasing a security as principal for the purposes of an exemption under this section.

Conditions and restrictions

(4) The regulations may prescribe conditions and restrictions that apply to an exemption under this section.

Report

(5) Without limiting the generality of subsection (4), the regulations may prescribe reporting requirements that apply in connection with an exemption under this section.

Interpretation

(6) For the purposes of the definition of "accredited investor" in subsection (1), the regulations may define "foreign jurisdiction" and "subsidiary".

S.O. 2009, c. 18, Sched. 26, s. 12 (2).

*Exemption, private issuer***Definition**

73.4 (1) For the purposes of this section,
"private issuer" has the meaning prescribed by the regulations.

Exemption

(2) The prospectus requirement does not apply to a distribution of a security of a private issuer to a person or company who purchases the security as principal and who satisfies the criteria prescribed by regulation.

Conditions and restrictions

(3) The regulations may prescribe conditions and restrictions that apply to an exemption under this section.

S.O. 2009, c. 18, Sched. 26, s. 12 (2).

*Exemption, government incentive securities***Definition**

73.5 (1) For the purposes of this section,

"government incentive security" means a security that enables the holder to receive a grant or other monetary or tax benefit pursuant to a provision of an Act or regulation of Canada, Ontario or another

province or territory of Canada, and that is prescribed by the regulations as a government incentive security.

Exemption

(2) The prospectus requirement does not apply to a distribution of a government incentive security.

Conditions and restrictions

(3) The regulations may prescribe conditions and restrictions that apply to an exemption under this section.

Report

(4) Without limiting the generality of subsection (3), the regulations may prescribe reporting requirements that apply in connection with an exemption under this section.

S.O. 2009, c. 18, Sched. 26, s. 12 (2).

Additional exemptions by regulation

73.6 (1) The regulations may prescribe exemptions from the prospectus requirement in addition to the exemptions provided under sections 73 to 73.5.

Report

(2) Without limiting the generality of subsection (1), the regulations may prescribe reporting requirements that apply in connection with an exemption authorized by that subsection.

S.O. 2009, c. 18, Sched. 26, s. 12 (2).

Resale of securities, deemed distribution

73.7 (1) The regulations may provide that the first trade in a security previously distributed under an exemption from the prospectus requirement is deemed to be a distribution unless it is carried out in accordance with the regulations.

Distribution by a control person

(2) Without limiting the generality of subsection (1), the regulations shall prescribe the circumstances in which a distribution by a control person is exempted from the prospectus requirement.

Orders in the public interest

127. (1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:

1. An order that the registration or recognition granted to a person or company under Ontario securities law be suspended or restricted for such period as is specified in the order or be terminated, or that terms and conditions be imposed on the registration or recognition.
2. An order that trading in any securities by or of a person or company or that trading in any derivatives by a person or company cease permanently or for such period as is specified in the order.
 - 2.1 An order that the acquisition of any securities by a particular person or company is prohibited permanently or for the period specified in the order.
3. An order that any exemptions contained in Ontario securities law do not apply to a person or company permanently or for such period as is specified in the order.
4. An order that a market participant submit to a review of his, her or its practices and procedures and institute such changes as may be ordered by the Commission.
5. If the Commission is satisfied that Ontario securities law has not been complied with, an order that a release, report, preliminary prospectus, prospectus, return, financial statement, information circular, take-over bid circular, issuer bid circular, offering memorandum, proxy solicitation or any other document described in the order,
 - i. be provided by a market participant to a person or company,
 - ii. not be provided by a market participant to a person or company, or
 - iii. be amended by a market participant to the extent that amendment is practicable.
6. An order that a person or company be reprimanded.
7. An order that a person resign one or more positions that the person holds as a director or officer of an issuer.
8. An order that a person is prohibited from becoming or acting as a director or officer of any issuer.
 - 8.1 An order that a person resign one or more positions that the persons holds as a director or officer of a registrant.
 - 8.2 An order that a person is prohibited from becoming or acting as a director or officer of a registrant.
 - 8.3 An order that a person resign one or more positions that the person holds as a director or officer of an investment fund manager.
 - 8.4 An order that a person is prohibited from becoming or acting as a director or officer of an investment fund manager.

8.5 An order that a person or company is prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter.

9. If a person or company has not complied with Ontario securities law, an order requiring the person or company to pay an administrative penalty of not more than \$1 million for each failure to comply.

10. If a person or company has not complied with Ontario securities law, an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

Terms and conditions

(2) An order under this section may be subject to such terms and conditions as the Commission may impose.

Cease trading order

(3) The Commission may make an order under paragraph 2 of subsection (1) despite the delivery of a report to it under subsection 75 (3).

Exception

(3.1) A person or company is not entitled to participate in a proceeding in which an order may be made under paragraph 9 or 10 of subsection (1) solely on the basis that the person or company may be entitled to receive any amount paid under the order.

Hearing requirement

(4) No order shall be made under this section without a hearing, subject to section 4 of the Statutory Powers Procedure Act.

No hearing required

(4.1) Despite subsection (4), the Commission may make an order under paragraph 2 or 2.1 of subsection (1) without giving the person or company that is subject to the order an opportunity to be heard if the person or company fails to file a record required to be filed under this Act.

Contents of order

(4.2) An order made under subsection (4.1) must include a reference to the record that was not filed.

Revocation of order

(4.3) Subject to subsection (4.6), the Commission shall revoke an order made under subsection (4.1) as soon as practicable after the record referred to in the order is filed.

Notice of order

(4.4) The Commission shall publish a notice of every order made under subsection (4.1) as soon as practicable after the order is made.

Notice of revocation

(4.5) The Commission shall publish a notice of every order revoked under subsection (4.3) as soon as practicable after the order is revoked.

Additional information

(4.6) If an order made under subsection (4.1) has been in effect for more than 90 days and the Commission is of the opinion that it would be in the public interest to do so, the Commission may require that, before it revokes the order, in addition to filing the record referred to in the order, the person or company that is the subject of the order concurrently file or deliver such additional records or information about the person or company as the Commission requests.

Temporary orders

(5) Despite subsection (4), if in the opinion of the Commission the length of time required to conclude a hearing could be prejudicial to the public interest, the Commission may make a temporary order under paragraph 1, 2, 2.1 or 3 of subsection (1) or subparagraph ii of paragraph 5 of subsection (1).

Period of temporary order

(6) The temporary order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by the Commission.

Extension of temporary order

(7) The Commission may extend a temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period.

Same

(8) Despite subsection (7), the Commission may extend a temporary order under paragraph 1, 2, 2.1 or 3 or subparagraph 5 ii of subsection (1) for such period as it considers necessary if satisfactory information is not provided to the Commission within the fifteen-day period.

Notice of temporary order

(9) The Commission shall give written notice of every temporary order made under subsection (5), together with a notice of hearing, to any person or company directly affected by the temporary order.

Inter-jurisdictional enforcement

(10) Without limiting the generality of subsections (1) and (5), an order may be made under subsection (1) or (5) in respect of a person or company if any of the following circumstances exist:

1. The person or company has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives.
2. The person or company has been convicted in any jurisdiction of an offence under a law respecting the buying or selling of securities or derivatives.
3. The person or company has been found by a court in any jurisdiction to have contravened the laws of the jurisdiction respecting the buying or selling of securities or derivatives.
4. The person or company is subject to an order made by a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, that imposes sanctions, conditions, restrictions or requirements on the person or company.
5. The person or company has agreed with a securities regulatory authority, derivatives regulatory authority or financial regulatory authority, in any jurisdiction, to be made subject to sanctions, conditions, restrictions or requirements.

R.S.O. 1990, c. S.5, s. 127; S.O. 1994, c. 11, s. 375; S.O. 1999, c. 9, s. 215; S.O. 2002, c. 22, s. 183; S.O. 2004, c. 31, Sched. 34, s. 5; S.O. 2005, c. 31, Sched. 20, s. 8; S.O. 2008, c. 19, Sched. R, s. 1; S.O. 2010, c. 26, Sched. 18, s. 35(1), (3)-(6); S.O. 2015, c. 20, Sched. 39, s. 3; S.O. 2016, c. 37, Sched. 23, s. 1; S.O. 2017, c. 34, Sched. 37, s. 8.

Payment of investigation costs

127.1 (1) If, in respect of a person or company whose affairs were the subject of an investigation, the Commission,

- (a) is satisfied that the person or company has not complied with, or is not complying with, Ontario securities law; or
- (b) considers that the person or company has not acted in the public interest,

the Commission may, after conducting a hearing, order the person or company to pay the costs of the investigation.

Payment of hearing costs

(2) If, in respect of a person or company whose affairs were the subject of a hearing, the Commission, after conducting the hearing,

- (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or
- (b) in the case of any action, other than an action for rescission, the earlier of,
 - (i) 180 days after the plaintiff first had knowledge of the facts giving rise to the cause of action, or
 - (ii) three years after the date of the transaction that gave rise to the cause of action.

R.S.O. 1990, c. S.5, s. 138.

PART XXIII.1

CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

Interpretation and Application

Definitions

138.1 In this Part,

"compensation" means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded; ("rémunération")

"control person" REPEALED: S.O. 2006, c. 33, Sched. Z.5, s. 14 (1), effective December 20, 2006 (R.A.).

"core document" means,

(a) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements and an interim financial report of the responsible issuer, where used in relation to,

- (i) a director of a responsible issuer who is not also an officer of the responsible issuer,
- (ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or
- (iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

(b) a prospectus, a take-over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take-over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, an interim financial report and a material change report required by subsection 75 (2) or the regulations of the responsible issuer, where used in relation to,

- (i) a responsible issuer or an officer of the responsible issuer,
- (ii) an investment fund manager, where the responsible issuer is an investment fund, or
- (iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or
- (c) such other documents as may be prescribed by regulation for the purposes of this definition; ("document essentiel")

"document" means any written communication, including a communication prepared and transmitted only in electronic form,

- (a) that is required to be filed with the Commission, or
- (b) that is not required to be filed with the Commission and,
 - (i) that is filed with the Commission,
 - (ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any exchange or quotation and trade reporting system under its by-laws, rules or regulations, or
 - (iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer; ("document")

"expert" means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer, but not including a designated credit rating organization; ("expert")

"failure to make timely disclosure" means a failure to disclose a material change in the manner and at the time required under this Act or the regulations; ("non-respect des obligations d'information occasionnelle")

"forward-looking information" REPEALED: S.O. 2004, s. 31, Sched. 34, s. 10(3) effective December 31, 2005 (O. Gaz. 2005 p. 2485).

"influential person" means, in respect of a responsible issuer,

- (a) a control person,
- (b) a promoter,
- (c) an insider who is not a director or officer of the responsible issuer, or
- (d) an investment fund manager, if the responsible issuer is an investment fund; ("personne influente")

"issuer's security" means a security of a responsible issuer and includes a security,

- (a) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and
- (b) which is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer; ("valeur mobilière d'un émetteur")

"liability limit" means,

- (a) in the case of a responsible issuer, the greater of,
 - (i) 5 per cent of its market capitalization (as such term is defined in the regulations), and
 - (ii) \$1 million,
- (b) in the case of a director or officer of a responsible issuer, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director's or officer's compensation from the responsible issuer and its affiliates,
- (c) in the case of an influential person who is not an individual, the greater of,
 - (i) 5 per cent of its market capitalization (as defined in the regulations), and
 - (ii) \$1 million,
- (d) in the case of an influential person who is an individual, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,
- (e) in the case of a director or officer of an influential person, the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the director's or officer's compensation from the influential person and its affiliates,
- (f) in the case of an expert, the greater of,
 - (i) \$1 million, and
 - (ii) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation, and
- (g) in the case of each person who made a public oral statement, other than an individual referred to in clause (d), (e) or (f), the greater of,
 - (i) \$25,000, and
 - (ii) 50 per cent of the aggregate of the person's compensation from the responsible issuer and its affiliates; ("limite de responsabilité")

"management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and financial performance of a responsible issuer as required under Ontario securities law; ("rapport de gestion")

"public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed; ("déclaration orale publique")

"release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or an exchange or to otherwise make available to the public; ("publication", "publier")

"responsible issuer" means,

- (a) a reporting issuer, or
- (b) any other issuer with a real and substantial connection to Ontario, any securities of which are publicly traded; ("émetteur responsable")

"trading day" means a day during which the principal market (as defined in the regulations) for the security is open for trading. ("jour de Bourse")

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 10; S.O. 2006, c. 33, *Sched. Z.5*, s. 14; S.O. 2007, c. 7, *Sched. 38*, s. 11; S.O. 2010, c. 26, *Sched. 18*, s. 38; S.O. 2010, c. 1, *Sched. 26*, s. 6.

Application

138.2 This Part does not apply to,

- (a) the purchase of a security offered by a prospectus during the period of distribution;
- (b) the acquisition of an issuer's security pursuant to a distribution that is exempt from section 53 or 62, except as may be prescribed by regulation;
- (c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation; or
- (d) such other transactions or class of transactions as may be prescribed by regulation.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 11.

Liability

Liability for secondary market disclosure

Documents released by responsible issuer

138.3 (1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation

contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director of the responsible issuer at the time the document was released;
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document;
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document; and
- (e) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

Public oral statements by responsible issuer

(2) Where a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer;
- (b) the person who made the public oral statement;
- (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement;
- (d) each influential person, and each director and officer of the influential person, who knowingly influenced,
 - (i) the person who made the public oral statement to make the public oral statement, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement; and

(e) each expert where,

- (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
- (ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
- (iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

Influential persons

(3) Where an influential person or a person or company with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against,

- (a) the responsible issuer, if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
- (b) the person who made the public oral statement;
- (c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement;
- (d) the influential person;
- (e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement; and
- (f) each expert where,
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

Failure to make timely disclosure

(4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be

disclosed in the manner required under this Act or the regulations and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against,

- (a) the responsible issuer;
- (b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure; and
- (c) each influential person, and each director and officer of an influential person, who knowingly influenced,
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

Multiple roles

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

Multiple misrepresentations

(6) In an action under this section,

- (a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation; and
- (b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

No implied or actual authority

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, Sched. 34, s. 12; S.O. 2006, c. 33, Sched. Z.5, s. 15.

Burden of proof and defences

Non-core documents and public oral statements

138.4 (1) In an action under section 138.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation;
- (b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation; or
- (c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

Same

(2) A plaintiff is not required to prove any of the matters set out in subsection (1) in an action under section 138.3 in relation to an expert.

Failure to make timely disclosure

(3) In an action under section 138.3 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company,

- (a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change;
- (b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change; or
- (c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

Same

(4) A plaintiff is not required to prove any of the matters set out in subsection (3) in an action under section 138.3 in relation to,

- (a) a responsible issuer;
- (b) an officer of a responsible issuer;
- (c) an investment fund manager; or
- (d) an officer of an investment fund manager.

Knowledge of the misrepresentation or material change

- (5) A person or company is not liable in an action under section 138.3 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security,
- (a) with knowledge that the document or public oral statement contained a misrepresentation; or
 - (b) with knowledge of the material change.

Reasonable investigation

- (6) A person or company is not liable in an action under section 138.3 in relation to,
- (a) a misrepresentation if that person or company proves that,
 - (i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and
 - (ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation; or
 - (b) a failure to make timely disclosure if that person or company proves that,
 - (i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and
 - (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

Factors to be considered by court

- (7) In determining whether an investigation was reasonable under subsection (6), or whether any person or company is guilty of gross misconduct under subsection (1) or (3), the court shall consider all relevant circumstances, including,
- (a) the nature of the responsible issuer;
 - (b) the knowledge, experience and function of the person or company;
 - (c) the office held, if the person was an officer;
 - (d) the presence or absence of another relationship with the responsible issuer, if the person was a director;
 - (e) the existence, if any, and the nature of any system designed to ensure that the responsible issuer meets its continuous disclosure obligations;

- (f) the reasonableness of reliance by the person or company on the responsible issuer's disclosure compliance system and on the responsible issuer's officers, employees and others whose duties would in the ordinary course have given them knowledge of the relevant facts;
- (g) the period within which disclosure was required to be made under the applicable law;
- (h) in respect of a report, statement or opinion of an expert, any professional standards applicable to the expert;
- (i) the extent to which the person or company knew, or should reasonably have known, the content and medium of dissemination of the document or public oral statement;
- (j) in the case of a misrepresentation, the role and responsibility of the person or company in the preparation and release of the document or the making of the public oral statement containing the misrepresentation or the ascertaining of the facts contained in that document or public oral statement; and
- (k) in the case of a failure to make timely disclosure, the role and responsibility of the person or company involved in a decision not to disclose the material change.

Confidential disclosure

- (8) A person or company is not liable in an action under section 138.3 in respect of a failure to make timely disclosure if,
 - (a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under subsection 75 (3) or the regulations;
 - (b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis;
 - (c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist;
 - (d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation; and
 - (e) where the material change became publicly known in a manner other than the manner required under this Act or the regulations, the responsible issuer promptly disclosed the material change in the manner required under this Act or the regulations.

Forward-looking information

- (9) A person or company is not liable in an action under section 138.3 for a misrepresentation in forward-looking information if the person or company proves all of the following things:
 1. The document or public oral statement containing the forward- looking information contained, proximate to that information,

- i. reasonable cautionary language identifying the forward-looking information as such, and identifying material factors that could cause actual results to differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - ii. a statement of the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.
2. The person or company had a reasonable basis for drawing the conclusions or making the forecasts and projections set out in the forward-looking information.

Same

(9.1) The person or company shall be deemed to have satisfied the requirements of paragraph 1 of subsection (9) with respect to a public oral statement containing forward-looking information if the person who made the public oral statement,

- (a) made a cautionary statement that the oral statement contains forward-looking information;
- (b) stated that,
 - (i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - (ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information; and
- (c) stated that additional information about,
 - (i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and
 - (ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,

is contained in a readily-available document or in a portion of such a document and has identified that document or that portion of the document.

Same

(9.2) For the purposes of clause (9.1) (c), a document filed with the Commission or otherwise generally disclosed shall be deemed to be readily available.

Exception

(10) Subsection (9) does not relieve a person or company of liability respecting forward-looking information in a financial statement required to be filed under this Act or the regulations or forward-looking information in a document released in connection with an initial public offering.

Expert report, statement or opinion

(11) A person or company, other than an expert, is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer obtained the written consent of the expert to the use of the report, statement or opinion, if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that,

- (a) the person or company did not know and had no reasonable grounds to believe that there had been a misrepresentation in the part of the document or public oral statement made on the authority of the expert; and
- (b) the part of the document or oral public statement fairly represented the report, statement or opinion made by the expert.

Same

(12) An expert is not liable in an action under section 138.3 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert, if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made.

Release of documents

(13) A person or company is not liable in an action under section 138.3 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document, the person or company did not know and had no reasonable grounds to believe that the document would be released.

Derivative information

(14) A person or company is not liable in an action under section 138.3 for a misrepresentation in a document or a public oral statement, if the person or company proves that,

- (a) the misrepresentation was also contained in a document filed by or on behalf of another person or company, other than the responsible issuer, with the Commission or any other securities regulatory authority in Canada or an exchange and was not corrected in another document filed by or on behalf of that other person or company with the Commission or that other securities regulatory authority in Canada or exchange before the release of the document or the public oral statement made by or on behalf of the responsible issuer;
- (b) the document or public oral statement contained a reference identifying the document that was the source of the misrepresentation; and
- (c) when the document was released or the public oral statement was made, the person or company did not know and had no reasonable grounds to believe that the document or public oral statement contained a misrepresentation.

Where corrective action taken

(15) A person or company, other than the responsible issuer, is not liable in an action under section 138.3 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and, if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act or the regulations,

- (a) the person or company promptly notified the board of directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure; and
- (b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act or the regulations was made by the responsible issuer within two business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission of the misrepresentation or failure to make timely disclosure.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, Sched. 34, s. 13; S.O. 2006, c. 33, Sched. Z.5, s. 16; S.O. 2010, c. 26, Sched. 18, s. 39.

Damages

Assessment of damages

138.5 (1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions.
 2. In respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,
 - i. an amount equal to the difference between the average price paid for those securities (including any commissions paid in respect thereof) and the price received upon the disposition of those securities (without deducting any commissions paid in respect of the disposition), calculated taking into account the result of hedging or other risk limitation transactions, and
 - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
- A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the

- 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or
- B. if there is no published market, the amount that the court considers just.
3. In respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities (including any commissions paid in respect thereof determined on a per security basis) and,
- i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or
 - ii. if there is no published market, the amount that the court considers just.

Same

(2) Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:

1. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions.
2. In respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, assessed damages shall equal the lesser of,
 - i. an amount equal to the difference between the average price received upon the disposition of those securities (deducting any commissions paid in respect of the disposition) and the price paid for those securities (without including any commissions paid in respect thereof), calculated taking into account the result of hedging or other risk limitation transactions, and
 - ii. an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,

A. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or

- B. if there is no published market, the amount that the court considers just.
- 3. In respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received upon the disposition of those securities (deducting any commissions paid in respect of the disposition determined on a per security basis) and,
 - i. if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as such terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act or the regulations, or
 - ii. if there is no published market, then the amount that the court considers just.

Same

(3) Despite subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, Sched. 34, s. 14; S.O. 2006, c. 33, Sched. Z.5, s. 17; S.O. 2007, c. 7, Sched. 38, s. 12.

Proportionate liability

138.6 (1) In an action under section 138.3, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant shall be liable, subject to the limits set out in subsection 138.7 (1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

Same

(2) Despite subsection (1), where, in an action under section 138.3 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

Same

(3) Each defendant in respect of whom the court has made a determination under subsection (2) is jointly and severally liable with each other defendant in respect of whom the court has made a determination under subsection (2).

Same

(4) Any defendant against whom recovery is obtained under subsection (2) is entitled to claim contribution from any other defendant who is found liable in the action.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 15.

Limits on damages

138.7 (1) Despite section 138.5, the damages payable by a person or company in an action under section 138.3 is the lesser of,

- (a) the aggregate damages assessed against the person or company in the action; and
- (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 138.3, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

Same

(2) Subsection (1) does not apply to a person or company, other than the responsible issuer, if the plaintiff proves that the person or company authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 16.

Procedural Matters

Leave to proceed

138.8 (1) No action may be commenced under section 138.3 without leave of the court granted upon motion with notice to each defendant. The court shall grant leave only where it is satisfied that,

- (a) the action is being brought in good faith; and
- (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.

Same

(2) Upon an application under this section, the plaintiff and each defendant shall serve and file one or more affidavits setting forth the material facts upon which each intends to rely.

Same

(3) The maker of such an affidavit may be examined on it in accordance with the rules of court.

Copies to be sent to the Commission

(4) A copy of the application for leave to proceed and any affidavits and factums filed with the court shall be sent to the Commission when filed.

Requirement to provide notice

(5) The plaintiff shall provide the Commission with notice in writing of the date on which the application for leave is scheduled to proceed, at the same time such notice is given to each defendant.

Same, appeal of leave decision

(6) If any party appeals the decision of the court with respect to whether leave to commence an action under section 138.3 is granted,

(a) each party to the appeal shall provide a copy of its factum to the Commission when it is filed; and

(b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, Sched. 34, s. 17; S.O. 2009, c. 34, Sched. S, s. 6; S.O. 2010, c. 1, Sched. 26, s. 7.

Notice

138.9 (1) A person or company that has been granted leave to commence an action under section 138.3 shall,

(a) promptly issue a news release disclosing that leave has been granted to commence an action under section 138.3;

(b) send a written notice to the Commission within seven days, together with a copy of the news release;

(c) send a copy of the statement of claim or other originating document to the Commission when filed; and

(d) provide the Commission with notice in writing of the date on which the trial of the action is scheduled to proceed, at the same time such notice is given to each defendant.

Appeal

- (2) If any party to an action under section 138.3 appeals the decision of the court,
 - (a) each party shall provide a copy of its factum to the Commission when it is filed; and
 - (b) the appellant shall provide the Commission with notice in writing of the date on which the appeal is scheduled to be heard, at the same time such notice is given to each respondent.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 18; S.O. 2009, c. 34, *Sched. S*, s. 7.

Restriction on discontinuation, etc., of action

138.10 An action under section 138.3 shall not be discontinued, abandoned or settled without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the action, the court shall consider, among other things, whether there are any other actions outstanding under section 138.3 or under comparable legislation in other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 19.

Costs

138.11 Despite the Courts of Justice Act and the Class Proceedings Act, 1992, the prevailing party in an action under section 138.3 is entitled to costs determined by a court in accordance with applicable rules of civil procedure.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 20.

Power of the Commission

138.12 The Commission may intervene in an action under section 138.3, in an application for leave to commence the action under section 138.8 and in any appeal from the decision of the court in the action or with respect to whether leave is granted to commence the action.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, *Sched. 34*, s. 21; S.O. 2009, c. 34, *Sched. S*, s. 8.

No derogation from other rights

138.13 The right of action for damages and the defences to an action under section 138.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, Sched. 34, s. 22.

Limitation period

138.14 (1) No action shall be commenced under section 138.3,

- (a) in the case of misrepresentation in a document, later than the earlier of,
 - (i) three years after the date on which the document containing the misrepresentation was first released, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;
- (b) in the case of a misrepresentation in a public oral statement, later than the earlier of,
 - (i) three years after the date on which the public oral statement containing the misrepresentation was made, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation; and
- (c) in the case of a failure to make timely disclosure, later than the earlier of,
 - (i) three years after the date on which the requisite disclosure was required to be made, and
 - (ii) six months after the issuance of a news release disclosing that leave has been granted to commence an action under section 138.3 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.

Suspension of limitation period

(2) A limitation period established by subsection (1) in respect of an action is suspended on the date a notice of motion for leave under section 138.8 is filed with the court and resumes running on the date,

- (a) the court grants leave or dismisses the motion and,
 - (i) all appeals have been exhausted, or
 - (ii) the time for an appeal has expired without an appeal being filed; or
- (b) the motion is abandoned or discontinued.

S.O. 2002, c. 22, s. 185; S.O. 2004, c. 31, Sched. 34, s. 23; S.O. 2014, c. 7, Sched. 28, s. 15.

ANTHONY WHITEHOUSE et al. -and- BDO CANADA LLP
Plaintiffs

Defendant

Court File No. CV-17-579357-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

**IN THE MATTER OF Proceedings under the
Class Proceedings Act, 1992**

Proceeding commenced at Toronto

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